THE GRANTING OF A PARTIAL PARDON TO THE PERSONS SENTENCED BY RULING 459/2019 OF THE SUPREME COURT

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SÍNDIC
EL DEFENSOR DE LES PERSONES

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1. INTRODUCTION

In the report on Supreme Court Ruling 459/2019 and its repercussions on the exercise of fundamental rights (January 2020), the Catalan Ombudsman made several recommendations, including the "implementation of the legal instruments allowed under the constitutional framework to obtain the release of persons convicted by Supreme Court Ruling 459/2019 (amnesty or pardon law), regardless of the necessary reform of the Penal Code".

As is well known, by means of nine royal decrees issued on 22 June 2021 (from 456/2021 to 464/2021), the Spanish government has granted partial pardons to the nine people sentenced to between nine and 13 years in prison by Supreme Court Ruling 459/2021 (TS).[1] These pardons have had the immediate effect of releasing them all, though they have been granted under certain conditions and have not lifted the penalty of absolute disqualification from holding any public office.

This report has been prepared from a study commissioned to Professor Esther Giménez-Salinas. Its main purpose is to analyse how the pardon is applied to the people benefiting from it now in the Spanish legal system from the perspective of fundamental rights. Reference will also be made to the alternatives proposed in the January 2020 report, together with some issues that remain pending in the context of the central government's political conflict with Catalonia.

[1] Royal Decree 456/2021, of 22 June, pardoning Dolors Bassa i Coll.
Royal Decree 457/2021, of 22 June, pardoning Jordi Cuixart i Navarro.
Royal Decree 458/2021, of 22 June, pardoning Carme Forcadell i Lluís.
Royal Decree 459/2021, of 22 June, pardoning Joaquim Forn i Chiarello.
Royal Decree 460/2021, of 22 June, pardoning Oriol Junqueras i Vies
Royal Decree 461/2021, of 22 June, pardoning Raül Romeva i Rueda.
Royal Decree 462/2021, of 22 June, pardoning Josep Rull i Andreu
Royal Decree 463/2021, of 22 June, pardoning Jordi Sánchez i Picanyol.
Royal Decree 464/2021, of 22 June, pardoning Jordi Turull i Negre.

1. GENERAL CONSIDERATIONS ON THE PARDON IN THE SPANISH LEGAL SYSTEM

1.1. BASIC LEGAL FRAMEWORK: PARDON AS A PREROGATIVE OF THE GOVERNMENT

The basic regulations relating to the pardon are contained in the Spanish Constitution and in the Law of 18 June 1870, which establishes the rules for exercising the pardon.

The Constitution (Article 62.i) states that "it is for the king to exercise the right of pardon in accordance with the law, which may not authorise general pardons". On the other hand, Article 102 of the same text sets out a single case in which the right of pardon is not appropriate: the criminal liability of the president and the other members of the government.

The Law of 18 June 1870 has been reformed on several occasions, including by Law 1/1988, of 14 January, to adapt it to the constitutional text. Despite the longevity of the Pardon Act, the statement of reasons should highlight three aspects that remain relevant today. First is the finding that the pardon must always be granted with full knowledge of the facts and circumstances, as well as the consequences that may occur in terms of justice, equity or social utility. Second, the pardoned person regains the rights of which the sentence had deprived him. Finally, once the pardon is granted, it must have the full validity of an enforceable sentence. The most basic principles of justice proclaim the same, which is precisely why these pardons are irrevocable, in accordance with the conditions under which they have been granted.

According to the current legal system, the responsibility for granting pardons falls on the government, an exclusive power that is outsourced by a royal decree agreed in the Council of Ministers, signed by the king and ratified by the Minister of Justice. It is an essentially discretionary act. However, since it is a discretionary act to determine whether a certain person is pardoned or not, like any discretionary act it contains several regulated constituent parts scattered across different legal rules. Most important in this regard, as noted, is the Provisional Act of 18 June 1870, as amended by Act 1/1988, of 14 January.

The discretion of the pardon and the exclusive competence of the central government in granting pardons are characteristics of this mechanism. According to the repeated doctrine of the Supreme Court, reflected in the last ruling on 5 February 2020, "the pardonable decision that the pardon entails, which is contrary to the effectiveness of the sentence imposed by the courts, is not subject to a strict legal mandate and is fully available to the government". This means that the decision to pardon "cannot be questioned in court as to the essential decision of said right; that is to say, on the origin or not to grant the right or even the scope with which the government grants it".

As a discretionary prerogative of the Spanish government, only the formal and regulated procedural elements can be judicially controlled in the pardon, as well as the justification for the decision, in the sense of not incurring arbitrariness. As such, appeals against the pardons granted in this case should be dismissed in full with respect to any argument made outside these issues.

1.2. TYPES OF PARDONS

Theoretically, the pardon can be general or particular, but it has already been seen that the Constitution prohibits the former. Therefore, in our legal system only the private pardon is possible, meaning one granted to one individual. Another issue is whether the ban on general pardons also includes a ban on amnesty. As will be pointed out later, the Catalan Ombudsman does not agree with the ban on general pardons and amnesties.

A private pardon may be total or partial. According to Article 4 of the Pardon Act, "a total pardon involves the suspension of all sentences to which the offender has been sentenced and has not yet served". In the case of a total pardon, a favourable report from the sentencing court citing reasons of justice, equity or public utility is required (Article 11).

A partial pardon, in turn, means "the suspension of one or some of the sentences imposed, or part of all sentences that the offender has been handed down but not yet served. The commutation of the sentences or penalties imposed on the offender into less serious ones is also considered a partial pardon". As is well known, the pardons referred to in this report have been partial in nature.

Furthermore, the pardon may be granted without more conditions than the tacit ones that all pardons generally entail, as established in Article 15 of the Pardon Act (pure or unconditional pardon). On the contrary, in addition to these tacit conditions, the royal decree granting the pardon may impose "any others on the beneficiary advisable for reasons of justice, equity or public utility", in accordance with Article 16 of the same act.

According to a study relating to the period 2000-2008, most pardons granted, whether total or partial, are conditional.[2] The most common conditions are the establishment of a period during which the pardoned person cannot re-commit intentional crimes and is required to submit to and not abandon a treatment programme for the consumption of toxic drugs, narcotics or alcoholic beverages until complete rehabilitation, meeting the civil responsibilities set in the sentence within the period determined by the sentencing court. The study explains that cases in which a condition is not imposed are not statistically representative and are reduced to particular and exceptional assumptions.

Thus, most pardons are conditional and dependent either on general or specific conditions. The condition imposed the most often is clearly the establishment of a period during which the recipient of the pardon cannot commit intentional crimes. The average duration of this conditional period is 3.9 years.

1.3. THE PARDON: CONTROVERSIAL AND WIDELY USED

Over time, the pardon has had its share of controversy. Arguments against the pardon include the risk of arbitrariness and the fact that it does not respect the principle of equality, as not all convicted persons apply for a pardon, nor are they given a pardon in the same way. There are also major problems with the courts.

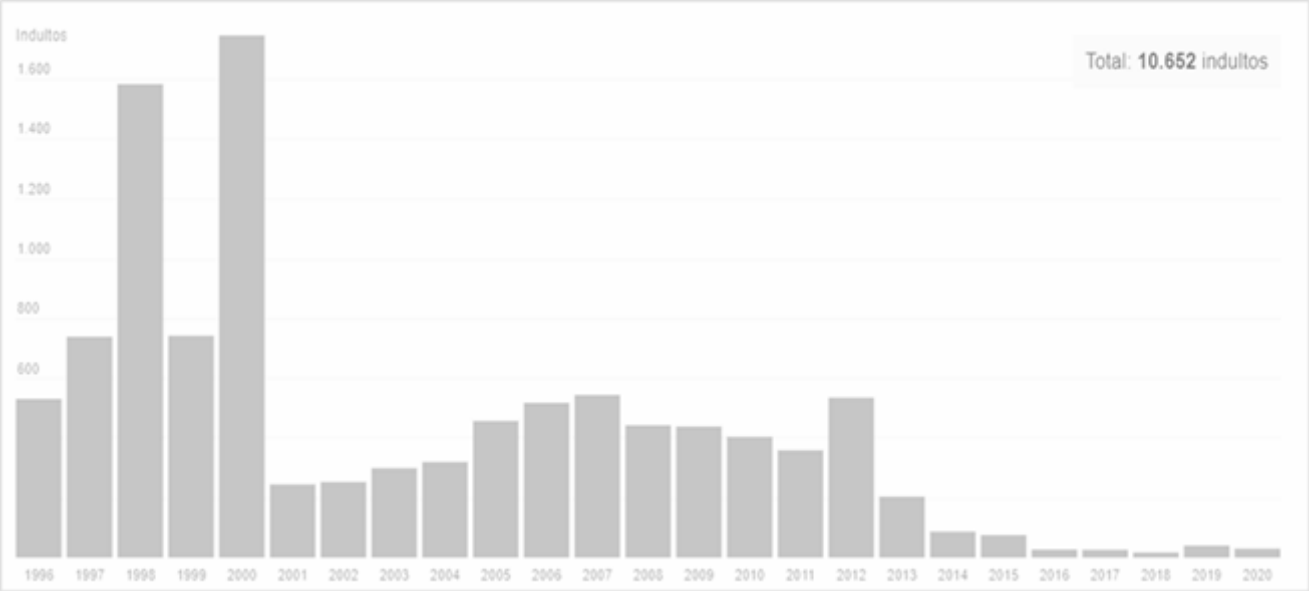
In favour of the pardon, however, people advocate a concept of justice also understood as equity, which aims to correct the error that may mean accepting the absolute nature of the law, the possibility of moderating or reducing the application of an excessively rigorous criminal law.

Likewise, once some time has elapsed between the crime and the conviction, it is suggested that in some cases there is no longer a need for punishment. This occurs in cases where serving the sentence would no longer be necessary, from the points of view of both general prevention and special prevention. Especially important would be the latter argument: if the person is resocialised, punishment is no longer necessary and pardon would be appropriate.

Finally, the penal response to a crime takes place in the sentence, which in Spain mainly still means imprisonment. These sentences are still excessively long and severe. If disproportionate sentences are found in certain crimes, the pardon can be used to correct this disproportion.

Beyond these arguments, the pardon has been widely used by governments of all stripes. From 1996 to 2019, 10,652 pardons were granted. (Civio: https://civio.es/el-indultometro/buscador-de-indultos/).

[2] Doval Pais, A.; Blanco Cordero. I.; Fernández-Pacheco Estrada, C.; Viana Ballester, C.; Carlos Sandoval, J. (2011): "Las concesiones de indultos en España (2000-2008). A: *Revista Española de Investigación Criminológica*: REIC, ISSN-e 1696-9219, N. 9, 2011.



The list of royal decrees of pardons published in the Official State Gazette (BOE) features those granted to persons convicted of crimes against public health above the rest of the pardons. In total, 3,044 of the 10,652 pardons since 1996 have been for these crimes. For many courts, a pardon in these cases can be a kind of "remedy" against sentences that are considered excessively severe. Certainly, these crimes are often repeated by the most vulnerable people in a chain in which those truly responsible will hardly be convicted. They are closely followed by crimes of theft (2,080 pardons on the dates covered by analysing the statistics). These data must be analysed since they are also the crimes with the highest number of convictions.

However, pardons granted for crimes of corruption have been particularly controversial. The Aznar government granted 139 and Zapatero, 62. Rajoy gave out 16. Most of these pardons absolved those convicted of crimes of prevarication and embezzlement.

If we analyse the proportion of pardons granted with respect to the sentences imposed, there are mostly crimes against the environment, crimes committed by officials against individual liberty, prevarication by public officials and embezzlement. In fact, three of these four crimes have to do with the exercise of public office or the theft of money from the public coffers.

The aforementioned study also shows the data in relation to gender. Although in absolute figures men represent a much higher percentage of pardons, if we consider the number of people sentenced during this period, the hypothesis that proportionally women are pardoned more often than men holds true, as 0.37% of the crimes committed by men are pardoned compared to 0.72% of the crimes committed by women.

In short, despite the risk of abuse, the pardon cannot be generally dismissed due to its undoubted potential as a corrective measure for laws and judgments that may be legitimate, but materially unjust.

2. PARDONS FOR PEOPLE SENTENCED BY SUPREME COURT RULING 459/2019

This section refers first to two pronouncements prior to the granting of pardons that are grounded in completely opposite political ideas. It then analyses the known motivations for granting pardons. It does not examine the details of processing these files, from their request by various persons and organisations a year earlier to the decision of the Council of Ministers in June 2021.

2.1. TWO PREVIOUS PRONOUNCEMENTS

a) Pardon report from the Criminal Chamber of the Supreme Court issued in the file processed for the execution of special case no. 3/2090/2017

The opinion of the sentencing court, which in this case is the Second Chamber of the Supreme Court, is mandatory, but not binding, when processing pardon proposals.

The Criminal Chamber of the Supreme Court rejected any form of pardon, total or partial, for those convicted in Ruling 459/2019, of 14 October, issued in special case no. 20907/2017.

Following the rejection of the proposed third-degree classification and Article 100.2 of the Penitentiary Regulations by the Supreme Court (which was already analysed in the report of the Catalan Ombudsman of November 2020, "The allocation of rights in the penitentiary execution of Supreme Court Judgment 459/2019"), there was little hope that the pardon report could be favourable. It is worth remembering once again that the third degree is a form of compliance provided for in General Penitentiary Law; it is not a benefit, a shortening of the sentence or a gift, but a more humane, inclusive, dignified and, above all, appropriate measure for the penitentiary development of the convict.

At the outset, the Supreme Court report criticises "the blurring of pardon requests" because it considers that no reasons of equity, justice or public utility are alleged in most cases. Above all, it thinks that "it represents a collective and mutually supportive criminal responsibility shared by a plural active subject responding to the name of the *prisoners of the process*".

Once again, the Supreme Court criticises the Catalan Penitentiary Administration, claiming that it does not pay enough attention to the personal and individual development of each prisoner, which "significantly hinders the fulfilment of the purposes of the sentence". It also holds it responsible for encouraging the fiction of a "collective subject that would be entitled to a change of penal category and to the right to a pardon".

In the same vein, and in a direct reproach to the convicts, the Supreme Court notes that, ultimately, they have not been able to prove that the sentences imposed "have fulfilled the general and special preventive purpose". The reason is obvious: the Court wants to hear them say that they regret it, despite knowing that, according to the law, repentance is not a necessary condition for granting a pardon. And so the Court finds that "there is not the slightest evidence or the weakest indication of repentance", accompanied by the following argument, delivered extraordinarily harshly: "The message conveyed by the convicts in their exercise of the right to give the last word and in their subsequent public statements is very expressive of their desire to re-engage in the attack on the pillars of democratic coexistence, even assuming that the struggle for their political ideals, whose constitutional legitimacy is unquestionable, would authorise popular mobilisation to speak out against observing the law, the substitution of the prefecture of the state and the unilateral displacement of the source of sovereignty".

The lack of repentance of people benefiting from these pardons has sparked a major political and social debate in which it has been forgotten that while repentance is a criterion that the sentencing court must assess, it is not a condition for granting a pardon. Moreover, in events of an essentially political nature such as those surrounding 1 October, great care must be taken that any demand for "repentance" does not become an attack on the ideological freedom and freedom of thought of convicted persons.

Another important point for requesting a pardon was the proportionality of the sentences, which are generally harsh and disproportionate. However, the Court considers them appropriate, basically for two reasons: because of the seriousness of the crime of sedition, which it describes as an "attack on public peace" and because when compared to other countries, it finds that the penal types and sentences are similar.

This comparison is surprising. Regardless of the *nomen iuris*, the descriptions of crimes in the countries mentioned are much more like the crime of rebellion in Article 472 of the Spanish Penal Code than the crime of sedition. There is an important point here that the Court obviously does not mention, which is the absence of violence in the events described that made it impossible to charge these people with the crime of rebellion. No less important is the difficulty in interpreting the type of sedition, given its indeterminacy and questionability. Yet where the Catalan Ombudsman believes that there can be no doubt is in the principle of proportionality: it is worrying that sentences lasting more than a decade in prison are treated lightly.

Finally, in the last paragraph of the report, the Criminal Chamber of the Supreme Court suggests that the alleged resocialisation does not involve sharing or identifying with hegemonic social values, but still rejects the pardon because it believes that the special prevention goals have failed.

b) Resolution of the Parliamentary Assembly of the Council of Europe 2381(2021)

Of particular importance is the resolution of the Parliamentary Assembly dated 22 June entitled "Should politicians be prosecuted for statements issued in the exercise of their office?"

Although it is practically contemporary with the time that the pardons were granted, the management of the resolution in the months prior to its adoption may have had a decisive influence on the Council of Ministers' decision and the time chosen for granting them.

This report was approved on 21 June 2021 with 70 votes in favour, 28 against and 12 abstaining. It was written by Boriss Cilevics, who spent more than a year on it, including a visit to Spain with the support of the Spanish public authorities, in which he interviewed a wide range of individuals involved in both the legal and political spheres.

Certainly, the Council of Europe report is not binding, but it does have moral and political authority, and in fact many of these reports from the Parliamentary Assembly have since been cited in ECHR rulings.

The report is a serious warning for Spain, which is obviously not comfortable being in the same report as Turkey. But it is important to emphasise that the resolution is not a critique of the Spanish judicial system as a whole, but of the judicial activity related to the events that took place in Catalonia in September and October 2017. In particular, this refers to the referendum in Catalonia, which it describes as unconstitutional, organised by the disconnection laws approved by the Parliament of Catalonia in September 2017 and also declared unconstitutional by the Constitutional Court. The report also stresses that Spain is a solid democracy.

However, the report highlights that the crime of organising an illegal referendum was repealed in Spain in 2005 and that, in this case, the organisers of the illegal referendum on 1 October were convicted of the crime of sedition. It also states that this crime is punishable by up to 15 years in prison and also requires, in Cilevics' opinion, an element of force (rising up publicly and tumultuously). The report notes that it is indisputable that none of the politicians called for violence, quite the contrary. Even the prosecution acknowledges that they asked the protesters to refrain from committing acts of violence.

It also stresses the need to update and restrict the concept of *sedition*, which actually better corresponds to a past of military pronouncements, so there are serious doubts about its application to organisers of peaceful demonstrations.

Thus, the Prosecutor's Office introduced a new definition of "violence without violence", according to which many protesters exercised psychological coercion on the police officers who confronted them. In doing so, they managed to reinterpret the concept of the *tumultuous uprising* required for the crime of sedition.

The Assembly's report also shows that three leaders and lower-ranking Catalan officials have been targeted in lawsuits, implicated in the events of October 2017, and stresses that the Spanish authorities continue to pursue the extradition of Catalan politicians residing in other European countries, despite being blocked several times by courts in Germany, Belgium and the United Kingdom. Finally, on a positive note, it mentions various processes involving senior Catalan police officers and members of the electoral commission that were recently absolved.

In view of this, the Assembly urges Spain to:

■ Reform the crimes of rebellion and sedition to preclude the interpretation that the organisation of an illegal referendum, which was decriminalised in 2005, has become criminalised again or that non-violent criminal offences can be disproportionately punished.

■ Pardon or release in any other way the Catalan politicians sentenced for their role in the organisation of the unconstitutional referendum of October 2017 and the large-scale peaceful demonstrations that accompanied it, in addition to considering the possibility of nullifying the extradition proceedings brought against Catalan politicians abroad, who are being pursued for the same reasons.

■ Drop the remaining lawsuits against lower-ranking officials who were also involved in the 2017 unconstitutional referendum and refrain from punishing those who have succeeded the imprisoned political leaders, whose actions simply express their solidarity with the detainees.

■ Not demand that Catalan politicians serving sentences renounce their deep political convictions in exchange for a more favourable prison regime or the possibility of receiving a pardon. However, they may be required to commit to pursuing their political goals without resorting to illegal means.

■ Establish an open and constructive dialogue with all political forces in Catalonia, including those opposed to independence, in order to strengthen the quality of Spanish democracy. This must be done through the rule of law, good governance and full respect for human rights, without the need to resort to criminal law, but with full respect for the constitutional order of Spain that, in turn, helps to consolidate a strong European democracy.

■ Apply these recommendations in accordance with the principles of the rule of law defined by the Council of Europe and particularly with respect for the principle of equality of all citizens before the law.

Given its importance, the Catalan Ombudsman has asked the Parliament of Catalonia to monitor this resolution, using the format of a study commission or working group (whichever is considered most convenient).

Likewise, the Catalan Ombudsman considers that dialogue based on the democratic principles of the rule of law is essential to resolving the political crisis between the central government and Catalonia, particularly given that the Constitutional Court's ruling annulling some articles of the 2006 Statute and reinterpreting a third is a delegitimised norm that neither satisfies the desires of much of Catalan society, nor is fully respected by state authorities in matters such as the transfer of competence or the improvement of funding.

2.2. THE ROYAL DECREES GRANTING PARDONS AND THEIR MOTIVATION

Nine royal decrees were issued on 22 June pardoning people convicted of sedition in all cases. Some were also pardoned for a joinder of sedition and embezzlement, in Ruling 459/2019 of the Second Chamber of the Supreme Court.

The texts are very similar. The name of the pardoned prisoner is certainly changed and

the crime and the years of the sentence are specified, which are also different. The reasoning is the same for everyone and it is only established that "given the circumstances of the convict and, in particular, the reasons of public utility set out in the proposal of the Minister of Justice, according to the information contained in the aforementioned file, these reasons of public utility are found to concur [...]".

The prison sentence is pardoned, but not absolute disqualification, provided that they do not commit any serious crime again for a certain period of time. Consequently, these are partial pardons, on the one hand, and conditional ones, on the other.

Pardons have been granted on the condition that their beneficiaries do not commit a serious crime (punishable by a sentence of more than five years). This conditionality means that, if a new crime is committed, the pardon is declared null and void. The period during which no serious crime can be committed is different (between three and six years) for the pardoned people: for Dolors Bassa, a period of three years is expected; for Raül Romeva and Carme Forcadell, four; for Jordi Sánchez and Jordi Cuixart, five; and for Oriol Junqueras, Jordi Turull, Josep Rull and Joaquim Forn, the period may last up to six years. To determine this period, not only the sentence has been taken into account, but also each individual's personal circumstances, which are explained in a motivated and individualised proposal by the Minister of Justice.

The Ministry of Justice's motivated proposals are individualised files of approximately 30 pages containing a brief summary of each person's life story and analysing and motivating the most important aspects for granting pardons. It deals extensively with the concept of public utility, personal circumstances and behaviour in prison and in each person's release permits, as well as their political and social leadership role. These files have not been officially made public, but some have been partially disclosed, which allows for an assessment.

The reports state the negative opinions of the Prosecutor's Office and the Supreme Court. The opposition of the sentencing court, as noted, makes the pardon only partial.

It also includes reports on the inmate's conduct, issued by the multidisciplinary treatment team of the corresponding prison. These reports provide a favourable prognosis for social reintegration and a set of assessments related to the behaviour of each pardoned person in prison, while especially highlighting their positive and participatory attitude in the long time spent in prison.

The nine reports detail the particularities of each case and the developments in serving the sentence. Thus, for example, they highlight their relationship with other inmates and their participation in the different activities of prison. They also feature their commitment to activities they performed and promoted through culture, sport, art or music, based on their own knowledge, training and values. They also cover the pardoned individuals' rejection of violence, advocacy of negotiation for conflict resolution, appropriate adherence to the rules of the prison, low future chance of recidivism (RisCanvi scale), positive assessment of release permits and participation in volunteering.

For a convict to receive a pardon, reasons of justice, equity or public utility must concur in their favour. As noted by the Plenary of the Third Chamber of the Supreme Court in the ruling of 20 November 2013, these reasons "[...] may spring from very different causes that can range from those of a penal or social nature to those of a personal or family-related nature".

The Ministry of Justice's motivated proposals focus on the "public utility" of the pardon, with the following arguments. A pardon granted on the grounds of public utility is a political decision in the public interest that may or may not be in accordance with the circumstances of the subject, the offence committed or the sentence imposed. In this sense, a clear difference is marked between reasons of justice or equity, which do focus on the personal situation of the convicts.

Certainly, the concept of *public utility* is open, indeterminate and of an essentially

political nature. This makes its interpretation very varied and, in any case, responsive to the specific needs of the moment. Therefore, in this case it is up to the executive branch to assess any political expediency and decide, given the circumstances, which options will be the most appropriate and best serve the interests of Spain.

In the specific case, it is therefore an express renunciation of the exercise of *ius puniendi*, based on reasons of public utility. The government must give special consideration to reasons of public utility linked to the exceptional situation that Catalonia has experienced in recent years. The answer cannot be delayed any longer and must help to restore social peace after the deep social and political crisis.

In this sense, the solutions have been delayed for too long, which conditions and erodes social peace and the guarantee of democratic coexistence in Catalonia and, by extension, throughout Spain. Therefore, the government believes that it has a duty to contribute to the normalisation of politics in Catalonia and understands that pardons are a decisive step in this direction.

From here, the motivated exposition develops two arguments of public utility:

a) Democratic coexistence. The reports find that Spanish democracy did respond from within the law to those who stood outside it, as was the case of the nine people offered pardons. The proposal describes it as an exemplary response, stressing both the Supreme Court and the Public Prosecutor's Office, then states that "those who acted against the Constitution had to assume their responsibilities in accordance with what is determined by law. Not only did they not achieve their purpose, but they also had to pay a high criminal price".

It is argued that Spanish democracy cannot forget that these people remain in prison and it is understood that they must regain their freedom, because they have not been forgotten by hundreds of thousands of Catalans who consistently vote for political programmes key to the events of September and October 2017. Thus it is thought that in some way the public debate has been seriously affected both in Catalonia and in Spain, and that all this also has a considerable impact on institutional activity.

From this point on, it tries to save the Supreme Court's ruling on the legally reprehensible nature of the facts before it and reflects on the need to provide additional analysis that could resolve the undesirable situation facing the country.

And in one way or another, each person's political weight stands out, such as the influence they have as political and social leaders. And so within this context, "it is assessed that keeping the social leaders and leaders of the main pro-independence groups in prison does not help to reduce the existing tension". It adds that "imprisonment has an important symbolic value for the independence movement and for those who are not pro-independence, yet still consider the situation unfair".

In fact, many of these arguments fall more in line with granting an amnesty than a pardon. This is especially the case when comparing the value of administering justice to a negative situation that society can come to perceive as unjust when seeing the main leaders imprisoned.

b) The dialogue and the current moment. Assessments were made regarding the extent to which each pardoned person's release helps to normalise the social and political life of Catalonia and the democratic dialogue. And so in a review of the different scenarios and the advantages and disadvantages or even risks of this proposal, it seems that the balance is clearly inclined to relaxation, dialogue and the search for peaceful and orderly coexistence.

And yet these arguments, insofar as the reasons are not related to justice or equity, but public utility, are much more similar to those that would be used in an amnesty. As such, the search for peace, social balance and the possibility of harmony appear as determinants.

It is claimed that the pardoned people were not convicted for their ideas, as the pro-independence option has a place and legitimacy within political pluralism, but

for acting against the legal system. And yet, it is reflected that perhaps it is time to assess whether, maybe by partially suspending the sentences, it could be possible to return to the starting point. Applying criteria of restorative justice is an attempt to repair the harm caused. In this case, however, the protagonists are reversed, meaning that it seems that it is the government that seeks through pardons to return to the starting point and place the defence of these ideas in the place from where it never should have left.

Another interesting approach is many leaders' justification of their commitment to dialogue. We must remember once again that this commitment to dialogue has always been present and that the absence of violence is a value that should have been taken into account much more.

2.3. CONSIDERATIONS OF SOCIAL LEGITIMACY AND SUBSISTENCE OF THE PENALTY OF DISQUALIFICATION

Though these pardons have been surrounded by a bitter political controversy, not only is their compliance with the law unquestionable, but they have also enjoyed important political and social support in Catalonia and Spain. It should be noted that in the Plenary of Congress on 15 June, a Popular Party (PP) proposal that urged the government not to grant these pardons was rejected with more than an absolute majority of votes (190). A few days later, the business sector showed its determined and clear support, represented in this case in the conferences organised by the Cercle d'Economia in Barcelona, as well as in trade union organisations such as UGT and CCOO and even the Tarragona Episcopal Conference and the Spanish Episcopal Conference, which traditionally have not taken positions on such issues.

However, it is not congruent to completely uphold the absolute disqualification penalty, definitively barring them from all public employment and office, including elected office, and disqualifying them from obtaining any other public honours, offices or jobs, including election to a public office during the time of their imprisonment for crimes committed in 2017.

To omit the penalty of absolute disqualification for public office from the pardon for these people, who are essentially devoted to politics, makes their professional career difficult and can be equivalent to their "political death", which is unfair and disproportionate. In addition, it is inconsistent with the praise of their individual "public utility" in the context of a new stage of dialogue with the state. Since these people are important to the "political debate", since pardons are adopted as a measure of "political normalisation" and since, as was also argued for granting the pardons, "these people have received votes from hundreds of thousands of Catalans", it makes no sense to exclude them from political life for a long time and prevent these hundreds of thousands of Catalans from voting for them.

3. PENDING DISCUSSIONS

3.1. EARLY PARDON

The pardon of the nine people convicted by Ruling 459/2019 leaves aside the other people accused of the crime of rebellion or sedition who are located in third countries. It has been considered whether an early pardon would be possible for these people, given that their conviction is foreseeable if they end up being tried in Spain and the public utility arguments applied to the nine people now pardoned would be equally applicable to them.

Certainly, a pardon is generally provided for those convicted by a final judgment and excludes those who are "in rebellion". However, the Law of 1870 provides for an exception: "Prisoners of the crimes of sedition and rebellion may, however, be pardoned, even if they are in these circumstances. The nature of crimes of this kind, the character and conditions of the society of our time and even high considerations of government demonstrate the need for this exception".

Although some argue that this reflection on the statement of the reasons of the law is anchored in remote times, the social upheaval brought about by the events of October 2017 would advocate for its full validity. In fact, Minister of Justice Campo himself acknowledged at the time that there was a legal provision to grant a pardon in this case in advance, although he also made it clear that the government did not plan to make use of the possibility. This was a political decision, not a legal one, which the Catalan Ombudsman believes should be reconsidered for the same reasons set out in the statement of reasons to the Pardon Act and the motivated proposals that have led to the pardons that are the subject of this report. These are people who have received votes from thousands of Catalans, who would be an asset in a context of dialogue and whose early pardon would assist the political normalisation pursued by the nine pardons granted.

3.2. VIRTUALITY OF AN AMNESTY LAW

The Constitution does not provide for amnesty, so it does not prohibit it. It does expressly prohibit general pardons, but an amnesty is not a general pardon either in form (a law of Parliament versus a royal decree of the executive branch) or in function (the pardon forgives, whereas amnesty makes a *tabula rasa*). Amnesty can exonerate all kinds of crime and punishment, but it is usually applied to so-called political crimes and is often used after changes in the political system, periods of transition or revolutions in an attempt to promote social peace. However, there is a clear precedent for an amnesty law passed without a change of regime: the one enacted in 1936 during the conviction of rebellion of members of the Catalan government (Generalitat) following the events of 6 October 1934. Enacted by a democratic government, this legislation aimed to turn the page on the political conflict with Catalan institutions at the time.

In any case, while the constituent bans general pardons, one cannot think it would forget to ban amnesty. Therefore, the Catalan Ombudsman is of the opinion that the Cortes Generales could pass a fully constitutional amnesty law. In this sense, it is surprising that the General Committee of Congress stands as a kind of constitutional pseudo-court and does not even prevent debate on a possible amnesty law. A separate issue is whether in the current political situation there might be the votes of a qualified majority to pass it or that a possible appeal to the Constitutional Court, in its current composition, would be viable. On the other hand, amnesty is the preferred option for a significant part of the Catalan population and has a wide international impact. Moreover, in December 2020, the Parliament of Catalonia passed a resolution in favour of amnesty for defendants charged since 2013.

Government intervention is not essential here, as it should be the parliamentary groups that decide whether it is appropriate

to activate the legislative initiative to propose amnesty and, after the corresponding parliamentary debate, to pass an amnesty bill or not.

As indicated in the January 2020 report, this could open a new political stage based on dialogue under the rule of law, as the Catalan Ombudsman has long advocated. In addition, it should have a wide scope, not only for those now convicted, but also for those who are outside the country and those who are awaiting further trials. It would also include national police and Guardia Civil officers (and perhaps senior state officials) being investigated in various courts. In this sense, the current amnesty bill is short and asymmetrical. It could even be extended to the entire period of conflict, which could be considered to begin with the ruling of the Constitutional Court regarding the Statute of Catalonia (2010) and thereby include people convicted for the events of 9 November 2014.

3.3. THE REFORM OF THE PENAL CODE

Following the pardons, reforming the Penal Code seems necessary once again. First, the crimes of sedition and rebellion should be modified and adapted to the current legal and social context: the crime of sedition as such should disappear and the crime of rebellion should be reformulated while always maintaining the need for violence to meet the definition of this crime. All crimes affecting the exercise of fundamental rights and civil liberties should also be reviewed and decriminalised. Indeed, criminal reproach should be preserved only for the most serious offences.

Furthermore, the suppression of the crime of sedition or its reformulation to make it more restricted would make it possible to find a suitable solution for the politicians who are currently outside Spain, such as Puigdemont, Comín and Ponsatí.

From this point of view, the Spanish government's recent announcement that it will not undertake reform of the Penal Code is disappointing, as well as being contrary to the recommendations of the Parliamentary Assembly of the Council of Europe.

In addition, not only must these crimes and their sentences be reviewed, but the concept of *restorative justice* must be considered for insertion into 21st century criminal law. Restorative justice tries whenever possible to repair harm, either directly or symbolically, and replace the exclusive conception of punishment. It restricts custodial sentences only for serious cases and introduces other forms of social control more in line with the times.

In this vein, it should be remembered that in line with the European Commissioner for Human Rights and in accordance with the political commitment of most political forces in the Congress of Deputies, the Catalan Ombudsman has repeatedly demanded the repeal or in-depth reform of the Organic Law on Citizen Security (or "gag law").

3.4. THE INTERVENTION OF THE COURT OF AUDITORS

The granting of the pardon has coincided with the bail imposed on 34 former senior officials of the government of Catalonia (Generalitat) amounting to 5.4 million euros for alleged undue expenses in promoting the separatist process abroad.

Certainly, the fines of the Court of Auditors are not prison sentences, but the impoverishment they imply, prior even to a sentence, and despite the fact that many of the people now prosecuted have already been tried at the highest level of jurisdiction for embezzlement (or are subject to criminal trials in which this crime does not even appear), has the same devastating effects on the public utility that the pardons are claimed to defend.

For this reason, and in line with the recommendations of the Parliamentary Assembly of the Council of Europe, the Catalan Ombudsman is of the opinion that the Court of Auditors should drop these lawsuits.

4. CONCLUSIONS

1. As the Ombudsman has pointed out in previous reports, the initial serious charge of rebellion, the long pre-trial detention for nine people (seven men and two women) and a final sentence for sedition with absolutely disproportionate sentences led the convicts to a long and painful period serving the custodial sentence. The penalties are unnecessarily severe and the criminal court could have responded differently and with less sacrifice of fundamental rights.

2. The pardon is included in Article 62 of the Spanish Constitution, with the express prohibition of general pardons. Although the Pardon Act is dated 18 June 1870, it has been amended in a democracy and, on its basis, thousands of pardons have been granted under a democratic government. The constitutionality and applicability of the pardon to people sentenced to prison in Supreme Court Ruling 459/2019 is not in question.

3. The granting of a pardon is the exclusive competence of the central government, which acts as a political body. Therefore, the granting or denial of pardon is not an administrative act by nature and is an essentially discretionary act. This means that the pardon cannot be appealed beyond regulated formal issues and the prohibition of arbitrariness.

4. The pardon is an act of grace and reasons of justice, equity or public utility must concur in favour of the convicted person. The agreement by which it is granted must explain these reasons, as has been done for the pardons of the nine political and social leaders convicted in Ruling 459/2019.

5. The Supreme Court reported negatively on the pardon, whether partial or total. Its report repeats some of the arguments it already used for the third-degree denial, especially the lack of remorse, the (little) time that had elapsed since the sentence was given and the consideration that the penalties were not disproportionate. The underlying argument in both the Public Prosecutor's and the Supreme Court's report is the requirement of repentance, forgetting that this is not a condition for granting a pardon.

6. One day before the pardons were granted, the Parliamentary Assembly of the Council of Europe issued a report with a serious warning for Spain. It was not a critique of the judicial system of the country as a whole, but of the court's legislation from the bench and intervention in the events that took place in Catalonia in September and October 2017.

In its conclusions, the resolution stresses the need to reform the crimes of rebellion and sedition; to pardon or release Catalan politicians convicted for the events of October 2017; to drop open criminal cases and to establish an open dialogue based on the principles underpinning democratic government and rule of law. The Catalan Ombudsman fully shares these recommendations and has recommended that Parliament monitor their implementation.

7. The pardon granted is partial and conditional. The penalty of a prison sentence is pardoned, but not that of absolute disqualification. Moreover, this all depends on them not committing a serious crime again in a period ranging from three to six years, depending on each person.

8. The omission of the disqualification in the pardon upholds an unjust and disproportionate punishment for people dedicated to public life, besides being incongruous with the public utility cited in the pardon of the nine convicted people.

9. An early pardon for persons currently charged with crimes of rebellion or sedition would be possible under the Pardon Act and would have the same contribution to public utility as has been argued for the pardons of persons convicted in Ruling 459/2019.

10. These people have spent almost four years in prison serving part of the sentence. Beyond the severity of the punishment for all, it has been even harder for the women, as prisons are basically intended for men, who are a majority of those serving prison sentences. Women in pre-trial detention

and/or confined prior to sentencing account for only 7% of the prison population in Catalonia.

11. The pardon proposal, much criticised at the beginning, has been gaining support from the Congress of Deputies, the business world, trade unions and even the Spanish Episcopal Conference. Beyond its undoubted legality, this broad support demonstrates its legitimacy in this case.

12. Criminal reform repealing the crime of sedition and reviewing the crime of rebellion would be essential, in addition to significantly reducing penalties for other crimes and transforming justice as inspired by the principles of restorative justice.

13. Amnesty is supported by a significant part of the Catalan population, resonates well and broadly internationally and is constitutional. In this regard, the General Committee of Congress should not block the processing of an amnesty bill or draft bill.

In addition, the Parliament of Catalonia approved a resolution in December 2020 in favour of the amnesty of people indicted since 2013. In the opinion of the Catalan Ombudsman, amnesty is what would best facilitate a new climate of understanding for resolving the political conflict with Catalonia.

14. Pardons are therefore a first step towards normalisation, but they do not resolve the central government's political conflict with Catalonia, for which open political dialogue is essential based on the principles that underpin democratic government and the rule of law.

5. RECOMMENDATIONS

Based on the considerations laid out above, the Catalan Ombudsman issues the following recommendations:

With regards to the central government of Spain:

- The central government of Spain should reconsider excluding the penalties for disqualification from pardons granted by the royal decrees of 22 June 2021.

- The central government should consider granting a comprehensive early pardon for persons indicted for crimes of rebellion or sedition in the context of criminal proceedings linked to the events of September and October 2017.

- The central government should draw up and present to the Cortes Generales a draft law amending the Penal Code that repeals the crime of sedition in its current form and ensures that the crime of rebellion can only be committed with violence.

- The use of criminal jurisdiction to resolve conflicts of a political nature should be avoided, as they must be the subject of a dialogue based on the principles of democratic government and the rule of law.

With regards to the Congress of Deputies:

- The Congress of Deputies should pass an amnesty law that will draw up all the criminal proceedings relating to the trial that have taken place since 2010.

With regards to the Parliament of Catalonia:

- The Parliament of Catalonia should monitor compliance with the recommendations contained in the Resolution of the Parliamentary Assembly of the Council of Europe 2381 (2021).

With regards to the Government of Catalonia:

- The Catalan Ministry of Justice should strengthen the gender perspective in the penitentiary system of Catalonia and avoid situations of discrimination against incarcerated women.

SÍNDIC

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