SUPREME COURT RULING 459/2019 AND ITS REPERCUSSIONS ON THE EXERCISE OF THE FUNDAMENTAL RIGHTS

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SÍNDIC
EL DEFENSOR DE LES PERSONES

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1. INTRODUCTION

Over the past two and a half years, in the exercise of its statutory and legal mission of protecting and defending the rights and freedoms recognised in the Constitution and the Statute of Autonomy of Catalonia, several reports from the Catalan Ombudsman have warned about the erosion of the fundamental rights and freedoms in the Kingdom of Spain. The last of these reports (May 2018), issued after political and social leaders had been accused of rebellion and were being held in preventative detention, asserted that the State authorities' actions were characterised by the use of exceptional measures that limited – and even criminalised – the exercise of the fundamental rights and freedoms, especially freedom of expression.

Supreme Court Ruling (SCR) 459/2019, dated 14 October 2019, which sentences 12 political and social leaders, nine of them for prison sentences of between nine and 13 years, confirms the fears that the Catalan Ombudsman expressed in previous reports. Even though the main sentence is for the crime of sedition instead of rebellion, as requested by the Public Prosecutor's Office, the Catalan Ombudsman believes that this is a disproportionate sentence which may have violated the constitutional rights to trial and the substantive rights of the convicted persons, and which could have effects on the entire citizenry's ability to enjoy the fundamental rights and freedoms. Numerous people who have communicated with the Catalan Ombudsman have asserted the same in the guise of grievances or inquiries after learning about the ruling.

Therefore, the purpose of this report is to analyse Ruling 459/2019 from this twofold perspective based on the contributions and reflections arising from the working seminar held in the Catalan Ombudsman's Office on 13 November 2019. It examines first the dimension that affects the convicted persons and their fundamental rights within the framework of the criminal proceeding, and secondly the potential spread of a restrictive interpretation of fundamental rights, namely the freedom of assembly and protest and the freedom of expression, to the entire State; the perspective on rights from the European Convention on Human Rights that may possibly be affected; and the principles of parliamentary inviolability and separation of powers.

Thereafter, more specific issues are addressed, such as the consideration that the release of the convicted persons is the step prior or parallel to resolving of the political conflict in Catalonia, and finally a reflection on the role of the judiciary in the interpreting the law and the fundamental rights.

The Catalan Ombudsman has repeatedly stated that the regional conflict currently underway between Catalonia and the rest of the State is eminently political, the outcome of a restrictive interpretation of the constitutional precepts on regional self-governance. This political conflict is causing major violations of fundamental rights, including the rights to political participation by means of elected representatives, the freedom of expression and protest and the right to individual freedom. A conflict of this sort can only have a political solution which must be articulated via a dialogue among the different political and social stakeholders in Catalonia and between the State and the Catalan institutions.

2. RULING 459/2019 AND THE FUNDAMENTAL RIGHTS OF CONVICTED PERSONS

This section refers to a series of fundamental rights which may have been affected throughout the hearing of case 20907/2017 and the oral hearing which led to Ruling 459/2019, dated 14 October 2019.

2.1. Right to ordinary court predetermined by law

It is common knowledge that the right to an ordinary or predetermined court basically entails four guarantees: the creation of the judicial body through a previous organic law, the generic determination of its authority, the aprioristic determination of its own authority, and finally the legal predetermination of the rules on the composition of the judicial body.

In the case of Ruling 549/2019, choosing Supreme Court (SC) as the authority to hear the case may have violated this right.

It should be borne in mind that at first the National High Court was in charge of the case. The reason cited at that time was that despite the fact that the majority of persons under investigation had immunity because they were regional ministers or MPs in the Parliament of Catalonia (even though most no longer were after the application of article 155 SC) and therefore should be judged in the High Court of Justice of Catalonia, since the Public Prosecutor's Office had lodged a complaint for the crime of rebellion, the National High Court should hold the authority because article 65.1.a of the Organic Law on Judicial Power assigned it the authority to examine crimes against the "form of government".

The Catalan Ombudsman believes that this is an inaccurate interpretation, given that this rubric – crimes against the form of government – had been stricken from the Criminal Code long ago because it primarily referred to political crimes which could in no way include rebellion, back at that time, as recognised by the Supreme Court interlocutory decree dated 26 May 2009. Furthermore, in the interlocutory decree dated 2 December 2008, the Criminal Court within the National High Court had explicitly stated that this court had never held the authority to examine the crime of rebellion, to avoid the authority to hold a macro-trial on the crimes of the Franco regime that year. It subsequently rectified this forceful, accurate statement from 2008 with the purpose of taking on an authority that cannot be juridically justified.

Once the majority of people investigated were imprisoned, the SC took authority over the case, reviving the argument of immunity, even though at the time it no longer applied to the majority of people being investigated by virtue of the implementation of article 155, in reference to what the Statute of Catalonia stipulates if the crime was committed by a person with immunity, because it stated the crime was committed "outside the territory of Catalonia" (art. 57.2).

The SC offers a threefold reason for justifying that the presumed crime of rebellion was committed outside of Catalonia, with an additional unexpected reason which was examined in the SCR. First, given that the rebellion was focused on attaining Catalonia's independence, it was an issue that affected the entire country of Spain, not just Catalonia. The argument is inconsistent and would imply, for example, that tax fraud committed by an MP in a regional parliament with their local company would also be under the authority of the SC because the treasury is national and therefore the failure to collect public monies would also obviously affect the coffers of the entire State.

The second argument is that the trial was supposed to have international elements. Throughout the entire legal proceedings, these elements did not appear, and in the case of rebellion, they would have to be weapons, logistics or at least economic support from some foreign state or supplied from a foreign territory. The only thing that did happen was talks and similar events abroad to promote independence, which under no circumstances can be considered a crime but instead are the exercise of freedom of expression, as the SC recognised.

The third reason is that, as stipulated by article 123 of the Constitution, the SC is

the highest court in all orders. However, this is not a reason but instead an interpretative excess of article 123. As the SC frames it, the highest court would seemingly be able to discretionally try cases at its will, when this is not true precisely because the right to ordinary court predetermined by law prevents it. No court can simply assign itself jurisdiction. Furthermore, such behaviour would be unheard of in a democracy and would be a blatant abuse of power. What article 123 states is not that the SC is hierarchically superior to the other courts, which is incompatible with judicial independence, but that it is the court of last resort – usual as an appeal – at the summit of the jurisdictional pyramid.

There is a fourth additional and unexpected reason. Some of the accused parties ran in different elections and were elected MPs and senators. And given that MPs and senators unquestionably have immunity from all courts but the Supreme Court, then the judicial body unexpectedly gained authority.

This last argument could cast doubt on what is called *perpetuatio iurisdictionis*, but its validity and extension to a criminal proceeding are highly debatable. However, what cannot suddenly give an MP or senator this status is adjusting the previous authority of a court improperly determined by the arguments outlined above. It is as if it were saying that by their very behaviour, the defendants had ended up legitimising or validating the Court's improper behaviour.

In any event, if the goal was to justify the violation of the right to a legal court, it is obvious that after everything we have seen there are at least two, or even three, essential guarantees on which doubt has been cast. Without the shadow of a doubt, the SC is a body created by a previous organic law, as are the provisions that a magistrate from the Second Court should serve as the examining magistrate. However, the same cannot be claimed of the Appeals Court against the decisions of this magistrate. This court is a jurisprudential creation made up of three magistrates who belong to the Second Court of the Supreme Court as the examining magistrate, as well as the magistrates of the court which hands down the ruling. That is, the examining magistrate, the appeals magistrate to counter the examining magistrate's decisions, and the magistrates that examine the oral trial all belong to exactly the same court that customarily examines the appeals of criminal proceedings, casting even more reasonable doubt on their impartiality.

It can also be said that the SC's authority is determined generically and therefore it is not an ad-hoc jurisdiction; however, the aprioristic nature of its authority can be questioned because after reviewing the records and arguments mentioned above, it seems that its authority was clearly not predictable and was constructed *ex post facto*. The reasons for this authority are clearly refutable and are in no way obvious from a perusal of the laws. What is more, when reading these laws (art. 57 of the Organic Law on Judicial Power and art. 57.2 of the Statute of Autonomy of Catalonia), one can conclude that the SC could not hold authority on this matter.

In short, the jurisdictional authority has characteristics that make it incompatible with the guarantees of the right to a predetermined court by law, which cannot be recognised after the fact. Thus, the SC should never have been put in charge of this case as the first and only instance.

2.2. Right of defence: fragmentation of the case

One immediate consequence of the possible violation of the legal right to a predetermined court is the fragmentation of the case. The Catalan Ombudsman report from May 2018 outlined the dangers that "the same matters may be assessed juridically and criminally by three examining magistrates, the Supreme Court, the National High Court and Court no. 13 of Barcelona, as if they were different matters, with the now-consummated danger of different assessments". This fragmentation decried at the time is now even further magnified by the addition of the High Court of Justice of Catalonia, to which the Supreme Court referred the

cases of some of the persons with immunity (former members of the Parliamentary Bureau and the president of the parliamentary group of the CUP party).

The repercussions of this fragmentation on the right of defence earned little space in Ruling 459/2019. Reference is made to it virtually only in terms of the defences' petitions for access the court proceedings from Trial Court no. 13 of Barcelona, which the Supreme Court rejects overly expeditiously.

Despite this indifference, the negative consequences of the fragmentation are considerable, especially for people outside case 20907/2017. The matters judged by the National High Court, the High Court of Justice of Catalonia and Trial Court no. 13 of Barcelona have already been determined and set in the Supreme Court ruling as "proven facts". The defences of the prosecuted persons in these courts may affect their clients' individual behaviour, but this prior general framework, which they had no chance to influence, will clearly condition them.

Additionally, the SC's categorisation of these matters as being tantamount to a crime of sedition, as we shall see below, without clear and individual inference, weighs heavily on the other proceedings, not only as a jurisprudential precedent but also because it comes from the court where the potential appeals of the court rulings would be filed, rendering these appeals pointless.

In this sense, it is paradoxical that on the date on which this report was concluded, the National High Court held the prosecution for rebellion for Major Trapero and the former leadership of the Department of the Interior when their direct superior, former Regional Minister Forn, has been absolved of this crime for these very same deeds.

2.3. Right of defence: interrogation of witnesses

During the oral hearing, different decisions from the Second Court could be considered harmful to the right of defence. One example is the fact that the defences of the accused parties were prevented from asking the witnesses questions in view of the videos of the police actions, as these videos are "material proof of the commission of the crime". According to the Law on Criminal Prosecution (art. 712), lawyers have the right to ask witnesses to view the videos as evidence, which the Court prevented.

This section will solely analyse one of these decisions: the Supreme Court's interpretation of article 708 of the Law on Criminal Prosecution. After establishing that the party that proposes a witness can ask them any questions they deem relevant, this precept contains an addendum which literally states: "The other parties may also ask them any questions they deem relevant, and which are relevant given the answers".

This wording, which comes from a text dating from the early 19th century and – once included in the 1882 Law on Criminal Prosecution – has not been reformed since then, harks back to the evidential system in force back in the mediaeval period: legal or weighted evidence. According to this system, each party was in charge of providing the evidence that enabled them to defend their position, while the opposing party could not use this evidence but instead could only object to it over different but very limited reasons.

Everything changed with the introduction of the system of free evaluation of evidence into criminal proceedings (precisely with the 1882 law), with what is called the *principle of acquisition of proof* inherent to it. This principle states that any evidence provided by the litigants is part of the material evidence of the trial and therefore all parties may use it, regardless of whether it helps or harms them. Therefore, evidence belongs to nobody but instead is common to all the participants in the trial, obviously including the judge. For all of these reasons, at least since the late 19th century, article 708 of the Law on Criminal Prosecution has always been interpreted in the sense that all the parties may equally question any witness about whatever they want as long as it is related to the purpose of the trial.

However, during the oral hearing, the Second Court determined that the opposing

party of the side that had proposed the evidence could not ask questions about a topic other than the one that the litigant who had proposed the evidence had addressed, even if it had to do with the purpose of the trial. This is an unheard-of decision in a court in Spain. Furthermore, the Court's decision is impoverishing because it does not allow all the information that could be gotten from the evidence to actually be gotten.

The SC justified this decision by stating that it did not want to violate the principle of contradiction, in the sense that if the opposing party brought up new topics, the party that proposed the evidence would have to be given the opportunity to respond, and so forth *ad infinitum*, which would be impractical. That is, the court itself implicitly recognised that the principle of contradiction could be salvaged with its interpretation, but that it did not want to invest that much time in it.

This decision ignores the interrogation model which has been the standard used in trial practice in most democracies around the world for decades: interrogation in common law. This interrogation is divided into three possible parts: examination in chief, cross-examination and re-examination.

As is known, the first examination is conducted by the party that has proposed the witness; it cannot contain leading questions, but they must instead be open-ended, such that the witness can express themselves spontaneously. After that comes the cross-examination, which is interrogation of the same witness by the other party. Its main purpose is to discredit the witness, and therefore it can include leading questions as well as – and this is very important – questions that directly cast doubt on the witness's credibility, even if these questions have no direct connection with the purpose of the trial. This includes questions that reveal behaviours by the witness that call into question their honesty, such as ascertaining whether a certain senior police officer was behind an anonymous social media profile ("Tácito") with highly Catalanophobic and ultra-right-wing contents.

Finally, there can be a re-examination, which is another interrogation by the party that put forth the witness; its purpose is to clarify or correct questions that arose during the cross-examination. It has the restriction that other issues that did not emerge during the cross-examination or examination in chief may not be brought up, precisely this time because questioning cannot go on infinitely.

However, in the questioning of the parties in the SC case, many questions which could cast doubt on the credibility of the witnesses were not allowed, nor – as mentioned above - were questions on other issues related to the purpose of the trial but which had not been part of the questioning allowed to be asked. This reached such an absurd point that one time, with one of the most important witnesses, the President of the Court, using the same article 708, had to ask a key question which had not been the subject of the questioning ex officio, although the response to this question was clearly relevant to the ruling.

And this is precisely the most serious problem arising from the court's decision to restrict the questioning that is being analysed. The restriction was held throughout the entire trial, which limited the cross-examination in such a way that it affected the construction of all the material proof in the trial as a whole and, more importantly, the formation of the court's conviction.

2.4. Right of defence: the accusation of rebellion and preventative detention

The right of defence or due process of law has been shaped by the jurisprudence of both the Constitutional Court (CC) and the European Court of Human Rights (ECHR), and its scope is such that it has ended up becoming the most oft-cited right in both courts. Several aspects which define it may have also been violated in Ruling 459/2019.

The arguments posed revolve around the lack of grounding of the accusation of rebellion, which vitiated this accusation while leading to two dire situations: first, the accused parties were tried in the Supreme Court (SC), and second, they were given preventative detention. These two

extremely relevant circumstances also led to violations of several fundamental rights. Without looking any further, as the Catalan Ombudsman condemned several times, the combination of the accusation of rebellion and preventative detention, along with the largely debatable interpretation of article 384b of the Law on Criminal Prosecution, have led to the infringement of the right to run for office of the imprisoned persons who held positions of political representation. Likewise, it seriously affected a series of fundamental rights associated with the right of defence. Below we shall briefly examine them.

1. Right to appeal in criminal matters. Assigning the authority to resolve the case to the Second Court of the Supreme Court diminishes the potentially convicted persons' right for their case to be reviewed by a higher court. Since the Supreme Court is the highest court in the land, the Ruling immediately becomes final; furthermore, even though it was admitted by the European Court of Human Rights in the case of the parties with immunity, this nonetheless reduces not only the expectations of the defence but also the possibilities that a ruling will be appropriate, given that the existence of this twofold examination precisely seeks to guarantee the highest possibility that the resolution is appropriate, since it is always better for it to be confirmed by two different bodies than one court alone without any review by any other body. In this case, the Ruling could be amended by both the Constitutional Court or the European Court of Human Rights, but it is obvious that the scope of their examination is in no way comparable to what could be expected by the highest degree of ordinary jurisdiction in internal law.

Additionally, the extreme fragmentation of the case means that for everyone who is accused of the same deeds in other courts, beginning with the leadership of the Department of the Interior before the National High Court, the right to appeal instead becomes a wilful violation of legal procedure in that a higher court, namely the Supreme Court, has already declared certain deeds proven and has applied the Criminal Code in a given way.

2. Preventative detention in such a long trial hinders the exercise of the right of defence. In January 2019, the former presidents of the Catalan Government and the Parliament published a communique in conjunction with the Catalan Ombudsman which stated: "If the situation in which the indicted parties remain imprisoned remains, there could be long transfers to the visit site from and back to the prison, as well as long stays in judicial units outside the Supreme Court. All of this could hinder the parties' constant contact with their lawyers and limit their active participation in their own defence, without legal justification, thus unnecessarily restricting this right. This daily transfer could foreseeably take place over the course of months, which is additional unnecessary onerousness for the purposes of preventative detention."

Based on this statement, the Catalan Ombudsman appealed to the authorities to consider, "with a view of guaranteeing the right of defence and due process, providing alternative measures to the imprisonment of the persons who are currently in preventative detention during the trial, which should be scheduled within a few weeks".

This request was never heeded. This is certainly not a problem exclusive to this case: other recent macro-cases have also had extensive oral proceedings while the accused persons were held in preventative detention. In both this and the other cases, prison timetables, marathon sessions and communication difficulties between the defences and the accused persons entail an erosion of the exercise of the right of defence with full guarantees.

3. The accusation of rebellion also affected the presumption of innocence. The requirement of the presumption of innocence is reinforced by the EU's Charter of Fundamental Rights, the European Convention on Human Rights and the jurisprudence of the ECHR, which has always spoken out emphatically on this matter. It is also reinforced by the EU Directive on the Presumption of Innocence (Directive (EU) 2016/343). Even though here we cannot undertake an analysis of what this requirement means with regard to the

right of defence, as an example we can state that one of the consequences is that public authorities cannot refer to the indicted persons in such a way that frames them as guilty before the final ruling.

None of these guarantees was upheld in this trial, and yet again this was mainly because they were originally accused of a very serious crime: rebellion. This should be coupled with different authorities' repeated violation of the provisions of article 4.1 of the Directive on the Presumption of Innocence, and by the provisions on public references to guilt:

"The Member States should take appropriate measures to ensure that... public authorities do not refer to suspects or accused persons as being guilty as long as such persons have not been proved guilty according to law."

The SCR (p. 140 and following) recognises that the Secretary of State "Irene Lozano and other political leaders" referred to the accused persons as if they were already guilty. Certainly, the SC cannot be held responsible for what other individuals and entities say. However, it is the SC's responsibility to ensure the right of defence and the presumption of innocence, and its actions to this end not only during the oral hearing but also throughout the trial were non-existent.

4. The right to defend oneself in one's own language is violated. Several times, the defences alleged that the right of defence entails the right to defend oneself in one's own language if it is also one of the official languages where the person on trial lives. However, given that they were accused of rebellion and transferred to the Supreme Court, that Catalan is not one of the official languages in the Autonomous Community of Madrid and that the trial is taking place in Madrid, technically no right is violated.

In fact, Spain has signed the European Charter on Regional or Minority Languages, dated 5 November 1992, which states that the signatories must guarantee that everyone can exercise the right of defence in their own language as long as it is official in their community. The SC's arguments revolve around this idea: "Neither the Spanish Constitution nor the Statute of Autonomy of Catalonia nor the organic laws enacted grant an unconditional right to use the language of an autonomous community in trials which take place outside that language's territory. Therefore, territory serves as a true criterion delimiting official status" (p. 76 of the SC ruling). Therefore, a collateral effect of the disproportionate accusation of rebellion and the violation of the right to a court predetermined by law is that the persons on trial were unable to exercise the right to use their own language in the oral hearing.

2.5. Right to criminal legality (art. 25 SC)

1. The right to criminal legality translates into the expressions *lex praevia, lex scripta* and *lex certa*, as the Constitutional Court and the European Court of Human Rights have repeatedly required.

Lex praevia is generally fulfilled via a total ban on unfavourable criminal nonretroactivity. In continental European law, *lex scripta* is fulfilled more than acceptably: custom is cast out as a source of sanction law. The problem lies in *lex stricta*. Criminal law should avoid evaluative clauses or indeterminate terms, and when they do exist, they should be interpreted restrictively by the judicial bodies in charge of interpreting them.

According to *lex stricta, in malam partem* analogies are constitutionally prohibited. However, the courts and many penologists skirt the indeterminateness of the criminal categories and overstep some of their literal limitations with a rhetorical device: they use not analogy but expansive interpretation. Especially when a law's linguistic terms are not very clearly defined, they make it say more than what it actually says via an expansive or denatured interpretation, which is constitutionally impermissible. At these times, this label is used to conceal a true *in malam partem* analogy.

This is a fundamental problem of the criminal category of sedition. One the one hand, its description of behaviours is overly lax and indeterminate; on the other, the Supreme Court has not rectified this laxness

with a restrictive interpretation of this term; in fact, it has done quite the contrary.

2. The fundamental rights are contained in constitutional rules, which is the supreme law in the legal system. Likewise, the conventionally recognised rights are ranked above organic and ordinary laws. Laws are certainly not unlimited in scope, yet they cannot be limited to such an extent that they are splintered by infra-constitutional provisions.

In this sense, it is important to ignore that the Criminal Code provides for a crime punishable with a civil servant's suspension which prevents them from exercising their civic rights, that is, any right: fundamental, conventional or law-based (art. 542 Criminal Code). This provision in criminal law gives a sense of how important the fundamental rights are to lawmakers themselves.

The consequence of behaving otherwise is tantamount to criminalising rights. If rights are not the limit of the law, and the law instead limits them, there is a criminalisation of the exercise of fundamental rights. Everything becomes a crime if it is provided for in criminal law, without nuances, while ignoring the existence of expressly legal cases of justification, such as the exercise of a right (art. 20, 7, Criminal Code).

3. From the standpoint of subsumption, the Ruling lacks a systematic form of inference judgement. Indeed, the criminal courts have to establish the proven facts to which the legal precepts are being applied. The judicial body must specifically clarify where it got the facts which it says are proven in the oral proceedings, yet it must explicitly state precisely which aspects of the oral proceedings. In consequence, it has to mention the evidentiary instruments which it bore in mind when admitting or excluding a piece of evidence, and it must make a well-grounded assessment of its degree of conviction. If laymen must do this as members of a jury, professional judges must even more imperatively do so.

It is an inextricable part of the right to due process that the defendant (and the citizen) can find out with what criteria, with what elements (and with which ones not), the court has considered proven what it considers proven. The fact that the law stipulates that evidence be conscientiously considered (art. 741 Law on Criminal Prosecution) does not mean arbitrarily, even less so in the constitutional rule of law. Motivation must prevail in any judicial action in order for it to be legitimate.

In Ruling 459/2019, we do not know, nor can we, why the Court has considered proven the facts it declares proven. What is more, the facts deemed proven in the Ruling are full of statements without any reference to evidence.

There are several examples of this. Situating the defendants within the facts is essential. This is not done and thus the behaviours cannot be objectively charged, as required. In any event, setting aside allusions as opposed to proven facts, which are erroneous and manifestly insufficient with regard to Dolors Bassa and Carme Forcadell, the recounting of the facts is incredibly careless.

The first example are the facts related to the uprising that the SC resolution states took place in September. The SCR states that 21,000 people assembled in front of the Palace of Justice: it states that it was tumultuous (while also referring to throngs of people simply because they were assembled, without any specification of disorderly conduct), yet the source of proof of the number of people assembled and demonstrating is not cited. It tallies the mobilisation on the previous day in front of the Department of Economy on Rambla de Catalunya at 40,000 people, once again without citing any source.

What is more, the SCR says that the Department was "surrounded". This does not seem to match reality. A person who does not know the location of the Department of Economy in Barcelona would think that it is a freestanding building, separate from the other surrounding buildings, and that it might even occupy an entire city block. This is what "surround" assumes: to go fully around an object or person. What is more, since words are not innocent, "surround" gives the sense of siege, which considerably magnifies the drama of the deeds.

There was a demonstration in front of the Department of Economy which lasted many hours, but *in front of*, not *around*, the building in question. In fact, at the intersection with Gran Via, an ad-hoc stage was set up where music was performed and different speeches were given. No establishment nearby (chemist's, jewellery shops, banks, theatres, restaurants, shops in general, etc.) had to close.

Another example is when talking about the injuries suffered by police agents on 1 October, citing *multiple injuries* with differing degrees of seriousness. But the proven facts do not support this expression multiple injuries. First aid reports, injury reports, reports on medical or surgical treatments, admissions, rehabilitation, aftereffects, etc. must be cited. Any minimally meticulous ruling provides an exhaustive list of the details of the injuries, regardless of their type. Yet this ruling simply says that there were multiple injuries but never states who suffered from them, how serious they were or the medical treatment applied.

4. Focusing now on the issue of the perpetrators, sedition is a group crime; it is a crime involving a set of actions, since the law states 'actors' in the plural (in Catalan, "els qui"). Sedition or criminal rebellion are crimes that require coordination involving planning and efforts that must be broken down individually and framed within a hierarchy in proven facts in order to objectively and individually charge each person involved in a criminal act. These crimes do not exist without an organisation, no matter how bungling it may be, and the proven facts should contain evidence of this organisation. The entire Ruling lacks a statement of a plan and coordination of functions among those who were later convicted. Since they were in neither Enfocats (an anonymous undated document, although it is from prior to 2016) nor the Moleskine agenda (which was not confirmed by its hypothetical author at the trial), these documents cannot prove anything. No peripheral signs or proof of the organisation and division of functions was provided either.

Since it must have been quite difficult to finger a physical perpetrator, the SCR twice resorts to the label of 'indirect responsibility'. This responsibility, only cited but not attributed to anyone, means that the man or women behind it used other people as their instrument to commit the crime. However, for this to happen there has to be a connection between the real, concealed perpetrator and the instrumental perpetrator, who performs the act classified as a crime, in this case rebellion. Doctrine and jurisprudence establish four possible connections between the real perpetrator and the executor. Using an instrument without action (throwing someone through the window so that they kill the person to be killed by falling on them); using a justified instrument (falsely accusing someone whom the police, in carrying out their duty, arrests); using a false unqualified instrument (using another person to steal something and giving it to the person who designed the plan); and finally, using a power structure (the killing machinery of the SS).

None of the four cases applies here because: 1) no one rebelled (as recognised in the SCR) and 2) the attitude of citizens on 1 October does not fit within any of the four cases mentioned, regardless of the defendants' intention. What is more, the SC resolution uses the term 'indirect responsibility' twice, rhetorically, more as a symbol of moral perpetrator than as a criminally relevant perpetrator, and it does not specify any of the four aforementioned connections or the behaviour of either the defendants or citizens. This is yet another infraction of the right to criminal legality by not identifying the perpetrator in this specific case.

Therefore, to justify group co-perpetration, the STC states that the defendants used collective deceit. It repeats this several times throughout the condemnatory text (collective deceit: making someone believe the legitimacy of their action or abusing good faith). This linguistic stretch comes upon a problem: if there really were rebellion or sedition, it would be the first case in history that ten or fifteen people, the defendants, perpetrated the crime of rebellion by deceiving two million plus people, without any violence against them, without any kind of intimidation, without any sort of pressure.

2.6. Right to a well-grounded, reasonable resolution (art. 24.1 SC)

Ruling 459/2019 has a negative impact on one of the most important aspects of the right to due process of law as contained in article 24.1 SC, which is repeatedly recognised by the CC: the right to have a well-grounded, reasonable resolution whose reasoning is based on premises that have no obvious errors and whose inference process used does not contain logical contradictions. That is, it is reasonable, not arbitrary.

In fact, some of the contents of Ruling 459/2019 infringe on this right to a well-grounded, reasonable judicial resolution either because they contain clear material errors, or because there is a lack of motivation, or because they follow illogical or incongruent thinking from the perspective of ordinary logic, regardless of their legal assessment.

We shall not dwell overly long on the perspective of the clear material errors in the premises of the SCR's reasoning, but we cannot fail to cite as an example the statement that Dolors Bassa was not only the Regional Minister of Labour but also "by delegation" the Regional Minister of Education and that in consequence, she is charged with allowing schools under the aegis of the Department of Education to be used as electoral colleges on 1 October.

From the perspective of motivation and reasonability, we can mention several instances of incongruence and lack of motivation in Ruling 459/2019.

1. The SCR does not state motives and becomes incongruent when adopting two such fundamental decisions as: 1) identifying the behaviours that comprise the criminalised action, the tumultuous rebellion, by the criminal category of sedition, and 2) identifying the legal asset that is the object of protection in this regulatory statement.

In terms of the typical behaviours of the crime of sedition, when judging this categorisation, and more specifically, when referring to the facts that constitute the crime of sedition – albeit in a confused way and using a plurality of supposedly synonymous terms and expressions as the descriptors of the action – the SCR deems that the actions encompassed within the tumultuous rebellion for the purposes of the crime of sedition are rallies, gatherings, crowds, large and widespread mobilisations of people who, through attitudes that are not necessarily through violent or insurrectional but are hostile, intimidating, obstructionist, involving peaceful or nonviolent resistance, and even "refusal voiced vehemently", prevent or "hamper" ("dificulten" [sic]) the agents of the authority – judicial, law and order forces, etc. – from the "normal" [sic] exercise of the jobs entrusted to them.

However, groundlessly and in contradiction of this premise, throughout the Ruling other behaviours totally disassociated from this definition of tumultuous rebellion are included as actions or typical behaviours. Examples include the admission of a proposed draft law or resolution to be debated and voted on in the plenary of Parliament, the approval of laws such as the Legal Transition Act or the referendum, and promoting or calling a referendum that the CC had declared illegal.

These actions may be related to what the SCR called the creation of a legal system parallel to the one currently in force and to disobedience of certain judicial decisions, but they have nothing to do with a tumultuous rebellion that prevented the agents of the authority from acting. Consequently, including them in the criminal category of sedition can be considered incongruent or at least groundless given the definition of the criminal action which the SCR says it is using.

The same could be said of the legal asset protected by the criminal category of sedition which, in fact, is complementary to the above. Even though here, too, the SCR uses muddled reasoning, it ends up choosing the thesis that the asset protected by the crime of sedition is preservation of the public order. However, incongruent with this premise, and in any event groundlessly, throughout the Ruling it repeatedly adds protection of the

constitutional order – inherent to crimes against the Constitution – and obedience to the decisions of the CC or the SC, as assets protected by this crime

Indeed, when defining the actions categorised as the crime of sedition and determining the legal asset protected, the *ratio decidendi* of the Ruling often ignores the concept of tumultuous rebellion mentioned previously, and without explaining this omission, it considers the following to be seditious behaviours:

- First, "the creation of a manifestly incompetent regulation" (p. 314), the "creation of a parallel constituent legal system whose objective is to bring into crisis the constitutional order currently in force", "shattering the constitutional pact" (242), "amending the Constitution outside the constitutional means", "challenging constitutional legality" (316), "championing the de facto derogation of constitutional principles", "attacking the constitutional foundations of the system" (247) and "annihilating the constitutional pact" (241).

- Secondly, a set of behaviours characterised as disobeying judicial decisions, especially the CC. Thus, it actually says things like "sedition is nothing other than riotous, collective disobedience accompanied by resistance or force against judicial decisions" (p. 396) or "rebellion against specific judicial rulings" (p. 395). In fact, the SCR states that "protest is not criminalised, but the failure to abide by judicial decisions from the CC and the SC is" (pp. 391 and 392); likewise, calling a referendum is not criminalised, but calling "a judicially prohibited referendum" (p. 339) is. In the case of the Speaker of the Parliament, Carme Forcadell, after the SCR declared that by allowing the vote on the so-called disconnection laws she had overstepped the functional space of her job (p. 316) with an "infraction" of the rules of the chamber (p. 385), it concludes that "the decisive act was that she did not prevent voting on resolutions that are openly counter to the CC ruling" (p. 327). What is more, the SCR particularly stresses that what is criminalised is the goal pursued by the accused parties of "making it evident that Spanish justice could not execute its legitimate decisions in Catalonia" (p. 383), since what they sought was to "discredit justice before the citizenry".

In short, what the SCR seeks to protect with the crime of sedition, beyond the public order, is the constitutional order and more specifically obedience to the rulings of the judicial branch. In fact, even though the SCR states that disobedience is "absorbed" by the crime of sedition, in reality what it does is turn disobedience into the fundamental structural element of the criminal category of sedition: turning disobedience into sedition and sedition essentially into a crime of disobedience.

2. We can also consider there to be a lack of motivation in most of the passages of the SCR which analyse whether the exercise of the accused persons' fundamental rights is relevant as a cause for total or partial exoneration of the category. Several times, the Court initially accepts, as a premise of its reasoning, that the fundamental rights must be borne in mind when delimiting the content of the criminal categories and applying them to the specific cases being tried ("the declaration of perpetration of a crime of sedition [...] can only be admissible after a careful exercise weighing the limits of the right to assembly", p. 377).

However, contradicting this premise, after stating it, the SCR quite frequently goes on to ignore it: it does not weigh these limits and instead merely checks whether the behaviour or action being tried can be abstractly subsumed under a criminal category. And, while it does so with a clearly circular argument that turns the question into the premise, it believes that it is unnecessary to consider whether the fundamental right affected should be weighed. In the Ruling, it appears that once the Criminal Code categorises a behaviour as criminal, the criminal category becomes completely conceptually autonomous from constitutional rights, whose effects cease to extend to the interpretation and implementation of the criminal precepts, rendering them infra-constitutional.

In any event, based on the incoherent sum of different legal assets and categorised behaviours disassociated from the idea of

rebellion, for such a serious crime as sedition the SCR sentences such disproportionate punishments as nine to thirteen years of imprisonment.

Several examples of this way of acting include the SCR's statement (p. 394) that "when criminal precepts are violated to express one's own opinions [...], it is impossible to seek the protection of the fundamental right, consciously altering its essential content". It then drives the point home by saying that "protest or dissidence can never justify the unequivocal commission of criminal acts". Other examples are when it analyses the right to political representation, it states that "holding a political position does not legitimise actions that stand in clear opposition to criminally protected legal assets", and when it states that a protest is not being criminalised but what the Constitution cannot tolerate is failure to obey a court's decision" (p. 391).

In fact, only in one minor case does the SCR indeed weigh the relevancy of a fundamental right. Specifically, on page 427 it states that payment of the expenses for talks where self-determination and independence were defended could not be included in the crime of misuse of public funds, since in this case the behaviour was exonerated from the category because it entailed the exercise of the fundamental right of ideological freedom.

In the other cases, the lack of motivation and the begging the question are so radical that it can be asserted that the SCR violates not only the fundamental rights cited but also the right to a well-grounded and reasonable judicial resolution, as stated in article 24.1 SC.

3. It is logically incongruent to convict the accused parties for approving laws or promoting or allowing their approval with the argument that through these acts they sought to create a parallel legislation whose goal was to bring crisis to the constitutional order and do so after having declared proven: 1) the absolute insufficiency of both the acts performed and those planned [...] to derogate the Spanish Constitution in Catalan territory (p. 268), and b) that the purpose of the accused parties "was not [...] to actually instate the legal system [called for in the disconnection law: transitory provisions and referendum] but to convince the government of Spain to negotiate".

It is contradictory to convict with the argument that the laws approved attacked the constitutional order and then conclude that "an essential element of the criminal category is excluded [...], namely, that [independence] and constitutional derogation are the true purpose of the rebellion" (p. 274), especially if the SCR adds the statement that these laws were never implemented, that "it was enough with a decision from the CC to strip them (the disconnection laws) of immediate enforceability and that "the plot was aborted with the mere display of a few pages in the BOE published in application of article 155 SC" (p. 269).

The same could be said about the conviction motive based on the acts of promoting and calling the referendum on 1 October. In this regard, the Ruling itself initially recalls, as a proven fact, Agreement 90/2017 of the Central Electoral Board, which states: "1) Last 1 October 2017, no process which could be considered a referendum [...] (with guarantees) took place in Catalonia; 2) therefore, what have been presented as the results of that so-called referendum on self-determination lack any value" (p. 28). Further on, it states that "under no circumstances did the consultation turn the Catalan community into a sovereign state", and it more explicitly adds that the consultation was a simple "device", that the unviability of the results was clear, that they lacked "actual functionality to truly instate a republic" and that in reality, the only thing the accused parties sought was a pact with the State government (p. 358).

And it would be impossible to counterargue that what is being condemned is simply the potential risk of violating the constitutional order by the approval of these laws, since even though sedition is framed as a crime of risk and truncated result, the Ruling itself demands that the risk be a real, objectively feasible one, and it states that in this case this risk did not exist since it was only a "pipe dream" ("ensoñación") (p. 270). It recognises that the disconnection laws never actually prevented the

enforcement of the laws in force, and it goes even further to state that this was not the purpose pursued by the accused parties and that their "objective was the political pressure they sought to exert over the State government" (p. 271).

In short, if the SCR declares that the means used or planned did not allow the functioning of the democratic rule of law to be effectively questioned, as the Ruling itself requires, and they were not viable for derogating the constitutional order, and if it adds that this was not even the purpose pursued, it is unreasonable to conclude the reasoning with a conviction of sentences from nine to thirteen years of imprisonment.

4. When judging the criminal category of rebellion, it is incoherent to state that there was no violence "pre-ordered directly, without intermediate steps" (p. 267) since based on the statements of the pro-independence leaders one can deduce that what they sought was solely to reach an agreement with the State, and this fact (the pact, whose "*sine qua non* condition was acts [conducted] by third parties [the Spanish government], which would exclude the planning of violence", p. 273) is incongruent with the statement that the peaceful resistance of the crime of sedition had indeed been designed since 2012, despite the fact that in this case the objective sought was also a pact with the State.

According to the Ruling, the planning of the resistance strategy must have begun in at least 2012, as proven by the speeches of the leaders of Òmnium Cultural and Assemblea Nacional de Catalunya delivered at the closure of the demonstrations on 11 September 2012 and 2013, or the roadmap of Junts pel Sí in 2015. Nonetheless, the SCR does not cite any strategic planning of violence for the purpose of intimidation.

5. It does not fit within ordinary logic to state that applying the crime of sedition to the accused parties does not infringe upon their right to assembly and protest, since the people who participated in the demonstrations on 20 September and 1 October were not convicted for engaging in "acts of protest" or for voting. This would be proven, states the Ruling, by the fact that none of the demonstrators or voters appeared before a court or were sanctioned by the government. This is illogical reasoning because it seeks to prove more than it actually can prove: the fact that they were not accused proves that for this very reason (the absence of an accusation) they could not have been convicted, but it does not prove that they could not have been convicted of sedition, at that time or in the future, had they been accused of it.

Equally incongruent is the argument used by the SCR that the accused parties are being convicted not for having mobilised in acts of protest or for having voted but instead for promoting the mobilisation and vote. Without further motivation, the argument falls into the absurdity of criminalising the promoters of an activity while not criminalising the people who engage in it. This is a curious case of a tumultuous rebellion conducted by just nine people.

6. Yet more cases with a lack of motivation or reasonability in Ruling 459/2019 could be cited. Another example is the fact that given the defences' allegation that when applying the criminal category of sedition, it must be borne in mind that calling a referendum had been decriminalised, the Ruling limits itself to stating that this only affected referendums called without having the authority to do so, without considering, for example, the accused parties' ability to foresee this subtle nuance.

3. GENERAL EFFECTS OF RULING 459/2019 ON THE FUNDAMENTAL RIGHTS AND SEPARATION OF POWERS

3.1. The rights of assembly and protest and freedom of expression after the Ruling

The interpretation of the crime of sedition made by Ruling 459/2019 and the way it is applied to the defendants in this case to convict them of this crime affect not only the convicted persons' fundamental rights of freedom of expression and freedom of protest but also pose the risk of a serious limitation of these freedoms within the context of future social and citizen protests.

Indeed, the crime of sedition provided for in article 544 of the Criminal Code contains four basic elements: (i) uprising as a category of action, (ii) public and tumultuous; (iii) conducted with the purpose of impeding the enforcement of laws, preventing the authorities or public servants from exercising their legitimate functions or preventing fulfilment of agreements or administrative or judicial resolutions"; and (iv) via force or by illegal means. When applying the criminal category, these four elements are closely interrelated, but in order to determine their scope, it is useful to examine their interpretation by the Supreme Court separately.

1. The tumultuous rebellion. With regard to the first two elements, which identify and qualify the categorised action (public, tumultuous uprising), the SCR scarcely defines or analyses them in relation to the specific deeds which are at the core of the conviction of sedition (the mobilisation on 20 September 2017 in front of the headquarters of the Department of Economy and Finances of the Catalan Government, and the referendum held on 1 October 2017, although in the Forcadell case, the SC does mention the demonstration held on 21 September 2017 in front of the headquarters of the High Court of Justice of Catalonia).

In fact, the Ruling speaks about a "collective uprising" or "public, tumultuous uprising", or even a few times of "insurrection", to refer to the events on both 21 September and 1 October as well as the calls for mobilisation which, according to the same Ruling, the defendants targeted at the population, but nowhere does it establish a specific concept of uprising which could distinguish it from other kinds of demonstrations or rallies.

On the other hand, with regard to the descriptor 'tumultuous', which the criminal category requires for the act of rebellion, the SC concludes that it means "open hostility" and adds an element of hostility and violence "which does not necessarily have to be physical nor entail the use of force", and which must be externally manifested via "intimidating, threatening, injurious attitudes, [...]". To the SC, only in this way can it distinguish sedition "from peaceful collective opposition to the enforcement of the laws or the exercise of public service outside the legal system of appeals or complaints, or disagreement with what the law states or prescribes" (p. 281).

The other elements of the crime of sedition that the SC includes here (the purpose of the uprising, in terms of opposition to the enforcement of laws or the exercise of public service, and the way it happens, outside legal means) shall be analysed specifically below. It is important to highlight that to the SC, a tumultuous uprising requires neither violence nor physical force; instead it must have an intimidating, threatening or injurious effect (without considering the addition of the "etc." included in the reasoning which the SC says it used) and leaves the door open to other circumstances in such an imprecise and flexible way that it is hardly compatible with the necessary strict nature which would prevail when interpreting criminal law.

The most serious problem in this conception lies in the fact that while force and violence are objective actions which can be assigned to their perpetrators, intimidating, threatening or injurious effects refer not to actions but to the subjective perceptions of the people affected by the mobilisation, who can naturally have very different levels of sensitivity. On the other hand, it is quite difficult to imagine that a mass mobilisation could cause a real intimidating effect if it does not use violence or force. Under no circumstances can the mass nature of a mobilisation, especially if it is peaceful, be

the reason for attributing it an intimidating effect. If it were, any mass protest could fall into this category.

This conception of tumultuous uprising could also affect the right to criminal legality (art. 25.1 SC and art. 7 European Court of Human Rights), as seen in the previous section.

2. The purpose of the uprising. The key element used by the SC to define sedition and enable it to distinguish it from other crimes which limit the right to assembly and protest, such as public disorder, is its purpose (p. 277): to prevent laws from being enforced and authorities and civil servants from doing their jobs or, in the specific case of the Ruling, from fulfilling the judicial resolutions. One of the most noteworthy issues of the SCR is precisely that the SC makes an expansive interpretation of this purpose in relation to both the definition of the criminal category (standard purpose) and its assessment in this specific case (to subsume the acts into the crime of sedition).

With regard to the standard purpose of the crime of sedition, even though the SC does recognise this at some point, in a strict interpretation of article 544 of the Criminal Code in which sedition "is consummated by impeding fulfilment of a judicial order by force or non-legal means" (p. 382), it asserts in general that mere resistance to police action to ensure that a judicial order is fulfilled, even using nonviolent means, "is in itself appropriate and suitable to meet the standard requirements of the crime of sedition" (p. 283). Furthermore, in its estimation, the SCR reduces the purpose sought to merely hampering judicial action, regardless of whether or not this purpose is consummated or its effects. Thus, in effect, it alludes to the fact that a throng of people was summoned with the purpose "of hampering" the fulfilment of a judicial resolution (p. 247). Therefore, the purpose of the sedition takes a qualitative leap and goes from "impeding" to "hampering", such that the standard purpose which allows a mobilisation to fit within the crime of sedition is expanded.

According to the SCR, this act of hampering must be cast over the normal functioning of the public services and institutions in general, or the execution of judicial orders in particular (p. 277, and others). This would be the concept of public order that, in the SC's opinion, would protect the crime of sedition. However, this conception of public order is similar to the concept upheld in the 1959 Law on Public Order, which defined it as the "normal functioning of the public and private institutions", while distancing it from a conception centred on protecting persons and goods and maintaining citizen peace, which is essential to guaranteeing the free exercise of rights. This is the conception currently upheld, even in a law such as Organic Law 4/2015, dated 30 March 2015, on the protection of citizen safety, several aspects of which have been criticised by the Catalan Ombudsman.

The expansive interpretation of the purpose also appears when the SC assesses the actions being tried in this specific case, namely the mobilisations on 20 September and 1 October, to subsume them under the criminal category of sedition. Here there is confusion between the purpose of these actions and their effects or consequences. Indeed, it is clear that the purpose of 1 October was to hold a referendum and that the citizen mobilisation took place to make this possible, clearly despite the judicial resolutions against it, and that the mobilisation on 20 September was to protest arrests and searches which were considered unjust, but its purpose was not to impede them, as shown by the events which transpired in front of the headquarters of the Department of Economy.

This confusion between the purpose and the potential consequences of the mobilisation, especially when, as in the cases being tried, they stem from its massive nature, not from violent attitudes, could lead to the criminalisation of acts of protest, especially those whose massive size (which actually indicates a high degree of citizen participation in the protest) may have the effect of hampering the normal functioning of the public institutions and services, including the enforcement of judicial resolutions.

This danger makes it advisable to conduct an in-depth revision of the crime of sedition as it is categorised in the current Criminal Code, which is a relic of the past, and to even consider striking it from the Code. There are

already some criminal limits to the rights of assembly and protest, such as crimes of illicit demonstration (art. 513 and 514, Criminal Code), attack against the authority, resistance and disobedience (art. 550 and forward, Criminal Code) and public disorder (art. 557 and forward, Criminal Code), which specifically and sufficiently protect the legal assets that could be affected by gatherings and demonstrations, without the need for such an open, confusing criminal category, which is furthermore interpreted expansively by the SC, leading to very dire criminal consequences.

3. The means: the use of force or outside the legal means. According to the criminal category, in order for there to be sedition, the tumultuous uprising seeking the standard purpose must also take place "by force or outside the legal means". This is a key factor in the crime of sedition on which not only does the SC make an interpretation which is very lax and expansive but it also avoids weighing it with the fundamental right of assembly and protest as legal means, which is unquestionably the exercise of a right.

First, the SC states in effect that physical violence is not needed, but instead an intimidating, injurious or threatening attitude (p. 281) is, and it equates resistance, even non-violent resistance, with force and intimidation (p. 393). As mentioned above, these circumstances are subjective opinions by the person who feels accosted or affected by the mobilisation (they feel intimidated, injured or threatened) more than objective actions (such as the exercise of force or violence) which can be attributed to the perpetrators of the crime. Naturally, the level of intimidation, injury or threat can be very different for each person and each circumstance, and thus it cannot be used to measure and objectively describe the behaviour attributed to the perpetrators, even less so when the criminal consequences are as serious as in the crime of sedition.

The SC equates resistance, even when it is non-violent, with force and intimidation (p. 393). In this case, it is criminalising the massive nature of the mobilisation, and even its peacefulness (with its attitudes of non-violent resistance) when, as happened on 1 October, it renders the police unable to fully enforce a judicial resolution (in that case, preventing the referendum). According to the SC, mere verbalised refusal to let the police act to prevent the vote would have been a crime of sedition (p. 283), and it states that the "force" required by the criminal category was being used in view of the huge concentration of people who non-violently led the police to have to "retract" their mission. This interpretation vastly broadens the scope of sedition and means that it can include mass mobilisations of people engaged in no violent actions.

This risk is not averted because the SC circumscribes the scope of this interpretation to mobilisations around the territory in general which are massive and previously planned. According to this jurisprudence, occasional incidents within a general strike with a large following or mobilisations of a national platform such as the PAH may fall within the category of sedition.

Secondly, the SCR fails to examine the alternative means consisting in acting "outside the legal means" and draw the relevant consequences. As mentioned above, the SC believes that a mobilisation is tumultuous when, without the need for physical violence or the use of force, it has an intimidating or threatening effect (with all the problems cited above), which makes it "hostile and violent" (p. 281), and that this is what distinguishes it from "from peaceful collective opposition to law enforcement or the exercise of the public service outside the legal system of appeals or complaints or disagreement with what the law states or prescribes" (p. 281). Apart from this equation between (subjective) intimidating effect and violence, the SC cites no specific reasoning on the meaning that the term *legal means* used in article 544 of the Criminal Code might have, which must necessarily include the exercise of the fundamental rights, in this case, the right to protest (art. 21 SC and European Court of Human Rights). This should lead it to specifically weigh the acts indicted with the exercise of this right and consider whether or not the limits had been infringed upon or violated. It should be clear that currently the legal means are not limited to the appeals and complaints provided for by law, as they also include the exercise of fundamental rights. The expression "outside the legal means"

appeared in the crime of sedition categorised back in the 1973 Criminal Code (art. 218) as well as in the 1944 Criminal Code (art. 218). Nonetheless, it is obvious that even though the words are the same, this expression cannot have the same meaning today as it did in the Franco dictatorship. The term "legal means" today should necessarily include the exercise of the fundamental rights.

4. The necessary weighing of the fundamental rights and the disproportion of Ruling 459/2019. This consideration should have led the SC to weigh the fundamental rights to determine whether the events – the mobilisations on 20 September and 1 October – constituted the exercise of fundamental rights, especially the rights of assembly and protest, by examining whether any of the limits had been overstepped. Despite the fact that it discusses the right of assembly and protest when resolving the prior questions on the potential fundamental rights violations as a possible cause of exclusion for legal inadmissibility (p. 244 and following), at no time does the SC concretely and specifically assess whether the acts being tried might be protected by this right or whether, to the contrary, they were an illegitimate exercise which had overstepped some of their limits (established directly in the Constitution, art. 21 SC [peaceful and without weapons] and in the European Court of Human Rights, art. 11, and specified in criminal law [weighing other legal assets that deserve protection] by different types of crimes, as discussed above).

Yet again, the purpose of these mobilisations, assumed and interpreted in a very lax way, is the key factor that the SC uses to fully discard, without any further analysis, whether they might have been undertaken through the right of protest. What is more, with a very vehement yet abstract defence of the right to protest, the SC expressly refuses to make this assessment (p. 245) and says that none of the citizens who participated in these demonstrations, not even Jordi Sánchez and Jordi Cuixart, have been accused of a crime of illicit assembly or protest. That is certainly true, but Sánchez and Cuixart – and the other individuals being tried in this case – have been accused and convicted for a crime of sedition, with very serious sentences, for having participated in and promoted these same demonstrations. The SC's argument is circular and once again highlights the purpose of the mobilisations:

"In short, the concerted attack on the constitutional foundations of the system cannot be protected in a case of exclusion for legal inadmissibility, using to do so a multitude of people called to hamper the exercise of the jurisdictional function, mobilised to make possible a vote declared illegal by the Constitutional Court and the Higher Court of Justice of Catalonia." (p. 247).

In this way, despite its allusions to the right to protest, at no point does the SC examine the situation from the vantage point of the fundamental rights; instead, it exclusively takes criminal law into consideration. It does not weigh the deeds in light of the rights of assembly and protest, following the criteria widely entrenched in the constitutional jurisprudence and that of the European Court of Human Rights, which apply a test of proportionality to assess restrictive measures or those that entail interference with the fundamental rights.

The very crime of sedition and its application to the events in this case should have been examined from the standpoint of the justification of its purpose, suitability and need, and especially its proportionality in the strict sense, given the gravity of the sentences stemming from its application compared to the sentences that would be applied for other crimes which also limit illegal protests or protect the public order (which is the criminal category in which sedition is included in the current Criminal Code, unlike the previous codes, where it was included in crimes against State security).

In terms of the disproportion of the sentences, what stands out quite starkly is that while the crime of illegal protest (for protests with criminal purposes or using weapons or explosives) is punished with sentences from one to three years of prison, the crime of public disorder with sentences of six months to six years (the latter only in the most serious cases, when weapons are carried or acts of violence that endanger

people's lives are committed) and the crime of attack on and resistance to authority with sentences of one to six years (the latter in the most dire cases), the crime of sedition – which appears in the current legislation as a crime against the public order – is punished with sentences of eight to fifteen years of prison.

The punishment for this crime compared to other crimes of public order (which entail, for example, the use of weapons or explosives or endanger the lives of people, circumstances which never occurred in the events tried in this case) is clearly disproportionate. This means that it should be applied even more strictly, and that the weighing of the facts with regard to fundamental rights should be even more necessary. In this sense, it is worth recalling that the Constitutional Court has protected and nullified criminal convictions based solely on the disproportion of the punishment imposed, as in the case of Ruling 136/1999.

Finally, the weighing of the fundamental rights in relation to the indicted events should also take into consideration the relevancy of freedom of expression (art. 20 SC and European Court of Human Rights). The ECHR has stressed the close association between these two fundamental rights, which are essential elements in the formation of free public opinion, which is, in turn, a fundamental cornerstone of democratic society. This Court it has deemed that the rights of assembly and protest are often presented as an instrumental guarantee of freedom of expression or, more generally, of communication. Even though the right to assembly is a special law compared to freedom of communication – and is therefore preferably applied to the latter in the necessary weighing – freedom of expression must also be considered in the deeds indicted in Ruling 459/2019, since the mobilisations which have ultimately been criminalised as sedition were clearly driven by a political claim, which is legitimate. If it is true that the Constitution does not establish a militant model of democracy, as the SC has repeatedly stated and strives to act congruently with, the political purpose that serves as the engine driving the mobilisations should be borne in mind as a manifestation of freedom of expression and should therefore be should be assessed in accordance with this fundamental right. Thus, the obstructive effects of the decisions by courts which may have caused it to be so massive should not solely be taken into consideration.

In short, given the considerations expressed so far, it happens that the criminal category of sedition was applied in an enormously expansive way without weighing it with the fundamental rights of assembly and protest and freedom of expression. This led to a disproportionate result, namely the sentences imposed, compared to the protection that the Criminal Code itself grants the legal asset protected by this category of public order since the new 1995 Code.

However, the problem goes beyond the improper application of the crime of sedition and indeed points to the actual legal configuration of this criminal category and even its very existence today. Indeed, in its regulation in the 1995 Criminal Code, once it has been disassociated from rebellion and placed within the framework of crimes against the public order, sedition seems more like a relic of the past with a heavy military influence, and it has such indeterminate, imprecise and open-ended limits in terms of the definition of the categorical behaviour and its purpose, perpetration and even the legal asset protected, that in addition to not questioning the principle of criminal legality in its *lex certa* dimension, it also has an extraordinarily high potential to affect the rights of assembly and protest and of freedom of expression.

Furthermore, as stated above, it provides for much harsher punishments than those provided for in other criminal categories that protect the public order, such that there is a clear punitive disproportion compared to other behaviours which are objectively more serious, such as violent protests or protests with weapons or explosives. For these reasons, as stated previously by part of the doctrine, this criminal category should be given an in-depth revision and perhaps even eliminated from the Criminal Code, as many of the countries around us have done.

3.2. Parliamentary inviolability and separation of powers

Ruling 459/2019 contributes decisively to culminating the process of annihilating the inviolability of both the Catalan Parliament as an institution and its members, which directly affects citizens' right to political participation as recognised in article 23.1 SC, since, as the Constitutional Court has stated, "the right of citizens recognised in 23.1 SC would be voided of content or ineffective if the political representatives were deprived of or disrupted in the exercise of their functions". The SCR does this, and it does so using the most destructive instrument at its disposal: the application of criminal sanctions. This is a process that thoroughly damages the principle of separation of powers and could open the door to a dangerous system of governance by judges. Without a doubt, this is one of the direst and most perilous consequences of the Ruling.

The process in which the courts, especially the CC and the SC, are penetrating the internal organisation and functioning of the regional parliaments first occurred in the judicial resolutions handed down between 2003 and 2008 in relation to the Basque Parliamentary Bureau's refusal to dissolve a parliamentary group, as ordered by the SC, which ended with the conviction of the Speaker of the Parliament.

As condemned in the Catalan Ombudsman report from May 2018, in Catalonia this process materialised initially in numerous jurisdictional resolutions which it agreed to hear, in which it ultimately declared Parliamentary resolutions, declarations with exclusively political content lacking legal effects, unconstitutional (the first of which was SCR 219/2015, which nullified Resolution 1/XI, the start of the process to create an independent state).

After these rulings, the courts ceased to apply the principle of presumption of constitutionality of the norms and resolutions it tries, which is accepted without exception by all the constitutional systems in democratic-liberal states. Instead, it began to issue preventative rulings which declared the unconstitutionality of hypothetical future actions. And going a step further, it began to issue bodies of the Parliament, such as the Bureau or the Presidency, mandates to take or refrain from taking certain actions. This includes stating the matters which the chamber can and cannot debate, or interfering in the drawing up of the agenda of the Bureau or the Plenary, with pronouncements as outrageous as a prohibition on the possibility of criticising the Crown's actions in the ban on claiming the right to self-determination, which the Catalan Parliament has repeated without objections more than ten times since it was restored in 1980.

The CC even imposed the obligation to impede or halt any action which directly or indirectly entailed ignoring one of its resolutions. However, the most noteworthy fact is that all these mandates were accompanied by the threat, which ultimately materialised, of trial for committing a crime of disobedience (subsumed or not into other more serious crimes) if the judicial orders were ignored.

Thus, any parliamentary action which in itself is not a crime can become one if it disobeys a judicial decision. For example, the State government could abusively promote an incident involving the execution of a resolution, even one that is distant in time, to criminalise the parliamentary action that is unauthorised (criticising the king's action) or runs counter to the Constitution (approving a law declared unconstitutional or supporting a political objective permitted by a politically neutral constitution), which in themselves are not criminal actions.

Ruling 459/2019 is an important example of this process of annihilating institutional and individual inviolability with the convictions of the parliamentarians accused of disobedience subsumed as a fundamental element in the crime of sedition. Disobedience is also the argument – and practically the only one – for refusing to apply the law or prerogative of inviolability as a cause for exoneration, justification or jurisdictional exemption.

Indeed, the Ruling begins by citing and emphatically supporting rulings by the CC

and the SC itself in which "the institutional nature" of inviolability is proclaimed, which makes its guarantees "prescriptible and irrevocable" (p. 226). It states the following: "The prerogative is geared towards preserving a qualified sphere of freedom in criticism and decision without which the exercise of the parliamentary functions could be obstructed and frustrated" (p. 226); that it has an absolute and not merely relative nature (p. 226); that its existence shields its holder from a criminal response which could sever the parliamentarian's capacity – and with it, the legislative body's capacity – to debate and determine criteria on the problems that affect and interest society" (p. 227).

Once this premise is established, it then recalls that the jurisprudence of the SC and the CC exhort that inviolability is not unlimited, since its purpose is ultimately to protect the exercise of parliamentary functions. Having said this, to conclude the matter posed, without any further explanation, it states that a parliamentary act that disobeys a CC resolution is not an act of exercising a parliamentary function:

"The parliamentary act (the Bureau's agreement to admit a resolution for hearing) which departs from its genuine functionality and becomes the vehicle for disobeying the resolutions of the Constitutional Court is not an act protected by this right; that is, it is not an act that can be shielded under the constitutional prerogative of inviolability, which does not provide protection against acts that entail consciously ignoring what the Constitutional Court has resolved. The protection disappears even when the decision is formally presented within a Bureau agreement from the time the legal system grants the Constitutional Court the legitimacy to formulate these requirements. The rejection of Constitutional Court resolutions handed down within its proper functional framework, with the parliamentarian duly notified yet ignoring the requirement, is subsumable within the crime of disobedience, which, according to the concurrent circumstances, is the category applicable or subsumed – as in the case of Ms Forcadell – in other more serious criminal categories" (p. 231).

In short, no act by the Parliament or a parliamentarian that contravenes a jurisdictional mandate can be considered an act of exercising parliamentary functions, and consequently it cannot enjoy the parliamentary guarantees stemming from inviolability.

These conclusions were applied particularly rigorously in the case of the Speaker of the Parliament. According to the Ruling, Forcadell's conviction for sedition is essentially based on the fact that she "repeatedly and contumaciously (failed to fulfil) the CC's resolutions" (p. 315); she "allowed initiatives which wholly contravene what was determined by the Constitutional Court [...] to be included on the Bureau's agenda, which she admitted for hearing and processing within the Parliament. Despite the fact that as the Speaker it was her job to do so, she did not stop initiatives for debate in the Plenary, even though she knew that these initiatives had been formally suspended by the Constitutional Court" (p. 317); and "what is fundamental in terms of sustaining the category of her behaviour is that she allowed the resolutions (suspended by the CC) to be admitted for consideration and to be voted upon, counter to the continued, repeated requests from the Constitutional Court" (p. 326). It concludes that "this behaviour was not protected by parliamentary inviolability" (p. 327).

To complete the categorical action of sedition, the Ruling adds, with an extraordinarily weak and virtually ungrounded evidential base, a set of actions which sought to show her "determined leadership in the criminal orchestration devised by the accused parties" (p. 315), such as her attitude as the leader of the ANC; her presence at public acts to support the government and in at mobilisations, as well as the fact that she had been invited to participate in a meeting between the commanders of the Mossos and the Catalan president and vice-president and regional minister Forn, even though it recognises that her actual attendance is not proven (only the invitation); her attendance at two gatherings, according to the Moleskine calendar, one of whose content is not clear (p. 332); and a brief reference to her "instrumental role in leading citizens

gathered in front of the headquarters of a jurisdictional body to protest the arrests of the civil servants from the autonomous community" (p. 330).

The conclusion is that parliamentary inviolability simply disappears as a guarantee of representatives' freedom of action in the event of any outside interference, which is the essence of this historical institution that is imperative to the functioning of parliaments in democratic states. None of this is at odds either with the existence of limits of inviolability for acts outside the scope of parliamentary representation and functions or with the subsequent control of acts which result from parliamentary activity by means, in our case, of the Constitutional Court.

4. EFFECTS ON THE RIGHTS RECOGNISED IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The European Convention on Human Rights and its additional protocols ratified by the Kingdom of Spain are part of the Spanish legal system at the highest level, as provided for in article 10 of the Constitution. For this reason, it is relevant to examine the SCR from the standpoint of the Convention and the way the European Court of Human Rights has interpreted it.

1. From a procedural perspective, several of the issues discussed in the previous sections of this report could be considered violations of article 6 of the European Convention, which guarantees the right to a fair trial as interpreted by the European Court. One example is the prohibition on the cross-examination of witnesses and the Court's restrictive interpretation of article 708 of the Law on Criminal Prosecution, along with the Court's refusal to question the police or the ideology of the witnesses from the Public Prosecutor's Office, the Solicitor General's Office or the particular accusation. Furthermore, the following may also be relevant:

- The recusals proposed by the defences, in particular those which could question the impartiality of the members of the Court (WhatsApp message which Cosidó sent in which he stated that with the election of magistrate Manuel Marchena as the president of the General Council of the Judiciary, they could actually "control the Supreme Court and the General Council of the Judiciary through the back door"), and the lack of impartiality during the examination of the case (when the examining magistrate Pablo Llarena stated in some of his resolutions "the strategy from which we are suffering"). This latter situation is quite similar to what motivated the conviction of the Spanish State in the case of Otegi Mondragón et al., dated 6 November 2018.

- Violation of the presumption of innocence, since the statements by senior State officials cast doubt on the separation of powers in the Spanish State and are particularly based on a presumption of guilt, which is wholly incompatible with article 6 of the European Convention. As constantly stated in the ECHR's jurisprudence, the scope of the right to the presumption of innocence is not solely limited to a mere procedural guarantee in criminal matters but also requires that no representative of the State or public authority declare that a person is guilty of an infraction before their guilt has been established by a court.

The potential violation of the right by law to a predetermined court (since the competence of a court cannot be left to the discretion of the judicial authorities themselves) and its repercussion on the fragmentation of the case deserves separate mention. It is noteworthy that the other persons indicted for the same deeds or connected deeds who will be tried by the National High Court, the High Court of Justice of Catalonia or the ordinary courts do enjoy the right to a second criminal hearing.

This dysfunction could be analysed by the ECHR as a violation of article 14 of the European Convention on Human Rights in relation to article 2 of Additional Protocol no. 7, given that article 14 (which is not substantive in nature) stipulates a prohibition on discrimination: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Or it could also be analysed by the ECHR from the vantage point of article 1 of Additional Protocol no. 12, which prohibits discrimination in general. Since the Ruling itself refers to the infinite advantages of being tried by the SC, this implies that the people being tried in other courts are lacking these advantages.

Finally, another procedural issue which may bear upon the violation of the guarantees of the right to a fair trial is related to the preliminary plea filed by the Supreme Court before the Court of Justice of the European Union (CJEU) on the status of the Euro-MP Oriol Junqueras and the privileges and immunities that come with

this position. The CJEU ruling dated 19 December 2019 confirms that Oriol Junqueras was a Euro-MP and enjoyed immunity starting from the moment the election results were announced (13 June), and that he should have participated in the establishment of the European Parliament.

Regardless of other decisions deriving from the CJEU, this decision could cast doubt in Strasbourg on the guarantees of due process and the Supreme Court's violation of article 3 of Additional Protocol no. 1, which establishes the right to free, periodic elections, and therefore the rights to vote and stand for election. These rights may have been violated when Junqueras was prevented from claiming and exercising his post as MP in the European Parliament. These obstacles are even more obvious when after the Court ruling, which was initially heeded by the European Parliament itself, although it later retracted, both the Central Electoral Board (3 January 2020) and the Second and Third Courts of the Supreme Court (9 January) refused to recognise Junqueras' status as a Euro-MP.

2. Violation of the right to criminal legality. According to article 7 of the Convention, "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier criminality be imposed than the one that was applicable at the time the criminal offence was committed."

As discussed above, the indeterminacy of the definition of the crime of sedition contained in article 544 of the Criminal Code and the way the Supreme Court interpreted it may violate the principle of legality contained in article 7 of the European Convention on Human Rights.

In order to meet the principle of legality, any behaviour has to be clearly defined such that it is accessible and predictable. Predictability implies that people can know what acts will make them criminally liable and what the punishment for such acts will be. Even though courts have some leeway in interpreting criminal categories, this interpretation should also be predictable based on a contextual reading of the text of the provision, as should the reasonableness of the interpretation.

Having said this, the structure of the Ruling lacks lines of reasoning linking the justification for the non-violation of human rights and fundamental freedoms recognised in the European Convention on Human Rights and the charge for the crime of sedition. The SCR states that the punishment for sedition is not a violation of the right to freedom of expression and protest. These rights are recognised in article 10 and 11 of the European Convention on Human Rights. Here it is understood that the ECHR should make two levels of reasoning: justification of the restrictions to the rights and freedoms of expression and protest, and the existence of an unforeseen purpose to justify the restriction and misuse of power.

3. Lack of sufficient justification for the restrictions on the rights and freedoms of expression and protest. These rights are recognised in articles 10 and 11 of the European Convention on Human Rights. Generally speaking, international human rights rules allow the exercise of the rights of freedom of expression and peaceful assembly to be subjected to restrictions for the purpose of protecting certain public interests (national security, public order, public health or morality, and other people's freedoms), but these restrictions are only admissible if they are properly stipulated by law, demonstrably necessary and proportional to achieving the legitimate purpose. Any restriction which does not meet these requirements is a violation of that right.

The first requirement for the national authorities of Member States to apply restrictive measures is that the restrictions must be stipulated by law.

It is absolutely essential for there to be an internal law for a public authority to be able to take a measure entailing an infringement of the fundamental law protected in the European Convention or its additional protocols. Indeed, the infringement must have a legal foundation in the internal law and be applied in accordance with the stipulations of that law. It must be an internal legal provision which existed prior to the application of the restrictive measure.

Once the content of the legal provision has been determined, it is essential to point out that legal security is guaranteed by the development of material principles, such as the accessibility and predictability of internal law. The accessibility and predictability of its effects should be described specifically in accordance with the content of their scope of application and targets.

Another factor which bears on the analysis of the criterion of predictability is the seriousness of the violation: the direr the infringement, the stronger the predictability of the law on which it is based should be. Certainly, the degree of predictability of a restriction depends on the importance and fundamental nature of the right in question for the complainant. In this sense, the criterion of predictability can be somewhat indeterminate because of its assessment in relation to the principle of proportionality, but it is important to recall that even though the principle of proportionality gives States leeway for interpretation, the legality should be analysed in accordance with the interpretative criteria of the Strasbourg institutions.

According to these criteria, doubt can be cast on the predictability of the crime of sedition, as categorised in article 544 of the Criminal Code, as a factor that could justify a restriction of the rights and freedoms of expression and protest. What is more, there is a lack of motivation in most of the passages of the Ruling which analyse whether the exercise of the accused parties' fundamental rights is relevant as a cause of total or partial exoneration from the category.

The second requirement in order for the national authorities of Member States to apply restrictive measures is justifying this infringement with one of the legitimate objectives listed in the provisions of the European Convention. Therefore, the national law that provides a restrictive measure must pursue one of the legitimate purposes established in the European Convention. Thus, the authority of restriction is strictly limited to clearly specified circumstances.

In the same articles of the European Convention and its additional protocols, when it stipulates the possibility of adopting measures that restrict the rights and freedoms recognised therein, it also exhaustively states the reasons that could lead national authorities to take these measures. Subsequently, the European Court, when it hears the matter, will analyse this requirement of legitimate purpose and establish specific criteria for the objectives that legitimise the adoption of a restrictive measure.

In the case referring to the deeds tried in SCR 459/2019, even though allusions are made to the right to protest and freedom of expression, at no time are they situated within the perspective of the fundamental rights. Instead, the ruling solely takes criminal law into consideration, along with a particular conception of protecting the public order. The goal of the SC's interpretation of the deeds is to justify the existence of a legitimate purpose, namely defence of the state and the social order; however, this purpose does not match the assessment of the notions of protection of the public order made by the ECHR throughout its jurisprudence. Furthermore, the Second Court stresses several times that the constitutional order and unity of the State were never at risk, which is why even with an expansive interpretation of the Convention's concept of the *public order*, it is impossible to interpret that the aforementioned fundamental freedoms could be restricted in this case.

The expression of "need in a democratic society" was added after the list of the purposes which allow the State to justify the restrictions to the guaranteed rights as a common measure in these restrictions. This expression seems to impose a supplementary and common quality on the restrictions; that is, they have to remain within the order or the spirit of a democratic society.

This criterion or weighing of democratic need was virtually ignored by the SC. Even though it discusses the right to assembly and protest and freedom of expression when resolving the prior issues related to potential violations of fundamental rights as a possible cause of exclusion for legal inadmissibility, at no time does it concretely and specifically assess whether the deeds being tried may be protected by these rights.

Thus, hampering (not impeding) fulfilment of a judicial order in a peaceful way may justify the imposition of certain restrictions on the exercise of the right to the freedom of peaceful assembly, but the Court does not demonstrate that the application of the crime of sedition and the imposition of such severe criminal sanctions are predictable, necessary and proportional measures for deeds which were eminently peaceful, as the Ruling itself acknowledges.

In summary, doubt can be cast on the predictability of the criminal laws which enable the rights and freedoms of expression and peaceful assembly to be restricted. Furthermore, the legitimate purpose pursued can be questioned. And if this is not enough, there is a total lack of imperative social necessity and proportionality in the sanctions established in SCR 459/2019.

4. Existence of a purpose not provided for to justify the restriction and misuse of power. The existence of an undue restriction or misuse of power is contained, not autonomously, in articles 17 and 18 of the European Court of Human Rights.

The first of these articles imposes a negative obligation on the State: no European Convention provision may be wielded in such a way that the recognised rights and freedoms may be suppressed. Therefore, since the purpose of article 17 is to protect the democratic social order, it prevents the State from overstepping its bounds in imposing more limitations than those provided for in the European Convention, since that would run counter to the democratic system.

As an interpretative rule of the restrictions on the rights authorised for the Member States, article 17 fulfils the purpose of impeding the State from applying broader limitations than those provided for in the European Convention or its additional protocols; that is, it asserts that by doing so, the State has would have acted outside the needs and values of a democratic society. By situating itself exclusively in the perspective of criminal law and not expansively evaluating the content of the fundamental rights affected, the SC is understood to have introduced a restriction that is incompatible with the European Court of Human Rights and its additional protocols.

In turn, article 18 prohibits the misuse of power ("The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed").

The purpose of this closing clause is to warn States that their authority to restrict or derogate certain rights and freedoms to protect the social order cannot depart from the conventionally stipulated purposes, and it attempts to adequately and non-arbitrarily reconcile the public interest and safeguard the individual rights and freedoms inherent to a democratic legal system.

The effect of article 18 is to reiterate that the limitation cannot be applied for any purpose other than the one stipulated. The goal is to ensure that the purposes of the individual measures applicable conform to the legal objectives of the restriction and the legitimate purposes according to the European Convention; that is, the public authorities do not have the capacity to use their powers to limit rights for any purpose other than maintaining the values of a democratic society. The SCR totally lacks the reasoning needed to justify the criminal accusations, and when this reasoning exists, the interpretative option chosen is not the one that favours the realisation of the rights and freedoms recognised in the European Convention on Human Rights; instead, the SC chooses the one that most restricts the proper exercise of these rights and freedoms.

In short, the arguments in SCR 459/2019 may entail the use of purposes not provided for and a misuse of power which means abusively using the crime of sedition to justify restrictions to the rights and freedoms of expression and peaceful assembly, which could, in turn, entail a violation of articles 17 and 18 in relation to articles 10 and 11 of the European Convention on Human Rights.

5. THE RELEASE OF THE CONVICTED PERSONS AS THE CONDITION OF A POLITICAL SOLUTION TO THE CONFLICT

The Catalan Ombudsman has repeatedly stated that it was an error to judicialise a political conflict. Now, the political system should not make excuses in finding a solution that contributes to a dialogued solution to the conflict and within this framework restore the freedom of the convicted persons.

This section addresses juridical and political alternatives which would enable the persons convicted by Supreme Court Ruling 459/2019 to be released from prison. It is up to the legislative and/or executive branch to decide, and this could happen within the most scrupulous respect for the constitutional system.

Amnesty

As is common knowledge, the word *amnesty* comes from the Greek word that means *forgetfulness*. It entails the erasure of the crime and the punishment, such that it acts as if the anti-juridical act committed did not exist. Two types of amnesty are usually distinguished: amnesty per se (which occurs before the initiation or conclusion of judicial cases) and amnesty over wrongful conviction, which takes place after a ruling and entails the nullification of the conviction. In this case, it would be amnesty over wrongful conviction, which is clearly distinct from pardon. It has precedents in the Spanish legal system, such as article 102 of the 1931 Constitution (it should be recalled that the Decree Law on Amnesty dated 21 February 1936 led to the release of the Catalan politicians convicted for the events that transpired in October 1934).

Amnesty is present in the current constitutions of France and Italy, which assigns Parliament the authority to grant it via the enactment of a law. In Germany, the Federal Constitutional Court has recognised the constitutionality of amnesty, even though the Basic Law of Bonn does not include it. This situation is similar in Spain, where the 1978 Constitution does not mention amnesty and therefore does not forbid it either.

The Spanish Parliament should approve amnesty with a rule with the status of law. A rule of this kind would enable a new political phase to be ushered in based on dialogue, as the Catalan Ombudsman has advocated for some time now. Furthermore, it could have a broad scope, encompassing not only the people currently convicted but also those located outside Spain and those awaiting other trials (senior officials in the Catalan Government, Major Trapero and other Interior officials, the Parliamentary Bureau, mayors, members of the Mossos d'Esquadra, etc.). Likewise, it could include the national police and civil guard officers (and perhaps senior state officials) being investigated in different trials. It could even be extended to the entire period of conflict and include the persons convicted over the events of 9 November 2014.

Yet it should also be borne in mind that there is some debate over the constitutionality of amnesty, so a SC appeal could be expected to be filed by some parliamentary groups (which would not necessarily lead to the suspension of the law). Indeed, one sector of doctrine believes that the Constitution's (article 62.1) general ban on pardons denies the possibility of amnesty. However, other jurists believe that amnesty is clearly different to pardon and that the prohibition in the Constitution does not include the latter, which is why nothing prevents a law on amnesty from being enacted. The scant Constitutional Court jurisprudence on this issue (Rulings 63/1983 and 147/1986) has not questioned the constitutionality of a law on amnesty, which is why it is understood that a law of this kind would be perfectly constitutional.

Pardon

Pardon is (still) regulated by the law dated 18 June 1870 on rules for the exercise of the mercy of pardon. The 1995 Criminal Code mentions pardon as a cause for the erasure of criminal responsibility (art. 130.1.5). Several proposals have been forwarded to the Parliament to limit the scope of the 1870 law (IU and PSOE with regard to the crimes of corruption and gender violence, and PP with regard to the crimes of rebellion and sedition), which have not yet come to fruition.

Continuing with the regulations, article 62.i) SC bans general pardons, and article 87.3 SC

excludes it from grassroots initiatives to submit a proposed law.

There is no need for the convicted persons to request pardon: it can be done by the government on its own volition, or by friends, family members or anyone else who may request it. The court which handed down the ruling (or the SC, which in this case is the same, or the Public Prosecutor's Office) may also request it. Plus, it does not require repentance.

Pardon may be total or partial, but people who are not at the disposition of the court that handed down the Ruling may not be pardoned.

A report must be requested from the court that issued the ruling (although this report is understood not to be binding). The report must include information on the repentance of the convicted persons, which again is not a determining factor.

It should be borne in mind that the SC has accepted appeals against certain pardons over a dearth of reasons of justice, equity or utility.

Since it is an executive decision, it can be taken rather speedily (even though it does require processing, it would always be quicker than the parliamentary steps needed in other matters).

However, it should be borne in mind that the abusive use of pardon has led to a societal reaction against it: 4,667 pardons were granted by the governments of the PP and PSOE between 2000 and 2008. The names of some of the beneficiaries are widely known.

Striking the crime of sedition from the Criminal Code

Before the Ruling was made public, the possibility of amending the Criminal Code became a bit muddled because no one knew whether it was possible to amend the crime of rebellion (by better specifying the issue of violence) or another aspect. The fact that the Ruling discarded the crime of rebellion and focused on the crime of sedition seems to make it more possible to eliminate the crime of sedition (art. 544 Criminal Code) from the Criminal Code.

This possible derogation would be applicable to the convicted persons with retroactive effects because it is more beneficial to them (article 2.2 of the Criminal Code: retroactivity of criminal laws that favour the defendant even though when it enters into force the final Ruling has been handed down and the subject is fulfilling their sentence).

In this case, it is obvious that since the Criminal Code is an organic law, an absolute majority would be needed to approve it.

In any case, the derogation should not be viewed as a strictly Catalan question; instead, it is based on the legal and democratic problems posed by this crime. In fact, above it was noted that many authors have cast doubt on this crime because of its antecedents and the ambiguity of the punishable behaviour.

Naturally, this reform would not eliminate the sentences for misuse of public funds and disobedience. And it would pose the need to analyse the fact that in some cases the Ruling convicts for sedition arising out of misuse of public funds. There are no doubts about the people who have not been convicted for misuse of public funds.

In short, the Catalan Ombudsman believes that the fairest solution would be a law on amnesty, and that the quickest solution would be a pardon. And in any case, for the reasons outlined throughout this report, the Criminal Code must be amended to eliminate the crime of sedition.

None of these solutions would harm the dignity of the convicted persons and their right to continue being considered innocent. Nor are they incompatible with each other. There could be a pardon for those convicted and later amnesty, or a pardon and amendment of the Criminal Code.

The repercussions of these options should be analysed in the foreseeable submission of appeals to the CC and the European Court of Human Rights against the SC, specifically whether amnesty and total pardon could lead to the loss of legitimacy for turning to European justice. In contrast, partial pardon (which would retain part of the conviction) or striking the crime of sedition (which would retain the convictions for misuse of public funds or disobedience) would enable these appeals to reach the Strasbourg Court.

6. A FINAL REFLECTION: JUDICIAL ACTIVISM AND GUARANTISM IN ENSURING JUDGES ACT PURSUANT TO THE LAW

As discussed, SCR 459/2019 places several very important issues on the table regarding the role of the courts in a democratic state governed by the rule of law. One of these issues is the problem of judges' obligation to act pursuant to the law.

In order for a State to be governed by the rule of law, the institutions comprising it must behave in accordance to the provisions of the judicial system. The effects of this on judges is that, as the interpreters of the law, they have to adhere to the juridical rules established in the system when resolving the cases they try. Therefore, if judges are assigned the job of resolving individual cases in accordance with the provisions of the general rules (laws) created by the lawmakers, then they would be overstepping the job assigned to them if they departed from this assignment.

This is at the very core of any democratic state governed by the rule of law when its design includes the separation of powers. In the sphere of the legitimacy of institutional decisions, the only body which may legitimately create laws in a democratic system is the Parliament, precisely because it is the repository of the people's sovereignty. For this reason, when judges overstep the interpretative role assigned to them by the system itself, they are behaving illegitimately from a democratic standpoint.

While this is a worrisome problem that affects all judges and all jurisdictions, it is particularly important when analysing affairs which entail decisions taken by a court of last resort, such as the Supreme Court, and in an area such as criminal law. The fact that it is a decision taken by a court of last resort means that it cannot be appealed, and the fact that it refers to criminal law means that the decision is binding in the strictest sense, given the importance of the legal asset at stake, namely freedom.

In a society where the fundamental rights are recognised, what the judge should do is simply apply these rights, without the need to invent them. Therefore, this means adhering to the rights. However, here rights are not equivalent to the traditional formalist vision but instead incorporate the complexity that stems from being before juridical systems surmounted by democratic constitutions and international treaties that explicitly recognise the fundamental rights.

In this context, incorporating a more or less homogenous list of fundamental rights into democratic constitutions means that it ends up being understood, in terms of both doctrine and jurisprudence, that the content of the constitution somehow permeates the entire legal system. The vision of this neo-constitutionalism can be summarised in these features:

a. The importance of principles and not only rules in legal interpretations. The fundamental rights are precisely formulated in terms of principles, not rules.

b. The omnipresence of the constitution in all legal spheres, without any meaningful space being reserved exclusively for laws.

c. The privileged position of the judge as the interpreter of the law: not only the letter of the law but also the entire system, coherent with the constitution and the system of rights.

On this latter point, the privileged position of judges in this institutional system simultaneously entails a huge responsibility given that, depending on how the argumentation is handled, they can overstep the boundaries of democratic legitimacy. Therefore, we must ask whether the reference to the fundamental rights (expressed by means of political-moral principles) should be a part of or be left outside the argumentation of criminal judges. Expressed in terms of the judge's being bound to act pursuant to the legal rules: Does the presence of these rights in the delimitation of the criminal category necessarily run counter to this obligation for the judge to act pursuant to the law, with all that this entails? The response must be nuanced.

On the one hand, the reference to the fundamental rights entails a higher level of

discretion in the sense that more sophisticated arguments are needed than if they are not present. On the other hand, in legal systems that incorporate the fundamental rights into their constitutions, the criminal judge's obligation to act pursuant to the law can no longer be understood as simply being bound to what the legal rules in the Criminal Code say, but instead this obligation often entails reference to the rights recognised in the constitution. However, how should this obligation be articulated? It should come through interpretation. One way of doing this would be via an interpretative principle that would run parallel to another undisputed criminal principle, such as *in dubio pro reo*.

This principle could be called *in dubio pro cive*, and it could be formulated as follows: of two possible interpretations of a criminal category that affects political rights, the criminal judge has to choose the one that limits the exercise of these rights the least.

Clarification of this formulation is needed. First, it is an interpretative principle and therefore it comes into play when assigning meaning to the regulatory texts in which the criminal laws are expressed.

Secondly, there have to be two or more possible interpretations. Doubt should not be understood in the subjective sense but should emerge from a judgement of reasonability after collecting all the facts in the case, obviously without ignoring those that favour the accused parties, as is also required in the principle of *in dubio pro reo*.

Thirdly, it refers to the delimitation of crimes that affect political rights. Political rights mean all those that not only are related to delimiting the authorities of political representatives but are also a necessary condition for carrying out the tasks inherent to citizenship in a democratic society. Therefore, this includes direct political rights, such as voting and running for office, as contained in article 23 SC, as well as the rights that are indissociably connected to being a citizen, such as ideological freedom (art. 16.1 SC) or the rights of assembly and protest (art. 21 SC).

Finally, in these cases, the judge's interpretative activity cannot be merely mechanical, but this does not mean that it should not adhere to the law. The interpreter must make an argumentative effort first to stress that it is reasonable to think of more than one interpretation, and secondly to specify the reasons why the interpretation chosen is the one that limits those rights the least. When there is no argumentation or when this argumentation entails choosing the option that most limits the rights, then one could say that the decision has ceased to be bound to the right that the judges should apply and that they are not fulfilling the purpose assigned them in a democratic state governed by the rule of law.

7. CONCLUSIONS

1. In this case, the Supreme Court was not the ordinary court predetermined by law. Its authority was not predictable and was constructed *ex post facto*.

2. The evidentiary activity was not conducted appropriately, particularly with regard to the parameters of the cross-examination.

3. The disproportionate initial accusation of rebellion tainted the entire case and led to several dire situations, such as the fact that the accused persons were tried in the Supreme Court, that unjustified and disproportionate preventative detention was imposed on them, that their presumption of innocence was affected, and that they were unable to express themselves in Catalan during the trial.

4. The deeds being tried in this Ruling are being heard in different jurisdictions, which has a negative effect on the rights of defence, non-discrimination and the accused persons' right to a second criminal hearing.

5. Ruling 459/2019 makes an expansive interpretation of deficient legal precepts such that it may run counter to the fundamental rights and particularly to the right to criminal legality. It allows the law to prevail over rights and pushes legal categories far beyond what a literal interpretation would allow, which is the maximum limit of the scope of the criminal categories.

6. The Ruling contains material errors in the lack of motivation with regard to fundamental aspects (proven facts, individualisation, inference judgement), as well as logical incongruences and a lack of reasonability.

7. When interpreting the criminal category of sedition, the Ruling seems to turn disobedience of judicial resolutions into the most important factor in this category: disobedience would become sedition, and sedition would essentially become a crime of disobedience.

8. The Supreme Court's interpretation of the crime of sedition affects not only the convicted persons' fundamental rights of freedom of speech and protest but would also be in danger of drastically limiting these freedoms within the context of future societal and citizen protests.

8.1. With regard to the convicted persons, the Ruling does not concretely and specifically weigh the rights to freedom of expression and freedom of assembly and protest in relation to the deeds attributed to them with the criminal law in order to assess them from the vantage point of the exercise of fundamental rights – including their limits – instead of exclusively from the vantage point of the Criminal Code.

8.2. The sentences imposed for sedition may be disproportionate compared to the punishments provided for in the crimes which are applicable as the criminal limits of the rights of assembly and protest, even in those which call for the use of weapons and explosives, which the SC itself does not believe occurred in this case.

8.3. Generally speaking, the SC's interpretation of several basic elements of the crime of sedition, such as the purpose of the uprising (which the SC says was to *hamper*, not *impede*, the usual functioning of public services and institutions, and specifically the implementation of a judicial resolution) and the way it transpired (equating non-violent resistance to force and intimidation, and failing to consider that the expression *legal means* used in the Criminal Code may refer to the exercise of fundamental rights), coupled with the indeterminacy of the very concept of *tumultuous uprising* (which is actually similar to a mass mobilisation of citizens, even a peaceful one) could entail an excessive restriction of the right to assembly and protest in future citizen protests and has a very notably chilling effect on these rights.

9. Via the crime of disobedience of the judicial resolutions, which was made an essential factor in the crime of sedition, the Ruling concludes a long process in which the courts have intervened in the internal organisation and functioning of the Catalan Parliament. Under the threat – now real – of criminal sanctions, the courts, at the request of the State government, often preventatively determine the issues which may be included or not in the agenda of the Catalan Parliamentary bodies, and which ones may be debated and approved by the Plenary. This interference may have devastating

effects on the inviolability of the Catalan Parliament and its members, the right to political participation and the separation of powers, and it may pave the way to a dangerous governance by judges.

10. Issues like impeding the cross-examination of witnesses, banning the defences from asking questions on the ideology of some of the witnesses, failing to heed recusals, and the violation of the presumption of innocence by senior State officials constitute violations of fundamental rights recognised in the European Convention on Human Rights.

11. On the other hand, there may also have been violations of article 7, 10 and 11 of the European Convention, and of articles 17 and 18 in relation to articles 10 and 11 of the same Convention. Examples of issues which may violate the European Convention on Human Rights include: a violation of the right to criminal legality because of the breadth of the criminal category of sedition; the lack of a legitimate objective and social need for laws that enable the rights and freedoms of expression and peaceful assembly to be restricted; the existence of an unpredictable purpose to justify the restriction and misuse of power; and the lack of the reasoning needed to justify the criminal charges .

12. The release of the accused persons seems essential to the success of a negotiated solution to the current political conflict. The State government and Parliament have fully constitutional tools at their disposal to do this, such as pardon and amnesty law. The derogation of the crime of sedition could also have this effect, and, as seen in this report, it is a democratic necessity.

13. Judges' obligation to act pursuant to the law is a fundamental feature of the rule of law because it guarantees the role that the judicial branch should play within the separation of powers, as well as the legitimacy of the legislative branch. The traditional vision of a judge's obligation to act pursuant to the law should be interpreted as being bound to rights. Therefore, the criminal judge is bound not only by the provisions of the Criminal Code but also by the fundamental rights recognised in the Constitution. This means upholding an interpretative principle like in dubio pro cive: when faced with two possible interpretations of a criminal category that affects political rights, the criminal judge has to choose the one that limits the exercise of these rights the least.

14. As it has done on other occasions over the years, the Catalan Ombudsman asserts that the conflict between Catalonia and the rest of the State is eminently political and the outcome of an overly ungenerous interpretation of the constitutional precepts on regional self-governance (among others, articles 2, 3, 149 and 156 SC on nationalities, linguistic diversity, territorial dialogue and financing). A conflict of this type can only have a political solution grounded on the linguistic, cultural and national diversity of the Kingdom of Spain.

Based on all the above, the Catalan Ombudsman recommends that the Parliament of Catalonia activate the legal and political mechanisms needed to:

1. Derogate or conduct an in-depth revision of the crime of sedition in the Criminal Code, which historically has heavy authoritarian connotations and, as seen in Supreme Court Ruling 459/2019, can be interpreted expansively, thus violating the fundamental rights to the freedom of assembly and protest, in connection with the freedom of expression.

2. Activate the legal instruments that the constitutional framework allows to release the persons convicted in Supreme Court Ruling 459/2019 (law on amnesty or pardon), regardless of the need to reform the Criminal Code.

3. Initiate a constructive dialogue to find a political solution to the conflict between Catalonia and the State, a courageous, imaginative dialogue that should include a consultation of the people of Catalonia on their political future.

This report is being forwarded to the Parliament of Catalonia, the Parliament and government of Spain, the European Commissioner for Human Rights and the international community of human rights defenders so they are aware of the facts and can take appropriate action.

SÍNDIC

EL DEFENSOR DE LES PERSONES

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