EFFECTS ON RIGHTS OF THE CRIMINAL ENFORCEMENT OF SUPREME COURT RULING 459/2019

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SÍNDIC
EL DEFENSOR DE LES PERSONES

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1. PURPOSE

The purpose of this report is to analyse the two reinsertion instruments provided for by the Prison Rules (PR) which have been applied to the nine people who are serving prison sentences over the ruling of the Procés: the prison regime from article 100.2 PR (also called the flexible prison regime from article 100.2 PR) and progression to the third degree. Both prison mechanisms have been the subjects of appeal by the Prison Oversight Prosecutor's Office (henceforth, the Prosecutor), on which the Supreme Court has or will hand down its decision.

With regard to the application of the prison regime from article 100.2 PR, the Supreme Court, via its interlocutory decree dated 22 July 2020, revoked this prison regime for Carme Forcadell and should soon decide on the appeals on Junqueras, Romeva, Rull, Turull, Forn, Sànchez and Cuixart. With regard to Dolors Bassa, the Provincial Court of Girona, via its interlocutory decree dated 22 July 2020, dismissed the Prosecutor's appeal because of loss of purpose, as when the appeal was ruled on, Bassa no longer enjoyed the flexible prison regime and was in the third degree. The Prosecutor filed a motion for dismissal of this interlocutory decree, as it believed that the Court of Girona did not have the authority to rule on the prison regime.

With regard to the application of the third degree, the Supreme Court must still rule on the appeals filed by the Prosecutor against the interlocutory decrees handed down by two prison oversight courts (henceforth, POC) which confirmed the progression of Junqueras, Romeva, Rull, Turull, Forn, Sànchez and Cuixart to the third degree (interlocutory decrees of POC 5 dated 19 August) and the progression of Bassa and Forcadell to the third degree (interlocutory decrees of POC 1 dated 27 October). Likewise, the Supreme Court must still rule on the appeals filed in relation to the decision on whether or not to suspend the application of the third degree while the appeals filed by the Prosecutor against the decision on progression to the third degree are being heard, namely, those of Sànchez, Cuixart, Junqueras, Romeva, Rull, Turull and Forn against the decision of POC 5 to suspend the application of the third degree because of the Prosecutor's appeal (provision dated 28 July and interlocutory decrees dated 31 August and 1 September), and it must also rule on the appeal filed by the Prosecutor against the decision of POC 1 to deny the suspensive effect of the third degree for Dolors Bassa and Carme Forcadell while the appeal filed against the progression to the third degree is being heard (interlocutory decrees dated 30 July 2020). Furthermore, it is quite possible that the Prosecutor may file another appeal against the decision by POC 1 to deny the suspensive effect (interlocutory decrees dated 2 November).

2. METHODOLOGICAL CONSIDERATIONS. SOURCES AND PRISON POLICY

This report has been drafted after gaining access to the judicial rulings and the appeals filed by the Prosecutor. However, no access was provided to the prison administration's proposals or individual reports related to the application of the prison regime from article 100.2 PR. Nor was access provided to the proposals or individual reports and rulings on progression to the third degree. However, this did not prove to be a methodological disadvantage bearing in mind that the judicial rulings are strongly grounded and contain the information on the proposal and factors contained in the reports, which led to the proposal of the flexible prison regime from article 100.2 PR, on the judgement of the treatment professionals, and subsequently to progression to the third degree. In addition to the judicial rulings, this report is issued considering the minor jurisprudence on prison matters and the statistical data available on the application of the prison regime from article 100.2 PR and the third degree in the Catalan and Spanish prison system.

Regarding the prison policy of applying the prison regime from article 100.2 PR and the third degree, the following are relevant: Catalonia is the only autonomous community which has been transferred the authority to execute prison sentences, which means that it has its own prison policy different to the policy in the rest of Spain. The prison policy of the Catalan administration has always supported and promoted the application of mechanisms that help people deprived of their freedom to return to society. Therefore, within the Catalan prison policy, the prison regime from article 100.2 PR and progressions to the third degree are mechanisms that are applied; that is, they are a reality.

With regard to the mechanism of article 100.2 PR, years ago the Catalan prison administration approved Circular 1/2005, which regulates the application of article 100.2 PR in order to establish the criteria with regard to this mechanism that had been applied since at least 2003. Thus, the flexible prison regime has actually been applied in Catalonia for over 17 years, and the Catalan prison administration has had a specific circular specifically on this mechanism as a real, effective tool to be applied which contributes to reinsertion for over 15 years. In this sense, we have evidence that in December 2019, the prison regime from article 100.2 PR had been applied to at least 480 people in the prisons of Catalonia (7.1% of the prison population).

From the beginning of 2020 until August of this year, the Catalan prison administration has applied the flexible prison regime to 274 people. In contrast, the prison policy of Spain does not have such a longstanding tradition. The state prison administration does not have a specific circular in relation to article 100.2 PR, but instead it alludes to article 100.2 PR within the general circular whose purpose is to regulate the "classification and destination of inmates". Furthermore, the application of the flexible prison regime from article 100.2 PR has only begun to actually be applied since 2010. Despite this more restrictive, late-blooming prison policy of using this mechanism, it is also a reality in Spain as this flexible prison regime was applied to 1,749 people (3.4% of the prison population) in 2018.

With regard to the reinsertion mechanism of the third degree in Catalonia, in August 2020, 28.1% of the people deprived of freedom and classified as Catalan prisoners were in the third degree. In contrast, outside Catalonia, only 18% of the people deprived of their freedom and classified outside of Catalonia were in the third degree in August 2020, 10 percentage points under the rate in Catalonia. Therefore, from this perspective, the application of the prison regime from article 100.2 PR to the nine people deprived of their freedom from the ruling on the Procés, as well as the subsequent application of the third degree, does not count as the prison administration giving privileged treatment to these nine people, counter to what has been claimed by some political actors and the media; instead, it simply reflects a reality in the Catalan prison system.

3. THE PRISON REGIME FROM ARTICLE 100.2 PR

3.1. ON THE AUTHORITY OF THE SUPREME COURT

Outside Catalonia, what court should hear the cross-appeal on the matter of the flexible prison regime from article 100.2 PR was not unanimously agreed upon. Part of the minor jurisprudence deemed that the ruling court held the authority. Another part of the jurisprudence believed that the Provincial Court did.

This debate did not exist within the Catalan prison system. In fact, with regard to the political prisoners, the Prison Oversight Prosecutor's Office filed an appeal against the POC decisions approving the prison regime de article 100.2 PR and wanted them to be sent to the Provincial Court. In contrast, the interlocutory decree of POC 3, which approved the flexible prison regime for Forcadell, made the unprecedented decision that the cross-appeal against the approval of her flexible prison regime would be determined by "the ruling body (Interlocutory decree AP Mallorca 182/2020, "Urdangarín" case)". Based on this sole interlocutory decree on the Urdangarín case, which is unprecedented in the Catalan system, the cross-appeal in relation to the mechanism in article 100.2 PR was sent to the Supreme Court.

The Supreme Court has declared its authority not only to hear the classification in the third degree but also the prison regime provided for in article 100.2 PR by virtue of the interlocutory decree dated 22 July 2020, which revokes the application of the flexible prison regime from article 100.2 PR for Forcadell. To ground and justify that it holds the authority to hear the Prosecutor's cross-appeal against the application of the flexible prison regime, the Supreme Court invokes three arguments:

i) That in the Expert Prison Oversight Workshops held in 2015, a part of the Prison Oversight Prosecutor's Office claimed that the ruling court held the authority in matters involving the flexible prison regime. The Supreme Court omits the fact that this stance held by the Prosecutor at the workshops was in the minority, and that the majority criterion of the Prosecutor's Office was imposed, namely that the court with the authority to hear cases on the prison regime from article 100.2 PR was the Provincial Court.

ii) It cites just two interlocutory decrees in which the ruling court ultimately determines the prison regime from article 100.2 PR: the interlocutory decree from the Provincial Court of the Balearic Islands (Urdangarín case) and the interlocutory decree from the Provincial Court of Tenerife. These two rulings are cited by the Supreme Court Prosecutor in its ruling on the authority to rule on the cross-appeal on the matter of the prison regime from article 100.2 PR, but the Supreme Court omits the fact that these rulings did not lay the legal underpinnings with a previous contradictory debate on the issue of authority.

iii) It invokes the fact that a systematic canon of interpretation leads it to conclude that the authority to issue the last word on the flexible prison regime from article 100.2 PR is the ruling court.

Beyond the quality of the arguments on which the interlocutory decree dated 22 July 2020 is based, the Supreme Court chooses to assign itself this authority at the expense of the judicial bodies specialised in prison matters, such that it maintains control over the sentence fulfilment conditions of the people sentenced in the Procés case. The interlocutory decree reveals that the Supreme Court mistrusts the prison oversight courts to approve the reinsertion mechanisms such as the prison regime from article 100.2 PR, even though the purpose of these specialised bodies is precisely not to authorise prison regimes or any other instrument that does not adhere to the law (article 76 of the General Organic Law on Prisons, LOGP), as they are the jurisdictional bodies which are entrusted with monitoring the legality of the prison administration's decisions and measures.

This lack of trust is reflected when the Supreme Court states the following: "On the other hand, this examination of the ruling body minimises the risk that the vagueness of the precept when setting the conditions of application of art. 100.2 of the PR could

lead it to be used for arbitrary progressions in degree or ones that do not adhere to the law" (page 8 of the interlocutory decree). Yet another manifestation of this mistrust can be gleaned when the Supreme Court addresses the POCs and warns them that it will correct any arbitrary decisions issued by these jurisdictional bodies. It states this when it asserts the "more than sufficient guarantee to avoid arbitrary decisions which, based on the decision taken by the Prison Oversight Judge of Lleida, we now have the opportunity to correct" (page 14 of the interlocutory decree).

With the interlocutory decree dated 22 July 2020, in which it takes on the authority on the matter of the prison regime from article 100.2 PR, this is now two prison mechanisms on which the Supreme Court has established that it will rule, namely the flexible prison regime (page 8 of the interlocutory decree) and classification (page 483 of the ruling), bearing in mind that the ruling actually claimed authorities on prison matters in an exercise of claiming authority.

With this decision on which body will have the last word on the prison regime from article 100.2 PR, authorities are being stripped from the specific bodies on prison matters, which have a sensibility and specific training of their own and no contamination in favour of the ruling court because they are not the body that judged the cases, such that the authorities are centred in the Supreme Court and the prison oversight courts are stripped of their jurisdictional purpose.

The Supreme Court's decision is tantamount to diluting the authority of the bodies specialised in prison oversight to supervise and resolve prison issues, thus blurring the authentic, autonomous guarantee of the rights of people deprived of their freedom, which entails judicial oversight by a specialised, autonomous judicial body other than the one that had ruled in the criminal proceedings, which was the spirit of the LOGP. The lawmakers decided to provide jurisdictional control independent of the ruling court.

In this sense, it prevented – even collaterally – the very court that ruled on the case and took a position on it from having to decide on granting reinsertion prison mechanisms, with the consequent bias of contamination and predisposition, as there is the likelihood that the ruling court have a preconceived position, with the subsequent loss of impartiality, and examine the prison mechanism which provides for release not according to the premises established by law, bearing in mind the conduct and development of the person deprived of freedom, but in accordance with other parameters such as the severity of the deeds at hand, when this is an issue beyond the prison regime from article 100.2 PR (see paragraphs 23 and 27 ut infra) which are introduced when the judicial body that weighs the benefit or prison mechanism is contaminated by elements and opinions that it has witnessed and weighed during the trial, which led it to hand down the ruling in the terms it deemed appropriate.

In short, with the authority criterion established by the Supreme Court, the guarantee of the jurisdictional purpose of the prison oversight courts is diminished, with the risk of voiding it of content, as seems to have happened.

3.2. ON THE REVOCATION OF THE FLEXIBLE PRISON REGIME FROM ARTICLE 100.2 PR

3.2.1 Transversal circumstances

There are two transversal circumstances unrelated to the motives invoked in the interlocutory decree dated 22/7/2020 which enable the decision taken by the Supreme Court to revoke the prison regime from article 100.2 PR to be questioned.

i. Loss of purpose

On 22 July 2020, when the Supreme Court revoked the flexible prison regime from article 100.2 PR for Forcadell, it no longer made sense for the Supreme Court to rule on it. Likewise, it no longer makes any sense for it to rule on the other appeals filed by the Prosecutor against resolutions on the application of this flexible prison regime.

The prison regime from article 100.2 PR is primarily applied when people deprived of their freedom are classified into the first or second degree. When an inmate is moved up to the third degree, the flexible prison regime from article 100.2 PR disappears and it is no longer possible to apply it, among other reasons because the inmate engages in most of their activities and the treatment programme in semi-freedom outside the prison. Inasmuch as on 14 July 2020 the people deprived of their freedom were moved to the third degree, the prison regime from article 100.2 PR ceased to be applied. Therefore, the appeal of this decision filed by the Prosecutor on the application of 100.2 PR had lost its purpose. Consequently, it was unnecessary for the Supreme Court to rule on a prison regime which no longer applied to the inmates. In this sense, the quarter section of the Provincial Court of Girona had already ruled on the prison regime from article 100.2 PR applied to Dolors Bassa.

Via the interlocutory decree dated 22 July 2020, the quarter section of the Provincial Court of Girona dismissed the cross-appeal from the Prosecutor against the interlocutory decree of POC 1 which had approved the prison regime with the reason that “as the inmate is serving third degree imprisonment, any discussion on the legality or opportuneness of applying art. 100.2 of the Prison Rules on her second degree is now sterile as she is no longer in this regime. It is indifferent whether this court confirms or revokes this concession because the decision adopted would lack all effectiveness, as the current system is a regime of semi-freedom in third degree imprisonment, which the ruling court may ultimately review”.

The position of the Provincial Court of Girona is common practice in prison matters, as the prison and personal circumstances of the inmate change. If the decision to apply a given prison regime or another prison mechanism that has been challenged disappears, then the appeal is usually withdrawn or the courts and tribunals may issue an interlocutory decree which declares the appeal null and void because the purpose that led the appeal to be filed has disappeared.

ii. Resolutions of the prison oversight courts

Three prison oversight magistrates of Catalonia, each using their own independent criteria, autonomously approved the applications of the prison regimes of article 100.2 PR. POC 3 approved the flexible prison regime for Forcadell via the interlocutory decree dated 28 April 2020. POC 1 approved the application of the prison regime from article 100.2 PR for Bassa via the interlocutory decree dated 9 March 2020.

Finally, POC 5 approved the flexible prison regime for the other persons convicted through different interlocutory decrees. If the Supreme Court not only agrees to hear the appeal filed by the Prosecutor in relation to the application of article 100.2 for Forcadell but also agrees to hear the appeals filed by the Prosecutor against the eight interlocutory decrees of the POCs that approved the flexible prison regimes proposed for the other eight people deprived of their freedom, this would entail revoking jurisdictional decisions of three magistrates specialised in prison oversight who independently and individually approved the flexible regimes. Based on this premise, namely the revocation of the application of the flexible prison regime, the following must be stated:

- It is difficult to claim that the prison regime from article 100.2 PR is not justified if we bear in mind that three different magistrates approved the motivated judicial resolution to apply the flexible prison regime. In contrast, a single jurisdictional body, the Supreme Court, which is not specialised in prison sentences, and which is also the ruling court and may be contaminated by the entire prior criminal trial, would revoke and deauthorise the prison oversight courts a full nine times.

- The party that approves the application of the flexible prison regime from article 100.2 PR is not the prison administration but the prison oversight courts, with the previous proposal from the Treatment Board, unlike the progression to the third degree, which does depend exclusively on the prison administration. That is, the application of article 100.2 PR has had to pass through two filters, namely the favourable proposal of the Treatment Board (which was unanimous, which was not true of the initial classification proposals) and the express approval of the POC. Without this express approval, the prison regime would not be possible, notwithstanding the immediate applicable of the proposal to apply article 100.2 PR.

- In connection with the above, it has been proven that at least two POCs, POC 3 and POC 5, requested additional information several times and asked the professionals from the prisons to report on specific issues related to article 100.2 PR. The specialised bodies, which fall outside the criminal trial and display a true exercise of jurisdictional function, did not commit an act of faith in the prison administration but only approved the prison regime from article 100.2 PR once they had performed their due diligence.

In this sense, in order to ensure that the proposal of the flexible prison regime from article 100.2 PR was not a political decision but was indeed justified, the interlocutory decree of POC 3 explicitly states that "it has grounded its petition on the real reinsertion process of the inmate who is subjected to the prison regime" (third legal underpinning of the interlocutory decree of POC 3 dated 28/4/2020). The interlocutory decree stresses that "additional reports were requested, from which it could be deduced that the measures are shown not to be arbitrary" (seventh legal underpinning of the interlocutory decree of POC 3 dated 28/4/2020).

Based on the above, there are no reasons to believe that the prison regime from article 100.2 PR is not legally proper and that it actually conceals natural justice or favouritism, as political actors and certain media have claimed, which lead the Supreme Court's decision in relation to the political prisoners to be questioned.

3.2.2 On the reasons for revoking the flexible prison regime from article 100.2 PR: Interlocutory decree of the Supreme Court dated 22 July 2020

In the interlocutory decree dated 22 July 2020, which rules to revoke the resolution of POC 3 that approved the application of article 100.2 PR for Forcadell, the Supreme Court invokes four factors to underpin its decision that it was inadmissible to apply the flexible prison regime. It will likely invoke the same factors with regard to the other eight people on whom the Supreme Court must yet rule.

i) Length of the sentence

The Supreme Court introduces the length of the sentence ordered as a variable to be borne in mind to assess the application of the prison regime from article 100.2 PR, when this variable is totally alien to the application of this article. Indeed, the literal tenor of the precept (article 100.2 PR) does not either stipulate or allude to this variable, which is a parameter completely alien to the flexible prison regime. It is not a factor that the PR provides for and therefore the Supreme Court's invoking it has no regulatory grounding.

In fact, the Supreme Court invokes article 63 LOGP to justify that the length of the sentence is a factor that must be weighed in order to grant the prison regime from article 100.2 PR, only to later claim that the sentence ordered for Forcadell is very severe (page 13 of the interlocutory decree). Article 63 LOGP, cited by the Supreme Court, is clearly a variable that it must take into account, but only to classify the degree, not

for the flexible prison regime, which is regulated in article 100.2 PR, which stipulates the conditions that must be met. Not only does the Supreme Court's pronouncement have no literal and systematic regulatory base, but it also entails a reversion of the prison sentence: even though the severity of the sentence may be a variable that hinders or delays access to the third degree, currently, according to the Supreme Court's position, the severity of the sentence also hinders access to the flexible prison regime, an unprecedented circumstance.

At the same time, the Supreme Court's interlocutory decree matches what the same court stated in its guilty verdict, where it already subtly indicated that the severity of the sentence is a parameter that could lead to the revocation of the third degree. Now it has gone a step further, expanded it and extrapolated it to the prison regime from article 100.2 PR.

With this same premise, not only have the nine people deprived of their freedom been impacted, but this could also have an impact on other people deprived of their freedom and destabilise the conception of the flexible prison regime meant as an instrument of reinsertion. If it is ultimately associated with the severity of the deeds or the sentence, this is not reinsertion but retribution, as it is clear that if the Supreme Court believes that the third degree does not match the severity of the sentence, it will revoke it. With this reasoning, it could also be considered to reveal a certain prejudice about granting the third degree, as it is solely focused on this information when it is neither the condition nor the key premise of classification in the third degree.

This expectation of being classified in the right degree and being able to defend it before a court would be stripped of content if there is no authentic guarantee that this right could be ensured, and that a full and effective guarantee can be given by a special jurisdictional body such as the prison oversight court, not the ruling court, which could be contaminated by the trial it heard and the sentence it handed down. Similarly, when it refuses to apply the security period, the Supreme Court is indirectly alluding to the parameter of the severity of the sentence as an essential issue, or at least as a circumstance which focuses the issue, as it states that "the decisions of the prison administration which are not considered in line with the severity of the sentence" cannot be neutralised in advance of the security period, and it then states that "these decisions have an ordinary channel to be challenged and may be reviewed" (page 483 of the ruling).

Invoking requirements not provided for in the regulations and analogous unfavourable interpretations, such as not having served part of the sentence, are forbidden given that this would entail a restriction of individual rights without regulatory support.

In addition to the above, a variable which cannot be ignored must also be taken into account: the sentences ordered and time served are not the same for the nine arrested persons. Therefore, even following the logic of the Supreme Court on the sentence length parameter, this would not justify revoking the flexible prison regime from article 100.2 PR for Jordi Sànchez, for example, who has a nine-year sentence. Thus, on the date when the prison regime from article 100.2 PR was approved for Sànchez and Cuixart, who had the longest sentences, they had already served one-quarter of them, such that this should be considered individually on a case-by-case basis.

ii) Comparing the prison regime of semi-freedom to the third degree

The Supreme Court believes that the flexible prison regime approved meant that "Mrs Forcadell, who was classified in the second degree, would de facto enjoy a regime of semi-freedom. And this should be a factor to be weighed because she has not yet served one-quarter of her sentence". This premise is erroneous. It cannot be sustained if we considered, as the interlocutory decree itself states, that "leaves from prison to perform the tasks described shall take place three days a week from 8:30 am to 5:30 pm" (page 15 of the interlocutory decree).

The interlocutory decree does not state on which legal or factual elements it concludes that the prison regime from article 100.2 PR was comparable to the third degree. In contrast to this conclusion's lack of grounding, the following should be considered:

- Inmates classified in the third degree should and do enjoy, as a general rule, the general third-degree prison regime provided for in articles 83, 86.4 and 87 PR. That is, the aforementioned articles regulate leaves and how many hours an inmate can be outside the prison if they are classified in the third degree.

- According to the aforementioned regulation and prison practice, an inmate who is in the third degree from Monday night to Friday morning spends 16 hours outside the prison every day and only stays overnight for 8 hours. That is, from Monday morning to Friday night they only spend the night in prison.

In line with these premises, it is difficult to claim that Forcadell's leaving prison just three days a week to serve as a volunteer and then care for her mother (8 hours per day on the three days that Forcadell left prison) may be comparable to leaving 16 hours per day 4 days a week, and the only three days she is outside the prison 24 hours a day.

As a general rule, the third degree in art. 83 PR only entails spending 8 hours in prison, usually overnight. In contrast, as a general rule, the prison regime from article 100.2 PR entails spending most of the day in the prison and only leaving a few hours a day on the authorised days to engage in the activities stipulated in their treatment programme which cannot be performed in prison. Thus, in the case of Forcadell, the authorisation for leaves in the prison regime from article 100.2 PR was not daily, a circumstance which is applicable with the principle of flexibility provided for in the precept, as the prison administration is not seeking to grant an open regime in a concealed fashion.

iii) Relation between treatment and type of crime

The Prosecutor filed the appeal against the interlocutory decrees that were going to approve the application of the flexible prison regime by stating that the work activities or family members or even activities related to non-profit organisations bore no relationship with the type or aetiology of the crime and therefore were not a treatment activity for the purposes of article 100.2 PR. Nevertheless, this stance is not coherent with the conception of treatment activity or programme for the purposes of article 100.2 PR, which was cited in the conclusions of the workshops for prison oversight prosecutors in 2015 (conclusion 29). This stated, without any particular vote and unanimously, that the Prosecutor believes that the treatment objectives they believe may justify the flexible prison regime are: "family, educational, training, work". Still, the appeal was filed based on a restrictive interpretation of treatment activity associated with the crime, which is considered by the Supreme Court in relation to Forcadell.

The provincial courts, particularly their sections specialised in prison matters, have been ruling that the prison regime from article 100.2 PR is justified if its purpose is to perform an activity or programme that contributes to reinsertion and that this activity cannot be performed in prison, rendering leaves justified. The activity's contribution to the reinsertion process has been interpreted and applied in a broad sense, that is, without the essential need to associate the activity or programme to be performed with the commission of the crime (type and criminogenic factors that led to it); rather, it is sufficient for the activity to objectively facilitate and lead to progress in the reinsertion process.

In this sense, in several resolutions, the Provincial Court of Barcelona has confirmed the application of the prison regime from article 100.2 PR for leaves to work even if the job is not a treatment activity targeted at addressing the commission of the crime either from the standpoint of the type of

crime or from a perspective of criminal aetiology.

In accordance with the jurisprudence of the provincial courts and the POC, and with this broad perspective of the activity or programme that contributes to reinsertion, the activity of volunteerism, complemented with family care, are actions that unquestionably foster reinsertion. For this reason, the POCs authorised the flexible prison regime in accordance with the consolidated interpretation and jurisprudence. In contrast to this stance, the Supreme Court reverts to a restrictive interpretation and says that an activity or programme can only be considered to contribute to the reinsertion process not in the broad sense but in the strict sense of a connection between the activity and the type of crime, the criminal acts and how this activity in particular works on factors related to the commission of the crime in such a way that it specifically contributes to the reinsertion process (page 16 of the interlocutory decree).

Therefore, it establishes a restricted concept of the reinsertion process and the activity to be performed in the flexible prison regime, without providing grounds for this more restrictive interpretation, which contravenes the broader and more favourable interpretation. In accordance with this interpretation, and given "the lack of connection between the treatment programme and the crime committed", it revokes the flexible prison regime while stressing "that utter absence of a link between the programme proposed and the inmate's social reinsertion process which, as is obvious, cannot be unrelated to the crime for which she was sentenced. Engaging in volunteerism described in that proposal or the programme to care for her mother bear no relationship with the type of crime for which the inmate is serving her sentence".

However, if we examine this restrictive concept of the need for the activity to be performed from the standpoint of treatment, meant as based on being related to the crime committed, it is more difficult to revoke the prison regime from article 100.2 for the people deprived of their freedom who were sentenced for the crime of embezzlement of public funds, as there is no sentence for liability but instead the quantification was agreed upon via the Court of Accounts, and in this sense there are jurisprudential precedents which conceive of the job that provides income to pay a liability as a necessary activity that justifies the prison regime from article 100.2 PR.

4. THE PROGRESSION TO THE THIRD DEGREE

The considerations formulated about the prison regime from article 100.2 PR (paragraphs 21 and 22) can be extrapolated and applied to the progression to the third degree of the nine people sentenced and deprived of their freedom. The Prosecutor's objections consisting in the claim that progression to the third degree is abnormal or constitutes favouritism have no rationale when the progression to the third degree of the nine people sentenced was validated by two different prison oversight courts.

POC 5 confirmed that Junqueras, Rull, Turull, Forn, Sànchez and Cuixart should be in the third degree. POC 1 has confirmed the progression to the third degree of Forcadell and Bassa. In short, similar to the prison regime from article 100.2 PR, the third degree was applied to the nine people deprived of their freedom because the legally stipulated conditions obtain, and this mechanism has been validated by an independent, specialised and non-contaminated legal body.

4.1. ON THE REVOCATION OF THE THIRD DEGREE

The Prosecutor has filed an indiscriminate appeal against all the progressions to the third degree, just as its appeal against the application of the prison regime from article 100.2 PR. The reasons invoked by the Prosecutor to request that the progressions to the third degree be revoked are identical in every single appeal filed, although there are a few nuances according to the prison and personal circumstances.

i) Admission of the crime

The Prosecutor invokes the following with regard to the nine people deprived of their freedom who do not admit to the crimes, albeit individualised in the following terms:

- With regard to Forcadell, it objects that she admits to the deeds but not the crime because, according to the Prosecutor, Forcadell claims that her action was justified by the right to freedom of expression and opinion. Therefore, the Prosecutor concludes that "inasmuch as the inmate does not accept the criminal nature of the deeds for which she is serving the sentence, it is impossible to talk about sufficiently favourable evolution". The Prosecutor lodges a similar objection with regard to Bassa, who it says admits the deeds, but "this assumption of responsibility for the deeds committed and this acceptance of their consequences are not tantamount to admitting to the crime because the inmate has always acknowledged her participation in the illegal referendum [...], which she does not believe is a crime". The same objection is formulated with regard to the other seven people deprived of their freedom.

- With regard to Jordi Sànchez and Jordi Cuixart, the Prosecutor not only asserts that they admit to the deeds but do not admit that they are crimes, and therefore they do not admit that their conduct was criminal, but stresses two further issues. First, it objects that they deny that the acts of 20 September 2017 were violent, and that this runs counter to the ruling. Secondly, both people, while enjoying leaves from the prison regime or even the third degree, made statements before the media which lead to the conclusion that they would repeat the deeds once again. That is, in the Prosecutor's judgement, they would repeat the acts. It formulates the same objections with regard to Junqueras, Raül Romeva and Josep Rull.

Now that the reason why the third degree should be revoked in the judgement of the Prosecutor (admitting the deeds but failure to admit that the deeds are criminal and justifying them on democratic legitimacy and the right to expression) has been framed, this does not justify revocation of the third degree in accordance with the stipulations of the prison rules. Article 106.3 PR states that "progression in the degree of classification depends on the positive modification of the factors directly related to the criminal activity". On the other hand, article 65.2 LOGP states that "the progression in treatment depends on the modification of the personality sectors or traits directly related to the criminal activity".

The two rules seek a modification in the elements that gave rise to the commission of the crime. There is no rule that sets admission

of the deeds and of the crime per se as a condition to access the third degree. However, inasmuch as both rules stipulate a modification in the elements which led to the commission of the crime, prison practice tends to require admission of having committed the crime, that is, of the deeds and their criminal nature, as it is erroneously believed that it is difficult to work on modifying what gave rise to the crime if the main premise, that is, that a crime was committed, is denied.

If the elements that gave rise to the commission of the crime disappear or change, then there is the capacity to live in semi-freedom (a requirement of article 102.4 PR). Both treatment professionals and legal operators in the prisons interpret the capacity to serve a prison regime in semi-freedom as the key to the future prognosis. It is believed that a person deprived of freedom, with all their criminal, prison and personal circumstances, who it can be inferred and proven will not repeat the purported crime in the regime of semi-freedom, has the capacity to serve a prison regime in semi-freedom. Based on this premise, the cause for revoking the third degree based on the fact that there is no admission of the crime – and therefore the elements that contributed to it have not changed, and consequently there is a risk of recidivism – is erroneous and does not fit the law.

- In relation to Forcadell and Bassa and in relation to Junqueras, Romeva, Rull, Turull and Forn, in view of the ruling and proven facts, and as upheld by the Prosecutor in its appeals, the crime was committed because they were public servants. These seven people performed the deeds contained in the ruling and declared criminal in this capacity.

In addition to the prison sentence, the ruling also imposes the sentence of total disqualification for more than ten years for each of them, which means that the factor that determined the commission of the crimes, serving in the parliament or government, has changed. It is impossible for these seven people to repeat their crimes because they may not run for public office for over ten years. Therefore, their discourse on whether or not the deeds are criminal is irrelevant, as the requirement of the capacity to live in semi-freedom in terms of non-recidivism of the deeds declared criminal for which they were sentenced is met.

This is also the sense of the interlocutory decrees by POC 5 of Catalonia that confirm progression to the third degree of the five people deprived of their freedom. One illustration is the interlocutory decree dated 19 August 2020, which confirms Junqueras' progression to the third degree, with regard to which it states that "it should be borne in mind and is of the utmost importance that the ruling handed down by the SC establishes a sentence of total disqualification for the amount of time of the prison sentence", and this prevents him from committing a new crime, as the interlocutory decree stresses that "the deeds were committed under very specific circumstances, as the crime occurred because the inmate had the status of occupying a very prominent public office" (p. 8, 6th legal underpinning of the interlocutory decree).

- The situation with Jordi Sànchez and Jordi Cuixart is different, but the discourse on the deeds is equally irrelevant. Jordi Sànchez is a social leader, and so is Jordi Cuixart. Therefore, it is true that in their case the sentence of disqualification imposed on both could be considered innocuous as they will likely not repeat conducts, since they undertook the deeds in the ruling without holding or using a public office, unlike the seven other people. Despite this, only the following should be borne in mind: as the civil leaders they are, all they need is to put out a call (a tweet, a communique, a statement to the media, etc.) to mobilise citizens and once again perform the deeds for which they were sentenced. And this has not happened.

- The discourse that Jordi Sànchez or Jordi Cuixart may have is subjective and interpretable. The Prosecutor interprets it one way; the treatment professionals another. What is not subject to interpretation is an objective deed, namely that as civil leaders who have been leaving prison since approximately the month of February and enjoyed leaves, and have therefore had the opportunity to exercise their role as civil leaders and mobilise the people, they have not done so. And therefore, there are no

objective reasons to consider that there is no prognosis of their capacity to live in semi-freedom. Their actions have not been weighed, and the sole focus has been placed on their statements, which are part of their freedom of expression.

In this sense, section 21 of the Provincial Court of Barcelona, via the interlocutory decree date 14 July 2020, confirmed the interlocutory decree of POC 5, which authorised ordinary leave for Jordi Cuixart, among other reasons because at that time the court disagreed that there was the risk of recidivism as "we now have objective information from the leaves that the inmate has already taken", and that "all the leaves inmate o has taken have occurred without any negative incident and with compliance", once again stressing that beyond the interpretations of the inmate's statements (and there are several possible ones), the fact is that "inmate o has already taken leaves and no incident related to recidivism of the crime for which he was sentenced, nor of any other, has occurred". This can also be extrapolated to Jordi Sànchez.

All of the above objectively shows that the failure to admit to the crime is not foreseen as such in the rules nor can it be an automatic cause of revocation of the third degree. In this sense, the interlocutory decree of POC 2 of Catalonia dated 10 August 2020 is illustrative, as it validates a progression to the third degree in the case of an inmate who is serving time for fraud, does not admit to the crime and justifies his deeds, as in that particular case, despite the inmate's discourse, he is deemed capable of living in semi-freedom.

In the case of the nine people sentenced by the ruling of the Procés, given the circumstances (paragraphs 48 to 50), discourse and the failure to admit to the crime invoked by the Prosecutor cannot be used as an element to justify that there is a risk of recidivism and that, therefore, the inmate is not able to live in semi-freedom, notwithstanding whether the requirement that a given discourse be verbalised, or that the third degree is taken from them because they did not express a given stance on the deeds, can be considered respectful of the right to ideological freedom or freedom of expression.

ii) On the requirement of a specific treatment programme

The requirement of a specific treatment programme as a cause of revoking the third degree is yet further proof that the real goal is to deprive the nine people deprived of their freedom from the third degree as a group, without individualisation. With regard to Forcadell, the fact that she has undergone no specific programme is invoked as a cause for revoking the third degree. However, with regard to Bassa, who has undergone an intervention and programme, this is not sufficient, as it considers that she still has a criminogenic deficit in view of her discourse on the deeds, and a specific programme related to the crime and with respect for the law is needed. And the same holds with the other seven people deprived of their freedom: regardless of whether or not they have undergone a specific programme, the Prosecutor is demanding that they do it in conformance with the type and/or aetiology of the crime.

The cause of the revocation of the third degree, that is, the demand for a specific treatment programme related to the second-degree type and/or crime group, prior to being moved to the third degree, is neither legitimate nor grounded in the rules, nor reflects common practice.

- If it is applicable to undergo a specific treatment programme or it is not an issue provided for in the (ITP) of each inmate. The Prosecutor and the jurisdictional bodies are invading competences when they stress undergoing specific programmes by overstepping their functions. The purpose of the appeal against progression to the third degree is to revoke this third degree or not, but it cannot be a means of going even further and imposing a specific programme when this is not the purpose of the appeal.

The purpose of the appeal is progression to the third degree, and therefore, the Supreme Court should limit itself to confirming or revoking the administrative resolution on progression to the third degree. An administrative decision not to undergo a specific programme is not the purpose of the appeal. Only in the event that the ITP of the person deprived of freedom states that a

specific programme or intervention must be undergone, and if not the inmate is not prepared to live in semi-freedom, would there be a basis of legitimisation to force them to undergo a specific programme and to dispute the progression to the third degree in relation to that programme.

Article 20.2 PR states that "the Treatment Board, with the prior report from the technical team, should check the data in the protocol and draw up an individualised treatment programme on aspects such as work, cultural and professional training, the application of assistance measures, treatment and any other measures that should be borne in mind for the time of release". On the other hand, article 103 PR states that the individualised treatment programme (henceforth ITP) has to cover the needs and shortcomings detected in the inmate in the areas stipulated in article 20.2 of these Rules. "The programme has to explicitly state the destinations, activities, educational programmes, work and occupational activities or activities of any other kind which the inmate must undergo". The appeal by the prosecutor seeks not only to appeal progression to the third degree but also to modify the individualised treatment programme designed and planned for the nine people deprived of their freedom. In effect, inasmuch as the Prosecutor asks not only for the third degree to be revoked but also for a specific group treatment programme to be undertaken, in reality what it is disputing is the ITP, and it is asking that this ITP be judicially modified, stating that within this ITP a specific treatment programme should be undergone even though it does not have the legitimacy to determine and undertake a specific programme.

- Undergoing an individual or group treatment programme is neither compulsory nor obligatory. There is no rule that calls for a specific programme. And POC 5 of Catalonia ruled in this way in the different interlocutory decrees dated 19 August 2020 that confirm the progressions to the third degree when it stated that "the Prison Rules do not obligate the inmate to forcibly undergo specific treatment programmes either individually or in a group", although the prison administration can suggest that they participate in a programme if the professionals deem it necessary. However, the inmate can voluntarily decline to do so. Therefore, as there is no obligation for a specific programme, it is the exclusive purview of the prison professionals who assess the risk of recidivism to determine whether they propose a specific programme and include it in the ITP.

Based on the above, there are cases in which the prison treatment professionals suggest within the ITP that the inmate should undergo a specific programme in relation to the type and/or aetiology of the crime (sexual crimes, violent crimes, gender violence, domestic violence and drug addictions), while in other cases they do not deem it necessary (the case of the nine people deprived of their freedom). However, even in the cases in which a specific programme is deemed necessary, there is no regulatory underpinning that forces the person to undergo a specific treatment programme in the second degree as a precondition for accessing the third degree. The prison administration has to offer the treatment programmes, but the inmate is not obligated to undergo them.

In this sense, in some cases the inmate has initially been classified in the third degree because it was deemed that they had to be in the third degree, but on the condition that they undergo a specific programme in this third degree. There are different judicial rulings that agree to the initial classification in the third degree, stressing that the specific programme can be undergone in semi-freedom and therefore that it is not a reason for revocation. In this sense as well, the statistics demonstrate that this is a reality, as in August 2020 at least 80 people who were in the third degree were doing a specific programme in semi-freedom.

iii) On the effects on ideological freedom

The appeals by the prosecutor and in the Supreme Court's interlocutory decree state two circumstances that affect the ideological freedom of the convicted people. First, demanding that a treatment programme be established that is connected to the crime

for which the sentence was given in order to grant the flexible prison regime 100.2 PR, and secondly, conditioning prison benefits on admission of the crime.

■ To the Prosecutor, and implicitly to the Supreme Court as well, inasmuch as it accepts the cross-appeal filed against the judicial resolution of the POC that approved Forcadell's programme, the reinsertion prison treatment which should be applied to achieve the regime of article 100.2 PR consists in inculcating in the inmate respect for the Constitution and the law as the basic principle of the democratic state and the rule of law. This intention to change Forcadell's ideas and beliefs (and, by extension, if it is repeated, those of the other prisoners serving their sentences), with the condition of initiating a programme with this purpose in order to be granted a given prison regime, constitutes a violation of ideological freedom as recognised in article 16.1 of the Spanish Constitution (henceforth, SC) and freedom of thought in article 9.1 of the European Court of Human Rights (henceforth, ECHR).

■ Indeed, both the SC (art. 16.1 SC) and the ECHR (art. 9.1) recognise ideological freedom and freedom of thought, respectively. And both rules also distinguish between the internal and external dimension of this freedom, such that they admit certain limitations only with regard to the expression of ideas and beliefs, but not with respect to holding these ideas and beliefs. Article 16.1 SC does so explicitly by stating that "the freedom of ideology, religion and worship of individuals and communities is guaranteed without any further limitation in their expressions than the necessary one to ensure that the public order protected by law is maintained". Likewise, article 9 ECHR recognises "the right to freedom of thought, conscience and religion", which entails "the freedom to manifest his religion or convictions individually or collectively, in public or private [...]" (section 1), but it only provides for the possibility of establishing restrictions on the "freedom to manifest one's religion or beliefs" (section 2).

■ It is not enough that the SC mentions stresses that Forcadell was not sentenced for her pro-independence ideology in the aforementioned interlocutory decree. Establishing a programme that attempts to change her ideas (her constitutional ideology) was made a condition for her being granting a favourable prison regime. This is doubtlessly a coercive move in the sense of the ECHR which aims to impose certain ideas on her. And the following also clearly meet the conditions demanded by the SC to detect a violation of ideological freedom in its internal dimension: first, the existence of a nexus between state action and the content and maintenance these ideas (the constitutional ideology of the prisoners) such that there is a relationship of causality between the two: the state act and Forcadell's ideas; secondly, the very violation of ideological freedom and freedom of thought also comes from the fact that being granted prison benefits is conditioned upon admission of the crime, as noted above.

■ Therefore, admitting to the crime and taking responsibility, in this case, does not mean admitting to deeds nor honouring the criminal consequences of them (which the convicted persons have done), but it implies renouncing their own ideology. And inasmuch as this is established as a condition to gain a given prison treatment, the demand to renounce one's own ideology has to be considered a violation of ideological freedom in the sense indicated by both the Constitutional Court and the ECHR.

iv) Effects on the right of actual legal custody and on the principle of equality

The above considerations on the illegality of requiring the convicted people to renounce their ideology – either through the inculcation of certain ideas or based on the assumption of a constitutional ideology which they do not share – lead to two additional violations of fundamental rights.

■ On the one hand, requiring someone to undergo a reinsertion programme, designed as an ideological re-education programme, with the purpose of inculcating certain ideas in them, means imposing a requirement to access a given prison treatment, in the guise of a regime, or progression to another degree in the future, which is not provided for by law. This is a

violation not only because it is not included in the requirements and conditions stipulated by prison law in relation to prison treatment (art. 59 to 72 LOGP), nor because the inmate's participation in the programmes is voluntary in general, but because the law cannot require this kind of programme inasmuch as it violates the ideological freedom and freedom of thought guaranteed by the Constitution and the ECHR, as noted above.

- The same holds true with regard to the requirement (in the guise of a condition for accessing a given prison treatment) of admitting to the crime in the terms stated above. In this case, we should also note that admitting to a crime (referring to either the deeds or their legal classification) does not appear in the prison laws as a requirement or precondition for applying the regime in article 100.2 PR or progression in prison classification. Therefore, if a judicial body requires these conditions, which fall outside the legal provisions and also violate a fundamental right, this would be tantamount to violating the right to actual legal custody in the sense of obtaining a court resolution that is grounded in law (art. 24.1 SC).

- On the other hand, in relation to the people convicted by Ruling 459/2019, requiring additional or reinforced conditions is also a difference in treatment that violates the right to equality stipulated in article 14 SC and article 1 of Protocol no. 12 of the ECHR, inasmuch as the differentiating factor with reference to these convicted persons is only subjective, and therefore it is neither objective nor reasonable.

v) On how much of the sentence has been served

It is true that the Supreme Court's failure to impose the security period does not automatically mean that the length of the sentence should not be considered when progressing to the third degree, in that ultimately it is one of the variables in article 102 PR and 63 LOGP. However, in the case of the nine people convicted, the revocation of the third degree based on the amount of time served or the length of the sentence makes no sense.

The Prosecutor states with regard to all the people that progression to the third degree is premature. With regard to those who have not served one-quarter of their sentence, it claims that it is completely anomalous to progress to the third degree without having previously had leaves from prison. And regarding those who have fulfilled one-quarter of their sentence and have had leaves, namely Jordi Sànchez and Jordi Cuixart, the classification in the third degree if also premature since very little time has elapsed since the first quarter is over. Therefore, it is simultaneously claiming that the severity of the deeds and the sentence determine that their access to the third degree is too premature. This claim can be countered as follows:

- The course and usual practice is that whoever has served a prison regime from article 100.2 PR is moved to the third degree, even if they have not served one-quarter of their sentence and have consequently not had leaves from prison. In this sense, the statistics demonstrate that within August 2020, almost one-third of the people classified in the third degree had previously served a flexible prison regime from article 100.2 PR, as the nine people deprived of their freedom have.

- What is anomalous is progressing to the third degree without having had leaves or a prison regime from article 100.2 PR, yet nonetheless if the inmate fulfils the conditions they are moved to the next degree. There are resolutions from the POCs to this effect.

Prison practice abides by the rules, which does not require one-quarter of the sentence to be served and having had leaves from prison as conditions for progression to the third degree. Conversely, according to article 104 PR, in order to be classified in the third degree, the person deprived of freedom must only have a particularly favourable environment and record if they have not served one-quarter of their sentence. When this condition obtains, the person deprived of their freedom may be moved to the third degree even if they have not served one-quarter of their sentence and were initially classified in the third degree. There are judicial rulings to this effect.

Finally, with regard to the amount of time served, the provisions of paragraph 28 are applicable, as a 9-year sentence and a 13-year sentence are not the same, a fact that is ignored by the Prosecutor, as the appeal was indiscriminately filed for this motive against all the convicted people without discerning the situations in which they are serving their prison sentences.

In this sense, the situation in which Jordi Sànchez, for example, is serving his prison sentences must be highlighted; when confirming the administrative decision of the third degree, in its interlocutory decree dated 19 August 2020 POC 5 stated that since 14 January 2020 Sànchez has served one-quarter of his sentence, and it stresses that "the inmate has been imprisoned for a long time, specifically two years and nine months, which the Attorney General's Office does not seem to take into account" (fifth legal underpinning, page 8, of the interlocutory decree). And the same is said in relation to Jordi Cuixart, for whom POC 5 also confirmed the third degree via the interlocutory decree dated 19 August 2020.

vi) More theoretical reasons for revocation invoked by the Prosecutor

In addition to the three aforementioned motives, the Prosecutor is requesting revocation of the third degree by alleging arguments and motives which are not only more theoretical in nature, but invoking them is tantamount to ignoring what it means to serve a prison sentence. It seems to assert that if the nine convicted persons are not in the second degree, they are not enduring and serving a sentence which deprives them of their freedom. In this sense, for all the appeals it states that since the nine people deprived of their freedom are already reinserted, the third degree would be tantamount to impunity, and that only by actual imprisonment can the prison sentence serve an intimidatory (negative special prevention) effect. It then introduces factors such as the severity of the crime, the severity of the deeds and the protected legal interest to claim that the third degree is not applicable, as it would mean "stripping the sentence of content".

The Prosecutor's reasoning is like denying that they are deprived of their freedom; or vice-versa, it is like claiming that with the third degree the convicted persons have regained their freedom. The Prosecutor fails to consider that the third degree is a regime of semi-freedom and therefore any person deprived of their freedom who is in the third degree in a regime of semi-freedom, in whatever modality it may be but especially when it is a restricted modality or entails being in prison four days a week and staying there 8 hours, is not free.

The third degree means serving a prison sentence; it means being deprived of one's freedom to move about freely and to take decisions on what to do, where to go, etc. The third degree requires commitment, effort and constancy on the part of the person deprived of their freedom, as keeping the trust of the regime of semi-freedom depends on their conduct. The third-degree regime does not eliminate spending the night in prison and does not mean using the hours outside prison at will. To the contrary, it entails very strong individual supervision and exigencies and an utmost level of responsibility which not all inmates are capable of fulfilling.

Nor can the generic, theoretical reasoning about the purposes of the sentence serve as a motive for revocation, especially when in its guilty verdict, the Supreme Court declared for the first time that the security period that prevents access to the third degree until half the sentence has been served is an instrument that can only be used and applied from a perspective of the danger and risk of recidivism, thus ignoring the fact that access to the third degree is a question of retribution or should be associated with the purposes of the sentence from the standpoint of general or special negative prevention. Furthermore, the prison rules associate this mechanism with the purpose of reinsertion, and it should be viewed from this perspective, as the interlocutory decrees of POC 1 and POC 5 do.

In this sense, the interlocutory decree of POC 1 dated 27 October, which confirms progression to the third degree for Forcadell, recalls that "the step to a more favourable prison degree is a legal possibility of extinguishing sentences that deprive the inmate of their freedom which is ideal when certain circumstances obtain and certain objectives or purposes of the prison treatment have been fulfilled, as we cannot avoid the fact that the third degree of imprisonment is not a grace, or

an attenuated pardon, but a modality of fulfilling the sentence inasmuch as progress on observation, integration and social readaptation has been made in other initial phases".

4.2. ON THE EFFECT OF SUSPENDING THE THIRD DEGREE

Even though the progression to the third degree of the nine people deprived of their freedom has been formally confirmed by the prison oversight courts, materially this progression has been virtually non-existent in the case of Sànchez, Cuixart, Junqueras, Romeva, Rull, Turull and Forn. On 28 July, 14 days after being moved to the third degree, POC 5 agreed to suspend the application of the third degree and ordered them into Lledoners prison with the motive that the decision on progression had been challenged by the Prosecutor. On 19 August, POC 5 confirmed the progression to the third degree and declared that these seven people should be in the third degree.

However, it also agreed to maintain the decision to suspend application of the third degree because it was not conclusive "until the ruling court, that is, the Criminal Division of the Supreme Court, rules on it in the appeal phase". In contrast, in the cases of Forcadell and Bassa, the regime of semi-freedom in the progression to the third degree has been and is a reality, as on 31 July POC 1 denied the suspensive effect, and once the decision on progression to the third degree was confirmed, on 2 November it once again denied the suspensive effect of the Prosecutor's cross-appeal.

The rule that regulates the suspensive effect of the third degree, which has been interpreted and applied differently by the two POCs, is unclear and poorly written. This has given rise to unequal treatment of the nine people deprived of their freedom, such as the fact that they all have the third degree confirmed but it has been suspended for seven of them but not for two of them. Given two identical situations, two independent, autonomous POCs have adopted opposite decisions with the concomitant juridical insecurity and a situation of uncertainty caused by its dependence on the legal stakeholder deciding the case.

Beyond the objectively unequal situation, we should also consider that if it is determined that some people deprived of their freedom should be in the third degree but they do not materially enjoy this third degree, then this is merely a symbolic declaration. The reinsertion mechanisms and prison benefits should be materially applied. They cannot be left at mere formal recognition with no efficacy because of the Prosecutor's appeal.

Just as what characterises a rule of law is not that the laws recognise citizens' rights but that these rights are actually exercised and are a reality, and if not then there are guarantees to materially claim these rights, a prison system is characterised by the fact that people deprived of their freedom actually enjoy the reinsertion mechanisms and prison benefits stipulated by law.

The request to suspend application of the third degree and the POC's decision that agrees to this suspension took place at two different times. Indeed, the Prosecutor filed two appeals with regard to each of the nine people deprived of their freedom in relation to their progression to the third degree. On the one hand, the first appeal was filed by the Secretariat of Criminal Measures and Victim Care against the administrative decision on progression to the third degree. In this appeal, it requested that the third degree be suspended while the appeal was being heard. On the other hand, at a later date, it filed the cross-appeal against the interlocutory decrees of the POC that dismissed the Prosecutor's appeal and confirmed the Secretariat's decision, and it once again requested the application of the third degree until the ruling court had decided on the appeal.

In addition to having to rule in the appeals of the Prosecutor regarding whether or not the third degree is applicable (substantive issue), the Supreme Court must also rule on the Prosecutor's and defences' appeal on whether application of the third degree should be suspended while the appeals are being heard (suspensive effect), though questioning whether the Supreme Court has the authority to decide on the suspensive

effect if we adhere to a literal interpretation of the rule, which explicitly states that the Provincial Court would be able to rule on it.

What is more, the request filed by the Prosecutor directly to the Supreme Court is excessive after the decision of POC 1 was made known because it agrees to the suspension of the third degree for Bassa and Forcadell, because what would be applicable is filing a cross-appeal against the interlocutory decree of this court dated 2 November, which dismisses the suspensive effect agreed by POC 5 in relation to the first appeal, and also in relation to the cross-appeal, as it has no legal or jurisprudential underpinning, given that its interpretation is not respectful of the law and could severely harm the rights of the persons affected.

4.2.1. On the suspension of the application of the third degree because of the Prosecutor's appeal of the administrative decision

The suspensive effect of application of the third degree has been requested and applied given the contents of the 5th additional provision, section 5, of the Organic law on Judicial Power (henceforth, DA 5a, section 3), which states that "when the resolution that is the subject of the cross-appeal refers to the matter of classifying inmates or granting conditional freedom and could give rise to the inmate's excarceration, as long as the inmates were sentenced for severe crimes the appeal has a suspensive effect which prevents the inmate from being released until the appeal has been decided". Based on this premise, the following should be considered:

- The suspensive effect is solely and exclusively provided for in the case that a cross-appeal is filed against the interlocutory decree of the POC, for no other kind of appeal.

- The suspensive effect is only provided for in relation to an interlocutory decree of the POC, that is, failure to carry out a judicial decision, but it does not stipulate that the authority to execute the administrative decision may be suspended. This is literally stipulated in DA 5a.

The above premises are invoked by POC 1 in the grounded judicial resolution dated 30 July when it denies the Prosecutor's petition that requests that the application of the third degree agreed to in the administrative decision be suspended with the first appeal against the administrative decision, relying on a similar application of DA 5a and stating that if the suspensive effect of the cross-appeal is foreseen it could also similarly be agreed to with regard to other appeals.

Via the interlocutory decree dated 30 July 2020, POC 1 opined that it should limit itself to a literal application of the law, with no justification for an analogical application against the defendant that restricts rights and contravenes the principle of legality. It further stated that there are no jurisprudential precedents that have applied the suspensive effect with the first appeal filed by the Prosecutor before the POC hands down the interlocutory decree which decides whether or not this third degree is applicable.

In addition to the reasoning of the interlocutory decree, it should also be considered that DA 5a is grounded upon the Organic Law on Judicial Power, whose purpose is to regulate judicial actions and their effects, but the actions of the public administration and its effects and ability to execute administrative decisions are regulated by Law 29/1998, dated 13 July 1998, which regulates the contentious administrative jurisdiction (article 129 and forward). However, it did not request the application of this law, which would have at least allowed the defences to be able to formulate pleadings, which did not happen, and POC 5 agreed to return them to Lledoners prison without hearing the defences or giving them the opportunity to be heard on the matter of the suspensive effect.

Indeed, in contrast to the decision of POC 1, POC 5 handed down a provision which applies the suspensive effect six days after the Supreme Court handed down its interlocutory decree dated 22 July in relation to article 100-2 PR on Forcadell, which revealed some lack of confidence in the POCs (see paragraphs 11 and 12). It further addresses the suspensive effect in relation

to 100.2 PR when this suspensive effect was neither discussed, nor was it related, nor was there any reason why the Supreme Court should take a stance on it.

The Supreme Court's reference to the POCs in the interlocutory decree dated 22 July was not innocuous if we bear in mind that POC 5 is applying an unprecedented suspensive effect, unregulated by DA 5a, among other reasons by alleging that the interlocutory decree of the Supreme Court says that the ruling body should minimise the risk of arbitrary progressions and that control of the jurisdictional body that heard and ruled on the deeds which are the grounds of the sentence cannot be avoided.

In view of the Supreme Court's statements, POC 5 stated that it is clear that "any issue referring to the classification of the inmates, which is now joined by the application of article 100.2 PR, is the exclusive competence of the ruling court in regard to appeals, according to DA 5a – LOPJ, which would mean that the suspensive effects can be applied in any phase in hearing these appeals". In view of this reasoning, the interlocutory decree reveals that the decision on the suspensive effect that had not occurred previously is conditioned upon the reasoning of the Supreme Court, such that this strips the decisions of the prison oversight courts of content in favour of what the ruling court says.

Both the POC 5's decision on the suspensive effect and the Prosecutor's stance when requesting a suspensive effect which may not have been requested before for any inmate in Catalonia harms fundamental rights, first because the decision that harms seven people deprived of their freedom was taken without their defences having the ability to discuss and oppose this petition, a violation of article 24 SC.

Secondly, the decision restricting rights was adopted without a regulatory foundation which provides for this suspensive effect, applying the analogy against the citizen deprived of freedom, bearing in mind that the law only provides for the possibility of suspending the application of the third degree once the interlocutory decree that confirms this third degree has been handed down, but not before then. Furthermore, the rationales cited by POC 5 in the interlocutory decree dated 11 August, which seeks to defend the suspensive effect agreed upon on 28 July, lack rigour and interpretative grounding.

i) It says that section 5 of DA 5a has always been difficult to interpret. However, it is also true that the difficulty of interpreting and discussing how to apply the suspensive effect has always been connected to the cross-appeal and the suspension of application of the third degree after there is an interlocutory decree from the POC, not before. It should be noted that in this sense it is illustrative that to try justify that the suspensive effect is also applicable in relation to the first appeal, the interlocutory decree solely cites the conclusions of workshops held by the Prosecutor's Office in 2011, with no judicial ruling, much less any consolidated minor jurisprudence whatsoever.

ii) It says that there is a legal lacuna in the jurisdiction of prison oversight because there is no specific trial rule and therefore, "trial rules must be drawn in a similar/supplementary/analogical/complementary fashion". This reasoning is incorrect. One issue is whether there is no trial law, which is true, but another issue is whether there is a legal lacuna with regard to the suspensive effect of the application of the third degree, which is not true.

Even though there is no trial law on prison oversight matters, there is a rule which explicitly regulates when the application of the third degree is suspended for an inmate. This is DA 5a, which states that the application of the third degree may be suspended on an exceptional basis only in relation to the cross-appeal and under certain conditions, such that the interlocutory decree itself admits that DA 5a is a rule that regulates appeals. Therefore, there is no lacuna that must be filled with similar or complementary criteria, even less so when they harm the person deprived of their freedom.

iii) It says that it deems that "administrative and contentious-administrative trial rules have nothing to do with prison oversight". This reasoning does not state on what grounds it deems that administrative rules

do not operate in the POC, when their purpose is precisely to oversee the legality of the prison administration's actions, further bearing in mind that this reasoning clashes directly with judicial practice. For example, in the 12th Meeting of Prison Oversight Judges, it was agreed that in order to determine the timeframe for appealing administrative decisions before the POC, the law regulating the contentious jurisdiction should be referred to and used. Similarly, the provincial courts that rule on prison matters hand down interlocutory decrees that apply administrative rules.

Once we have analysed that the decision on the suspensive effect of the third degree with the Prosecutor's appeal against the administrative decision on progression to the third degree has no precedents, that it was conditioned by the interlocutory decree dated 22 July, and that there is no regulatory foundation nor juridical nor interpretative technique that justifies the decision, beyond the fact that it obeys a relationship of authority and seeks to preserve the Supreme Court's ruling, we must now address the decision to suspend the application of the third degree once the POCs have handed down the interlocutory decrees that confirm that the nine people deprived of their freedom should be in this degree.

4.2.2. On the suspension of the application of the third degree because of the Prosecutor's appeal against the interlocutory decrees that confirm the progression to the third degree

If a classification in the third degree, be it an initial classification or a progression, is challenged by the Prosecutor, the general rule is that the third degree continues to be executed. The exception is the suspensive effect. Suspension of the application of a third degree which has been granted by the prison administration because of the Prosecutor's appeal is considered an exceptional situation. Indeed, the fact that it is exception can be gleaned when section 5 of DA 5a states that to suspend the application of the third degree, two conditions must be met concurrently: the third degree leads to a situation which "could give rise to the inmate's excarceration" and "as long as it is a sentence for a severe crime". This exceptional nature has also been declared by the courts (e.g., interlocutory decree of the Provincial Court of Barcelona, section 21, 170/2018, dated 29 January 2018).

In the case of the nine convicted people, it is evident that the first condition, consisting in the fact that the judicial resolution "could give rise to the inmate's excarceration", is not met, in addition to the situation of excarceration which should be attributable to the decision of the judicial body, which is not met in this case either, the reason why POC 1 denied suspension of the application of the third degree which had been granted by the prison administration in its interlocutory decree dated 2 November.

This interlocutory decree is based on the premise that section 5 of DA 5a states that "the appeal has a suspensive effect" in cases in which "the resolution that is the subject of the cross-appeal refers to the matter of inmate classification or granting conditional freedom and could give rise to the inmate's excarceration". The interlocutory decree chooses a literal interpretation and application of the precept and believes that only if the second degree had been maintained for these people, and the POC had determined by the defences' appeal that the third degree was applicable, and this did not lead them to leave prison, could the third degree be suspended. However, this is not the case, as it stresses that "the resolution has not created such a situation of degree but has ratified it". It also maintains this stance in the premises of conditional freedom and even in 100. PR for other POCs.

In the case of the nine people deprived of their freedom, the third degree already existed prior to the interlocutory decree, and therefore inasmuch as the interlocutory decree of the POC did not decide this third degree and give rise to the leave of the people deprived of their freedom but was limited to confirming a situation of semi-freedom, the premise for applying the suspensive effect is not met. In fact, this section 5 of the DA, where the suspensive effect is introduced under certain conditions, was introduced by means of Organic Law

7/2003 as a reaction to the Prison Oversight Court of Bilbao's decision to grant the third degree and conditional freedom to an inmate for a very severe crime when the Treatment Board and managing centre had agreed to the second degree, and because of the interlocutory decree the inmate ended up in the third degree.

Apart from the above, and in addition to what the interlocutory decree of POC 1 states, beyond the fact that the people deprived of their freedom left prison in semi-freedom not because of the interlocutory decree of the POC, the condition of excarceration is not met either. The courts have already stated that the third degree does not automatically entail excarceration, and that the law requires this excarceration to suspend the third degree. Therefore, the courts have deemed that only in certain third-degree situations the relationship with the prison is diluted and the third degree with the application of the prison regime de article 86.4 PR or the third degree with overnight stays in a dependent unit can materially be considered excarceration, but going to and staying eight hours a day four days a week at the prison is not an excarceration.

Counter to the interlocutory decree of POC 1 dated 2 November, which rules on the suspensive effect caused by the cross-appeal, in its interlocutory decree dated 19 August, POC 5 confirmed the suspensive effect caused by the appeal, although it did not justify that all the conditions required by law to exceptionally suspend the application of a third degree are met.

Regardless of the technical motives, presided by the principle of legality, which obtain to claim that the suspensive effect was at no time applicable while the appeals are being heard, we should stress that the rules should be interpreted in line with the social reality of the premise to be applied (article 3 of the Civil Code). The application and interpretation of the law is not an arithmetic operation; instead, the premise, the social reality and the consequences must be taken into consideration, which in prison matters is even more relevant bearing in mind the legal interests and life and personal effects not only for the person deprived of their freedom but also for those around them. In this sense, it should be stressed that the section 5 of the DA should be interpreted restrictively because if the third degree is applied to a person deprived of their freedom, among other reasons because they have a job, and it is later suspended, they may lose their job, even if the ruling court later confirms the third degree.

This latter consideration is even more important if we consider that the suspensive effect of the flexible prison regime was never agreed upon, nor was it discussed while the appeals are being heard, and that even though this matter was not in the debate or the objective of the ruling, in its interlocutory decree dated 22 July 2020 the Supreme Court said, in a kind of warning, that the flexible prison regime, in this case from the Prosecutor's appeal, would also be suspended, without any motive justifying it, much less in the terms in which it did so.

Thus, with the suspensive effect both the third degree and the flexible prison regime are neutralised until the Supreme Court soon or in the future once again rules on these new mechanisms, ignoring the serious harm that this causes not only to the nine people deprived of their freedom but to all people deprived of their freedom to whom the flexible prison regime or the third degree has been applied. Furthermore, because of the appeal of the Attorney General's Office, they cannot leave to work or do any activity they need to do on the judgement of the treatment professionals, with the corresponding disruption in their jobs and family and personal lives that this entails.

5. CONCLUSIONS

The principle behind serving sentences which deprive inmates of their freedom is that the inmate is the subject of rights, a recognition contained in art. 25.2 SC. With regard to ideological freedom, discrimination for this reason is banned in articles 3 LOGP and 4 PR. Any action by the administration or any judicial decision which attacks ideological freedom or freedom of thought is a clear offence against the inmate's most fundamental rights. Indeed:

- The Catalan prison administration's application of the regime from article 100.2 PR and the progression to the third degree did and does adhere to the law. The nine convicted persons are due these mechanisms, bearing in mind that all the proposals and decisions have been confirmed by three different, independent prison oversight courts (paragraphs 21 and 22). The objections that they were applied out of favouritism have no grounds, as the application is coherent with the Catalan prison policy which promotes these mechanisms.

- Before the flexible prison regime from article 100.2 PR was applied to the nine convicted persons by the ruling on the Procés within the Catalan prison system, the Prosecutor's cross-appeal in relation to the mechanism of article 100.2 PR had never before been referred to the ruling court. This is the first time the Supreme Court states that the ruling courts hold the authority to ultimately rule on the flexible prison regime from article 100.2 PR.

- Likewise, before the application of the third degree to the nine people convicted, the suspensive effect never been applied on the motive of the Prosecutor's appeal of the administrative decision, and the first time was in relation to the seven people serving their prison sentences in Lledoners. Bearing in mind that this decision, which has no legal or jurisprudential foundation, was conditioned by the interlocutory decree of the Supreme Court dated 22 July 2020, these seven people have suffered from civil wrongdoing and an unequal situation (paragraphs 60 and 61) and their rights have been violated.

- As the ruling body, the Supreme Court has declared itself to have the authority to hear prison matters and reinsertion mechanisms at the expense of the provincial courts, which have a section specialising in prison matters, alluding to the fact that the ruling court cannot lose control over compliance and execution of the sentence. In this sense, the Supreme Court claimed that it holds the authority to hear the flexible prison regime from article 100.2 PR, and that even though it is not the subject of the appeal or the pronouncement in the interlocutory decree dated 22 July, the suspensive effect also applies in relation to article 100.2 PR.

- The Supreme Court expresses a certain mistrust in the prison oversight judges – specialised bodies with specific sensibility and training, who take a more objective perspective to assess the development of the person deprived of their freedom because they are not contaminated with the bias regarding the deeds and the presence of the judgement and imposition of the sentence, and to grant reinsertion mechanisms – in favour of the ruling courts, which runs counter to the guarantee of the prison oversight judge to ensure the interests and rights of people deprived of their freedom.

- The Supreme Court introduces circumstances not provided for by law to rule on the reinsertion mechanisms, which are counter to the principle of legality (paragraphs 24 to 28). In a similar vein, the Prosecutor focuses weighing the third degree on factors which are inherent to the guilty verdict and the ordering of the sentence, such as the severity of the deeds and the lack of merit of conducts (paragraphs 24 to 26 and 28), and it makes restrictive interpretations of article 100.2 PR which could affect the people deprived of their freedom.

- Requiring the convicted persons to be subjected to a reinsertion programme devised as an ideological reinsertion programme, with the purpose of inculcating certain ideas in them, means setting down

a requirement to access a given prison treatment in the guise of a regime, or progression to another degree in the future, which is not provided for by prison law in relation to prison treatment.

- Renouncing their own ideology should be considered a violation of ideological freedom in the sense indicated in both the Constitutional Court and the ECHR. The same holds true regarding the requirement (in the guise of a precondition to access a given prison treatment) to admit to the crime in the terms stated above. In this case, it is also worth noting that admitting to the crime (in terms of both the deeds and their legal classification) does not appear in the prison laws as a requirement or condition for applying the regime in article 100.2 PR or progression in prison classification.

- In relation to the application of article 100.2 PR in the interlocutory decree dated 22 July 2020, a more restrictive interpretation of article 100.2 PR was made than what the provincial courts had made (paragraphs 34 to 39), although following certain guidelines would not be disadvantage to propose a new article 100.2 PR or article 117 PR, where there is no discussion on authority, which there had been in relation to article 100.2 PR, albeit not in Catalonia.

- The motives cited by the Prosecutor to refer the progressions to the third degree to the Supreme Court are focused on the discourse of the people deprived of their freedom, without considering objective information like the conduct and situation of the nine people deprived of their freedom (paragraphs 48 to 51), bearing in mind that the goal of the appeal against progression to the third degree is to seek to require a specific treatment programme while overstepping the appeal, which they also believe should be group treatment and in the second degree, without a legal or jurisprudential foundation which allows them to assert this requirement as an indispensable condition for accessing the third degree (paragraphs 52 to 54), and without it individualising it based on each person's situation and compliance.

- The Prosecutor's position of describing the third degree as stripping the sentence equivalent to a situation of impunity is not a motive for revocation, as it is tantamount to failing to recognise that the third degree does mean serving a sentence, bearing in mind that it is a regime of semi-freedom and that the people classified in this degree do not have the freedom to move around, and that statements on retribution and general or special negative treatment are theoretical arguments, and that the purposes of the sentence are being met with the proper verdict and the sentence ordered, as the prison rules focus on the goal of reinsertion.

The objective situations contained in the previous conclusions based on the judicial decisions and trial actions which took place in relation to the nine convicted people go beyond the specific case and have an impact on the entire Catalan prison system, as well as on the more than 8,000 convicted people in Catalan prisons, just as the actions and decisions that the Catalan administration may once again take relation to these nine people deprived of their freedom will also have repercussions on the other inmates, bearing in mind the trial action of the Prosecutor, POC 5 of Catalonia and the fact that the Supreme Court has already set certain action guidelines for the POCs, which entail a reversion in rights and reinsertion mechanisms. In this sense, the following should be considered:

- The prominence that the Supreme Court has conferred on not losing control over the execution of the ruling and the way the prison sentence is served entails a loss of guarantee for all inmates deprived of their freedom who are serving a prison sentence, as based on the people convicted in the case of the Procés, the ultimate decision on the flexible prison regime will not be taken by the specialised section of the Provincial Court but by the ruling court, not only with a bias of contamination but also with the bias that outside Catalonia prison policy focuses much less on reinsertion mechanisms, such that the person deprived of their freedom is harmed by the decision.

- In a similar sense, the suspensive effect on the third degree and the flexible prison regime will entail a disruption and destabilisation for everyone to whom this suspensive effect is applied based on the

events and judicial actions that have transpired, bearing in mind that some POCs have already begun to abide by the Supreme Court directive and apply the suspensive effect to other people deprived of their freedom with the consequent irreparable harm, such as job loss.

Despite the above, Catalan prison policy should obviously continue in the direction of applying reinsertion mechanisms, although it would be worthwhile if the proposals of the mechanism deemed appropriate were not pooled together (same date and same proposed mechanism). Furthermore, it is common in prison practice for different people deprived of their freedom convicted in the same proceeding to be assessed by different treatment boards with different dates and proposed mechanisms, bearing in mind the principle of scientific individualisation.

Finally, bearing in mind the situation and the resolutions already handed down, as well as those that might be handed down, this may be a good occasion to revise the circulars approved by the Secretariat on matters of the flexible prison regime and article 117 PR. In terms of the flexible prison regime, the circular dates from 2005 and contains elements that have no practical application in current practice, such as the statement that whether or not the inmate has had leaves from prison will be weighed when applying the mechanism, a factor that professionals did require in 2005, but a requirement that has fallen away today, and some of the people convicted in the Procés are examples of this reality.

This would also be a good opportunity to even further promote the application of article 100.2 PR. In relation to the mechanism in article 117 PR, it would be worthwhile to revise the circular and even further promote the application of this mechanism without referring to parameters such as the length of the sentence.

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