DETERIORATION OF THE RULE OF LAW IN SPAIN (Document prepared by Foro de Profesores, Impulso Ciudadano and Citizens pro Europe)

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I. Introduction

Foro de Profesores, Impulso Ciudadano and Citizens pro Europe wish to express their concern about the deterioration of the Rule of Law in Spain, a deterioration that can be observed both in the institutions of the State and in those of some Autonomous Communities. In our opinion, moreover, the two levels - the State and the Autonomous Communities - cannot be separated because the problems for the Rule of Law in our country derive to a large extent from a certain pathological relationship that has been established between the two; in such a way that certain practices that began at the Autonomous Community level have ended up being transferred to the State, at least partly due to the policy of alliances between national and regional parties, rooted in strongly nationalist and, therefore, to a certain extent, also populist currents.

At the moment we are particularly concerned about the consequences of the amnesty for those convicted of crimes linked to the secession process in Catalonia; but the failings of the rule of law in Spain began some time before, and the dangers that would result from such an amnesty are now more serious. These dangers will only deepen a deterioration that has several manifestations, and an several precedents must be considered to fully understand what is happening now.

This is why we will begin by presenting a breakdown of Rule of Law failings that can be seen in nation-wide institutions, and then move on to the crisis of the Rule of Law in some Autonomous

Communities, especially in Catalonia. As an introduction to this second part, it will be necessary to make a brief presentation of the territorial articulation of Spain; without it, it would be difficult to fully appreciate the significance of the attacks on the Rule of Law in the Spanish regional administrations.

II. Rule of law in national institutions

Approach

From the perspective of Foro de Profesores, Impulso Ciudadano and Citizens pro Europe, the deterioration of the rule of law in state institutions threatens judicial independence; it promotes tolerance towards certain crimes, including embezzlement, with the aggravating factor that such tolerance operates on the basis of the link between criminals and government parties; it favours the partisan use of institutions and the lack of independence of the public media.

These attacks on the rules for the functioning of a healthy democracy are interlinked and connected to a political discourse that, although in itself cannot be considered -in our opinion- as contrary to the rule of law, it does play a legitimizing role of the previous practices.

As a whole, we are faced with a situation in which, we believe, we must act with determination, because otherwise the anti-democratic drift could become difficult to reverse. In this sense, the approval of an amnesty law in favor of the criminals who had tried to achieve the secession of Catalonia will deepen this deterioration of the Rule of Law, as will be explained below.

2. Independence of the Courts and the Public Prosecutor's Office

A) Politicization in the appointment of the members of the CGPJ

The reports on the situation of the Rule of Law in the EU, prepared by the European Commission, have already warned of the anomaly of the non-renewal of the governing body of the Spanish judges (the CGPJ), as well as of the lack of implementation in Spain of the necessary measures to bring this governing body of judges into line with the recommendations of GRECO (Council of Europe) and which the EU has endorsed; and according to which, at least 50% of the members of this governing body should be elected by the judges themselves. The lack of renewal of the CGPJ also means that it is impossible to fill the vacancies that arise in the different positions of the judiciary, since the governing parties in Spain modified the LOPJ (Organic Law of the Judiciary) so that the CGPJ could not make appointments when it is in an acting capacity, with the sole exception of the proposal of the judges of the TC (Constitutional Tribunal) which corresponds to this body.

This limitation on the powers of the CGPJ until such time as it is renewed has just been declared as compliant with the Constitution by the TC [STC (Plenary) 128/2023, of October 2, 2023, ECLI:ES:TC:2023:128, https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2023_077/STC%20RI%202379-2021%20Y%20VOTO.pdf], despite the fact that European standards require clarity and legal certainty in the competences of such bodies, rejecting that such competences can be limited for political reasons. In this case, both the initial limitation as a means to exert pressure to achieve the renewal of the body, and the subsequent lifting of part of this limitation to allow the government to appoint the judges of the Constitutional Court who were to be appointed together with those

appointed by the CGPJ, at least give the appearance of political interference not aimed at the proper functioning of the institution and of justice.

This situation of blockage of both the CGPJ and the adaptation of its regulation to the requirements of the Council of Europe and the EU is extremely serious and can only be understood if we take its background into account.

After the approval of the 1978 Constitution, and for a few years, 12 judicial members of the CGPJ (out of a total of 20) were elected by the judges themselves. In 1985, in the LOPJ, a significant change was introduced in the appointment of these members. in the appointment of these members. Even though, of course, all must be Judges or Magistrates, the appointment now corresponds to the Parliament and the Senate by a 3/5 majority. Thus, all members are now chosen in this manner: the EC (art. 122.3) already imposed the election by the legislative chambers of the remaining candidates.

The exclusion of the election by the judges of the 12 judicial members of the CGPJ was questioned at the time and the TC had to rule on the compatibility of this appointment system with the Constitution. In its Judgment of August 13, 1986 [STC (Plenary) 1986 [STC (Plenary) 198/1986, of August 13, 1986, ECLI:ES:TC:1986:198], the TC held that the legislative appointment of these members was constitutional, but only provided that this system of election was not used to mirror in the CGPJ the political groups of the legislative chambers.

In other words, the appointment of the CGPJ by a reinforced majority of the Parliament and Senate was admissible if it responded to the search for persons of consensus and was not limited to agreeing quotas between the majority parties. In order to avoid precisely this occurrence, the term of office of the GGPJ is five years (instead of the four years of the parliamentary term), so that there will be no coincidence between a given composition of the CGPJ and that of the legislative chambers.

The practice that followed, however, confirmed the fear that the system for the appointment of the members of the CGPJ would become a transactional trade between the major political parties (PP and PSOE). The failed renewal that has been attempted for five years has given abundant evidence of this, since there are no qualms in recognizing that what the two major parties are negotiating, outside the Parliament and the Senate, which are the ones who formally have to proceed with the appointment, is the distribution of quotas between the two parties, with the occasional appointment of others, as happened when the then vice-president of the government, Pablo Iglesias, publicly acknowledged that his political group (Podemos) had been offered the possibility of appointing a member of the CGPJ within the framework of a global negotiation that also included positions in the public radio and television network (RTVE) (https://www.elespanol.com/espana/politica/20220927/pablo-iglesias-dimision-perez-tornero-facha/706429401_0.html).

Moreover, throughout this negotiation process it has been published that the negotiations between the political parties (as has been said, outside the institutions that are legally tasked with the designation of these members) include the nomination of the presidents of both the CGPJ and the TC (News in "El Mundo" of October 28, 2022,). October 28, 2022, https://www.elmundo.es/espana/2022/10/28/635bcf9621efa09a188b456e.html), when the Constitution reserves the election of these positions to the members of the respective bodies (art. 160 of the Constitution for the president of the Constitutional Court and art. 123.2 of the Constitution for the president of the CGPJ, who is also president of the Supreme Court), without in any way enabling political parties to interfere in the negotiation of these institutional positions.

In short, the image of politicization of the governing bodies of the Judiciary is already irreversible, with the damage it entails, including the bankruptcy of the jurisprudence of the Strasbourg Court, which requires that judges, in addition to being independent and impartial, appear as such to the public. For this reason, we consider that it is a priority to amend the LOPJ in order to adjust the appointment of members to the requirements of the Council of Europe and the EU.

In this regard, it should also be noted that the PSOE's attempt to force the unblocking of the renewal of the CGPJ led this party and its partner in government, Podemos, to present a bill that sought to change the majorities required for the appointment of the members of the CGPJ from the current three-fifths to a simple majority (Proposición de Ley Orgánica de modificación de la Ley Orgánica 6/1985 del Poder Judicial, registered on October 13, 2010, https://www.congreso.es/ca/busqueda-de-iniciativas?p_p_id=iniciativas&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&_initiatives_mode=showDetails&_initiatives_legislature=XIV&_initiatives_id=122%2F000090).

The explicit aim of this proposal was to be able to renew the body relying only on the support of the parties that formed the majority supporting the government (PSOE, Podemos and Catalan, Basque and Galician nationalist parties, see https://www.publico.es/politica/psoe-y-up-registran-reforma.html) and without having to reach any agreement with the main opposition party, the PP.

Obviously, this attempt was contested both by the Council of Europe and the EU ("Brussels warns the Government that the reform of the Judiciary may violate EU rules", https://elpais.com/espana/2020-10-15/bruselas-avisa- al-gobierno-de-que-la-reforma-del-poder-judicial-puoder-puede-vulnerar-las-normas- comunitarias.html ; "La Comisión Europea da un inédito toque de atención a España para frenar a Sánchez", https://www.abc.es/espana/abci-bruselas-sigue-atencion-discutida-reforma-cgpj-pretende-gobierno-sanchez-202010151315_noticia.html ; "El GRECO advierte al Gobierno de que la reforma del CGPJ puede "violar-las-normas del-consejo-de-europa", https://www.elindependiente.com/espana/2020/10/21/el-greco-advierte-al- gobierno-de-que-la-reforma-del-cgpj-puede-violar-las-normas-del-consejo-de-europa/)

and the bill did not go ahead (the proposing groups withdrew it in May 2021, https://www.congreso.es/ca/busqueda-de-publicaciones?p_p_id=publicaciones&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&_publications_mode=show_full_text&_publications_legislature=XIV&_publications_id_text=(BOCG-14-B-120-2.CODI .); but it gives a good account of the perception that the governing party in Spain has of judicial independence; completely distant from European standards and anchored in the idea that parliamentary majorities must be reflected in the governing body of judges (for example, Gabriel Rufián, spokesman for ERC, has stated that he sees it logical that the CGPJ reflects the majorities in Parliament, https://www.cope.es/actualidad/espana/noticias/irene-montero-duda-que-renueve-cgpj- quiere-agotar-legislatura-20221013_2340273); as well as in the Constitutional Court.

It is significant that, after having limited by law (Organic Law 4/2021, of March 29, amending Organic Law 6/1985, of July 1, 1985, of the Judiciary, for the establishment of the legal regime applicable to the General Council of the Judiciary in office, BOE, 20-III-2021) the possibility for the CGPJ to make appointments after the expiration of its mandate (as a measure of pressure to achieve the renewal of the body), this limitation was later qualified to allow the government to appoint two magistrates to the Constitutional Court (LO 8/2022, of July 27) in order to ensure that the Court would have a "progressive" composition (https://www.publico.es/politica/via-libre-mayoria-progresista-tribunal-constitucional- despues-nueve-anos-medio.html).

The generalization of this link between members of the CGPJ and magistrates of the Constitutional Court with the parties that have proposed them erodes the confidence of public opinion in the institutions, while at the same time making the control of the judiciary by the legislature more acceptable to that same public opinion. In this sense, we find ourselves in a populist drift, contrary to essential elements of liberal democracy; but, at the same time, trying to conceal the contrast between what is proposed and the demands of participation in the construction of Europe. Of course, the problem is not new (see, for example, the First Report on the Situation of the Rule of Law in the European Union); on the situation of the Rule of Law in Spain 2018-2021 see the "Hay Derecho" Foundation report, https://www.hayderecho.com/primer-informe-estado-derecho-espana-2018-2021/ , pp. 37-42) but this situation has rapidly deteriorated in recent years, as we have illustrated.

B) Criticism and stigmatization of the judiciary from the executive and governing parties

Point number 18 of the Recommendation of the Committee of Ministers of the Council of Europe on the independence, efficiency and accountability of judges (Recommendation CM/REC(2010)12) indicates that if the executive and the legislature comment on judicial decisions they should avoid criticism that could damage public confidence in the judiciary. It is a basic rule regarding judicial independence that the other two branches of government must maintain an attitude of institutional loyalty without devaluing public confidence in judges and magistrates. Unfortunately, in recent years criticism and stigmatization of judges by the government and its parliamentary supporters has been constant.

Many examples of this could be given, but we believe that two will suffice.

The first of these has its origin in the processing by the Constitutional Court of the appeal for protection filed by several MPs requesting the suspension of the debate in the legislative Chamber of some amendments presented to a legislative proposal. Without going into excessive technicalities, it would appear that the processing of said amendments would imply, in accordance with previous constitutional doctrine, the violation of the fundamental right to political participation of the MPs, for which reason said MPs filed an appeal for protection and requested the adoption of the precautionary measure of ordering the suspension of the processing of the aforementioned amendments.

The reaction of the Spanish government, even before the Constitutional Court adopted any decision on the matter, was one of fierce criticism of the Constitutional Court, clearly pressuring it not to grant what was being requested. Thus, the President of the Government, Pedro Sánchez, has criticized the "political, judicial and media" opposition and has "demanded" the Constitutional Court to act in accordance with “common sense”. He added that "we are facing an attempt to trample democracy, not only by the political right wing, but also by the judicial right wing, encouraged by the media". And he added: "democracy will prevail in the face of this outrage, be it from the conservative magistrates, the political right or the media that have attempted this unspeakable operation" (https://www.elmundo.es/espana/2022/12/15/639b934bfc6c837c2a8b45e0.html).

The complete video is on the web page of the Presidency of the Government: https://www.lamoncloa.gob.es/multimedia/videos/presidente/Paginas/2022/151222-sanchezeuco.aspx (in the video that includes the questions from the media, starting at minute 3:15. The reference to the Constitutional Court and the judges, from minute 14).

In those same days, the Minister of Finance and Public Function, María Jesús Montero, criticized the fact that the Constitutional Court had called a plenary session to study the protection requested by the deputies who considered their right to political participation violated and also that the Constitutional Court tried to "meddle" in parliament, and other MPs of the government party who, for example, equated the actions of the judges of the Constitutional Court with the military coup d'état of 1981 (https://www.eldiario.es/politica/ultima-hora-actualidad-politica-directo_6_9795582_1096431.html ; https://www.europapress.es/nacional/noticia- montero-considera-grave-tc-intente-entrometerse-congreso-peticion-pp-frenar-renovacion-20221215111808.html).

The second example has to do with the beginning of the implementation of a penal reform that had led to a significant reduction of sentences for a considerable number of sex offenders. Faced with the criticism that arose from this reduction in sentences, the Spanish government tried to blame such reductions on the judges, accusing them of misapplying the reform, linking this misapplication to their alleged machismo or their lack of training in gender issues (https://www.europapress.es/epsocial/igualdad/noticia-montero-culpa-jueces-reduccion- penas-violadores-machismo-puede-hacer-apliquen-erroneamente-ley-20221116114414.html).

This discourse has not been a one-off event, but has continued for months, thus contributing to the erosion of the image of the judiciary in the eyes of public opinion. It should be added, moreover, that already during the processing of what ended up being the law, there were many warnings that the reform would result in a reduction of sentences. Thus, explicitly in the report of the CGPJ on the law, where it is stated: "On the other hand, the reduction of the maximum limits of the sentences will entail the revision of those sentences in which the maximum sentences have been imposed in accordance with the current regulation" (no. 245, available here: https://www.poderjudicial.es/stfls/CGPJ/COMISI%C3%93N%20DE%20ESTUDIOS%20E%20INFORMES/INFORMES%20DE%20LEY/FICHERO/20210225%20Informe%20anteproyecto%20L.O.%20de%20Garant%C3%ADa%20Integral%20de%20la%20Libertad%20Sexual.pdf). The Public Prosecutor's Council had also warned, during the processing of the reform, that it would imply a reduction of penalties (https://www.larazon.es/espana/20221204/4pctd4ybqrcfdkqpew3lw5ynwq.html).

Thus, despite the fact that the governing body of judges had warned during the processing of the law that the text would mean, in some cases, a reduction of sentences once approved, the executive tried to make judges responsible for such reductions, resulting from the application of the principle of retroactivity of the most favorable criminal law, as had been pointed out at the time.

It is inadmissible for the executive branch of government to question judicial decisions, much less to accuse judges of attempting of coup d'état, simply for responding to the requests for review made by citizens. However, as we will see shortly, this criticism of the courts would become more acute if an amnesty law were to be passed, at least with the information currently available. We will deal with this in section two.

C) Independence of the Public Prosecutor's Office and the Constitutional Court

The different reports on the Rule of Law in Spain have also pointed out the impropriety of the State Attorney General being appointed by the Government for a period of time that corresponds to that of a legislature. In this sense, the appointment to the post of State Attorney General of persons closely linked to the government (Ms. Dolores Delgado went directly from the position of Minister of Justice to that of State Attorney General) must be reviewed. It is necessary that the high positions of

justice not only be prestigious and independent, but also that they appear to be independent, otherwise the prestige of the institutions would be damaged in the eyes of the public opinion. In the case of the Public Prosecutor's Office we must add that recently the Supreme Court [STS (Contentious Chamber, Section 4) of November 21, 2023, ECLI:ES:TS:2023:4688] annulled the appointment of the former Attorney General of the State, Dolores Delgado, as a Chamber Prosecutor (highest category in the prosecutorial career), on the grounds that she had acted with misuse of power in her appointment.

It should be pointed out that the appointment was proposed by the State Attorney General (who had been head prosecutor of the Technical Secretariat of the State Attorney General's Office during Dolores Delgado's term of office) and assumed by the Government. It is a particularly serious case, since the deviation of power indicates that the Attorney General of the State acted not with the purpose established in the law, but with the intention of achieving a purpose that the law does not protect; in this case that of promoting the former Attorney General on the understanding that this was obligatory for having held the position of Attorney General of the State, and in spite of the fact that the law does not contemplate this possibility. Given the links between those involved, the doubts about the independence and impartiality of the institution cannot be avoided, with the damage this entails for the image of the Prosecutor's Office in the eyes of public opinion.

The image of impartiality of the Constitutional Court has also been damaged in recent times. The appointment to the post of magistrate of the Constitutional Court of persons with close links to the government (a very recent Minister of Justice, Juan Carlos Campo; and a jurist who had been, until recently, Director General in the Ministry of the Presidency, Laura Díez Bueso) affects the image of independence of the institution and, moreover, will imply relatively frequently the need for magistrates to abstain in matters that are linked to their activity in the Government, as has already happened in several cases.

It is therefore necessary to establish mechanisms that guarantee not only that the persons appointed to positions such as those mentioned are the most prestigious jurists in the country, but also that they meet the necessary conditions of independence and the appearance of independence that contribute to legitimizing the high institutions of the State.

D) De-judicialization, *lawfare* and committees of inquiry

The investiture agreement concluded between the PSOE and Junts (https://www.newtral.es/wp-content/uploads/2023/11/231107-Acuerdo-PSOE-Junts.pdf?x73247), to which we will have to return a little later when dealing with the issue of the amnesty bill for those involved in the attempt to repeal the Constitution in Catalonia in 2017, provides for the creation of commissions of inquiry in relation to what is called "lawfare or judicialization of politics". The outcome of such commissions could imply accountability actions or legislative amendments.

This reference to *lawfare* has to be understood in the context of the nationalist narrative that pretends, on the one hand, that the situation generated in Catalonia has its origin in the Constitutional Court's Ruling of 2010 in relation to the Statute of Autonomy of Catalonia (this is also referred to in the agreement between PSOE and Junts: "This period cannot be understood without the Constitutional Court ruling of 2010, basically as a result of an appeal by the PP against the Statute approved by the Parliament, the Cortes Generales and in a referendum") and, on the other hand, that the legal actions developed against those involved in the 2017 secession attempt were unjust and motivated by political rather than legal reasons.

In accordance with this approach, nationalists defend that the courts be removed from the conflict with the argument that a political conflict has to be resolved politically. In the agreements concluded between the Spanish government and the Generalitat during the last term of government, the need for this de-judicialization is explicitly assumed (see the "Agreement to overcome judicialization and reinforce guarantees", https://www.mpr.gob.es/prencom/notas/Documents/2022/270722-acuerdo_judializacion.pdf).

The claim that the courts of justice should be removed from the resolution of conflicts that are not only political but also legal in nature is in itself an attack on the rule of law, since judicial protection is the ultimate guarantee of rights in democratic systems, at least in those that are inspired by the values of liberal democracy as set out in Art. 2 of the Treatise of the European Union. Equally, for the executive or legislative power to blame certain judicial decisions on the existence of a conflict is also an attack on essential principles of the rule of law. The problem will never be in the judicial decision, but in the acts prior to the decision that motivated it. It is not the sentence in which a crime is condemned that causes the conflict, but the crime that gives rise to the sentence. To lose sight of this is to seriously delegitimize the judiciary and, therefore, to break a basic balance in our democracies.

It is for this reason that the very narrative of blaming the courts is aimed at limiting their effectiveness; when practiced by the legislature or the executive branch, it is not compatible with basic principles of the rule of law. As we shall see in section IV.3, in the case of Spain, there has been a shift from narrative to reality, with devastating effects on the guarantees of individual rights.

Along with the above, mention must be made of the questioning of judges, which has already been noted and which is particularly serious when channeled through committees of inquiry in parliament whose purpose would be to review the actions carried out by the courts. This is an immediate consequence of the agreement between the PSOE and Junts that motivated the reaction not only of the judicial associations, but also of other groups and civil society in general. Thus, after learning of the investiture agreement, all the judicial associations signed a statement warning of the seriousness of parliamentary commissions auditing the actions of the courts (https://www.economistjurist.es/actualidad-juridica/las-asociaciones-de-jueces-se-unen- to-reject-lawfare-and-remind-that-the-judicial-power-is-independent/ ; the statement can be read here: https://www.ajfv.es/comunicado-de-las-asociaciones-de- jueces-sobre-el-lawfare/). The CGPJ also denounced the content of these agreements before the European institutions (https://elderecho.com/el-cgpj-envia-a-la-ue-sus-declaraciones-sobre-el-lawfare-y-el-acuerdo-de-investidura).

It is important to point out that what is introduced in the agreement between the PSOE and Junts is not unprecedented, since in the Parliament of Catalonia, previously, judges had already been ordered to appear before the Parliament to account for their jurisdictional activity (https://www.elmundo.es/espana/2023/12/04/656e257d21efa0a17b8b45a7.html). Spanish law expressly establishes the prohibition that no authority, civil or military, can order a judge to appear before it (art. 399 LOPJ), which is consistent with the necessary independence of the Judiciary. The fact that judges are expected to give an account of their activities before Parliament (Spanish or autonomous) is an attack on this independence that must be denounced forcefully and corrected immediately. Especially when in the last few days parliamentary commissions have already been created for the purpose of questioning judicial actions, as has been denounced by the CGPJ (https://www.rtve.es/noticias/20231205/cgpj-vigilante-comisiones- lawfare/2464726.shtml).

That these commissions are aimed at an audit of the judicial action by the legislature is an evidence, as recognized by the secretary general of Junts, Jordi Turull, one of the signatories of the agreement

between the PSOE and Junts, who has recently stated that "the judicial leadership (...) what they will have to do is to appear, to give explanations about why there have been so many cases of "lawfare" in the persecution of the independentism, and if it is accredited, to assume the responsibility" (https://www.abc.es/espana/turull-junts-cupula-judicial-comparecera-congreso-explicar-20231206130412-nt.html).

Jordi Turull was convicted by the Supreme Court for his involvement in the attempt to repeal the Constitution in Catalonia in 2017; specifically, for the crimes of sedition and embezzlement. Subsequently pardoned, he now awaits amnesty and to be able to hold the judges who convicted him accountable. The fact that the criminals have been able to agree with the government not only their pardon and amnesty, but also to demand accountability from the judges who convicted them, means turning the essential principles of the rule of law into nothing.

3. Tolerance towards certain crimes

A) Approach

On 13 November 2023, an organic amnesty bill was presented in the Congress of Deputies with the aim of facilitating impunity for those who have committed crimes with the purpose of achieving the independence of Catalonia or of protesting against the measures adopted to prevent such independence. The proposed amnesty covers all types of crimes, including terrorism, with limited exceptions (as we will see) that do not cover some crimes for which there is a specific obligation to prosecute under EU law (terrorism or embezzlement).

Apart from the above, it also implies a weakening of the guarantees of criminal law for citizens, which in itself represents a breakdown of the rule of law, as we will show below. On the other hand, it is a measure that is not proposed in isolation, but rather is a measure that is part of a decriminalization of certain conducts, when they are carried out by those close to power, which should be carefully examined. That is why we will now examine the specific outcomes of this decriminalization and its relationship with the deterioration of the Rule of Law, starting with the pardons granted in 2021 to those convicted for the events of 2017 to then examine the amendments introduced in the Penal Code with the aim of exculpating those who had not yet been convicted for those events to conclude with the analysis of the amnesty proposal that these days is being openly negotiated between the PSOE and the Catalan nationalist parties.

B) Pardons

Several people involved in the events of 2017, which were aimed at the secession of Catalonia and the creation in the territory of the Autonomous Community of an independent state, were convicted by the Spanish Supreme Court after a trial whose oral phase began in February 2019 [STS (Criminal) 459/2019, of October 14]. The convictions were for the crime of sedition ("rising publicly and tumultuously to prevent by force or outside the legal channels, the application of the Laws or to any authority, official corporation or public official, the legitimate exercise of their functions or the fulfillment of their agreements, or of administrative or judicial resolutions"), disobedience and embezzlement, for having diverted public money for the pursuit of an illegal end (the secession of Catalonia).

In 2021, the Spanish government partially pardoned those convicted, freeing them from the prison sentences that weighed on them, although maintaining those of disqualification for the exercise of public office to which they had also been sentenced (the pardons were granted by Royal Decrees 456/2021 to 464/2021, all of them dated June 22 and published in the Official State Gazette of 23-VI-2021).

The pardon is a measure of grace existing in several legal systems and which, although it implies the incidence of the executive power in the enforcement of judicial sentences and, therefore, a limitation to the exclusive competence of the judges and courts in the function of judging and enforcing what has been judged (art. 117 of the EC), it is admissible; although with limitations, derived from the international obligation to prosecute certain crimes (those involving serious violations of human rights, for example); it is admissible, although with limitations, derived from the international obligation to prosecute certain crimes (those involving serious violations of human rights, for example). Thus, for example, the decision of the Strasbourg Court of 5 April 2011 (4413/06, Tibor Törköly v. Hungary), took into account the possibility of pardon as a way to declare the compatibility with the ECHR of a life sentence.

Notwithstanding the foregoing, insofar as the pardon involves interference by the executive power in the jurisdictional function, it must be examined with caution, since, lacking adequate justification, it could become an arbitrary act, whose consequences go beyond the offender, since it affects the reparation that the victim hopes to obtain for the wrong suffered. Moreover, as has already been mentioned, there are limitations to the possibility of its use; specifically in those cases in which there is an international obligation to prosecute the crime (see, for example, H. Bertoit Triana, "Estándares interamericanos e indulto por "razones humanitarias" en casos de violaciones graves a derechos humanos. Resolution of the Inter-American Court of Human Rights of April 7, 2022 in the Barrios Altos and La Cantuta cases, Revista Electrónica Iberoamericana, 2022, vol. 16, no. 1, pp. 229-241).

In the case of the pardons granted in 2021 to those involved in the secession process in Catalonia, the pardon responds to the need of the party in government in Spain (PSOE) to have the parliamentary support of the nationalist parties. In this regard, it should be remembered that the pardon was granted contrary to the criteria expressed by the Supreme Court (the court that had convicted the pardoned individuals), as it did not consider the repentance of the convicted individuals or reasons of equity, justice or public utility that could cover the pardon (see E. de la Nuez Sánchez-Casado, "El problema de los indultos políticos", Hay Derecho, May 26, 2021, https://www.hayderecho.com/2021/05/26/indultos-politicos/).

That the pardons have been the result of a negotiation between the government parties and the nationalist parties that give them parliamentary support is not mere speculation; it has been openly admitted by such parties. Gabriel Rufian, spokesman in Congress for ERC, has declared that the pardons were an imposition of that party in its negotiations with the PSOE (https://www.youtube.com/watch?v=aD1P1wt-WDg , https://www.elmundo.es/cataluna/2023/07/14/64b111cfe4d4d85f298b456d.html). This approach is also reflected in ERC's official website, where in the "negotiation" section the achievement of limiting "the repressive capacity of the State" in order to put an end to the effects of judicialization is included as an example of success (https://www.esquerra.cat/ca/carpeta-antirepressiva).

When the exercise of the power to pardon is carried out against the criteria of the courts, without any repentance on the part of the pardoned and without them renouncing to reoffend in the conducts that justified their conviction, it is legitimate to ask whether such incidence of the executive power on the competence of the courts to enforce what has been judged is compatible with respect

for the Rule of Law. If we add that it is political affinity that explains the exercise of the pardon, in such a way that certain ideological options benefit to the detriment of others (pardons are granted to those who commit crimes for the purpose of achieving the independence of Catalonia, but not to those who commit crimes for other political purposes), we are faced with a political use of criminal law that is incompatible with essential principles of the Rule of Law, since it is not admissible that, in the public debate, those who defend certain postulates are benefited by the exercise of the right to pardon when they commit crimes.

In the case at hand, moreover, the pardon benefits those who had been convicted of embezzlement of public funds, which clashes with the obligation to prosecute this type of offenses resulting from EU law in cases where the financial interests of the Union are affected [Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on combating fraud affecting the financial interests of the Union through criminal law, OJ, no. L 198 of 28 July 2017] and the GRECO recommendations and the Council of Europe Convention on the criminal prosecution of corruption of 27 January 1999 (https://www.coe.int/fr/web/conventions/full-list?module=signatures-by-treaty&treatynum=173); as well as Resolution (97) 24 of the Committee of Ministers of the Council of Europe on Twenty Guiding Principles in the Fight against Corruption (6 November 1997, http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806cc17c) and with the Convention of 1997, established on the basis of Article K.3(2)(c) of the Treaty of the European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A41997A0625%2801%29).

To the above, it should be added that a pardon requested by several politicians of the governing party in Spain, also convicted in corruption cases, is currently being processed (https://www.publico.es/politica/ministerio-justicia-tramita- indultos-condenados-ere.html). The processing does not imply that a pardon has been granted, of course; but attention should be drawn to the fact that other cases of corruption among politicians have merited a pardon.

C) Reform of the Penal Code and decriminalization.

From our perspective, the pardons granted to those convicted for the attempt to repeal the Constitution in Catalonia in 2017 entailed, as has been shown, a breakdown of the Rule of Law insofar as they implied an interference in the execution of the sentences imposed by the Supreme Court without such interference having any justification other than obtaining the parliamentary support of political groups in which the pardoned played a relevant role (one of them, for example, Oriol Junqueras, was and is president of the ERC party, a stable support throughout the legislature for the governing party). The result, as already mentioned, was to establish a differentiated treatment among citizens according to their political ideology, since the pardon benefited those who had committed a crime with a specific political purpose: to achieve the independence of Catalonia and without any repentance or commitment not to act again against the constitutional order. Under these conditions, the pardon was not only discriminatory, but in itself was already an incentive to reiterate the attack on the constitutional order that was experienced in 2017.

However, the pardon was not enough for the nationalist parties, which demanded the modification of the Penal Code so that in the event that events like those of 2017 were repeated in the future, they could not have criminal consequences. To this purpose responds the repeal of the crime of

sedition and the reform of the crime of embezzlement that were approved in 2022 (LO 14/2022, of December 22, BOE, 23-XII-2022).

That this is the purpose of the law is not only deduced from the context in which it occurs, as we shall see, but is explained with this clarity on the website of ERC, the party presided over by one of the leaders of the secession attempt in 2017, convicted by the Supreme Court in 2019 and pardoned in 2021. On that website one can read (https://www.esquerra.cat/ca/carpeta-antirepressiva):

> *"The strategy of negotiation begins to bear fruit. The democratic strength of Esquerra Republicana has forced the State to repeal the crime of sedition. Also to eliminate the criminal type of embezzlement that has been used to persecute independentism, as well as to protect the right to peaceful demonstration.*
>
> *(...)*
>
> *That is why the elimination of the crime of sedition is so important. Neither any crime is replaced nor any new crime is created, protecting the independentism and the rest of democrats of today and tomorrow. We also reduce the penalties for public disorder, greatly limiting the application of the aggravated type, and significantly lowering the penalties for embezzlement without ceasing to pursue corruption.*
>
> *We have taken a great step forward, but we know how the courts can twist the law. That is why we persevere to make amnesty and self-determination possible. The first results of the political negotiation not only endorse it as a strategy, but confirm that the stronger the independence movement as a whole is, and the less repressive capacity the State has, the closer we will be to an independent Catalan Republic".*

The text is clear enough: ERC's objective was to eliminate the crimes for which those involved in the secession process had been convicted; not only with the aim that they would benefit from the retroactivity of the most favorable criminal law, but also to prevent future secession attempts from having criminal consequences. The PSOE agrees to these requests in order to maintain the parliamentary support of the nationalists.

It is clear that the legislator has the capacity to modify criminal legislation, but to do so as a result of pressure from the convicted criminals themselves in order to benefit them and facilitate the commission of new offenses in the future is a significant deterioration of the rule of law. We cannot forget that Criminal Law is a relevant element in the guarantee of democratic principles and citizens' rights. In the case at hand, the reform of the Penal Code that was carried out in 2022 was aimed at eliminating a type of crime aimed at preventing the application of the law or the actions of public officials (the crime of sedition) while modifying another so that the penalty for the use of public funds for illegal purposes would be substantially reduced (modification of the crime of embezzlement).

Is it compatible with the rule of law for the party in government to agree to a modification of the Penal Code that aims to favor criminals and facilitate the commission of new criminal acts (which already cease to be so as a result of the modification of the Penal Code)? We understand that it is not, since such a modification has as a consequence to unprotect the Rule of Law itself against those who openly state that they want to attack it.

That the purpose of the reform of the Penal Code operated in 2022 was to facilitate new attacks against the constitutional order as the one suffered in 2017 is not only derived from the statements of ERC; but it is also a logical consequence of the context in which such reform takes place.

In 2017, as is widely known, public authorities in Catalonia, integrated in several nationalist parties, acted jointly in order to hold a referendum of self-determination, proclaim the independence of

Catalonia and make such independence effective. As is also well known, the State reacted by using the exceptional measures provided for in the Constitution for cases such as this (art. 155 of Spain's Constitution) and the public prosecutor's office and the courts of justice investigated and tried the facts that could be criminal in the context of this attempt at secession.

It is clear that the fact that the objective of the actions carried out in 2017 was political does not make it immune from criminal law, since the attempted appropriation of public institutions for illegal purposes must also have criminal consequences. We have recently seen how, for example, in the United States the occupation of Congress after the last presidential elections has involved criminal proceedings that have concluded with prison sentences.

The existence of criminal offenses that punish illegal actions by public authorities, including embezzlement of public funds, is intended to protect the whole of the legal system and the rights of citizens who are harmed by such illegal actions. Of course, there is a wide margin to regulate the types and penalties, but without losing sight of the protective sense that criminal law has for the values that are considered valuable in a society.

The gradation of penalties, moreover, must be contrasted with practice, so that it would be desirable that the penalties, always proportional and allowing the reintegration of the offender, should be high enough to discourage the commission of the crime.

In the case at hand, it is clear that the existing penalties in 2017 were not sufficient to prevent the commission of the crime. And not out of mere ignorance, since, after the events of that time, the political forces that led them have not ceased to repeat that their purpose is to challenge the rule of law again when they have the opportunity to do so and consider it convenient. In this context, what reading can be made not of the reduction of sentences for embezzlement, but of the direct elimination of the crime of sedition, which had been the highest sentence for those involved in the attempted secession of Catalonia?

Thus, in our opinion, the reform of the Penal Code operated in the year 2022 is, seen in its context, connected with the previous pardons and the rest of the attacks on the Rule of Law that we have described and which we will deal with later, one more example of a systematic degradation of the Rule of Law that is eroding it in a way that, as we mentioned in the introduction, may be irreversible. The amnesty law currently being negotiated between the PSOE, its ally Sumar and the nationalist parties would be another decisive step in this degradation.

D) Amnesty

The nationalists do not hide -we have already seen it- that their objective is the amnesty for the crimes committed in the framework of the so-called "procés" - the set of actions developed since a decade ago and oriented to the independence of Catalonia. In the year 2021, they presented an amnesty bill that was not even admitted for processing by the Bureau of the Congress of Deputies for considering it absolutely unconstitutional. After the elections of July 2023, however, the PSOE and Sumar were open to the possibility of passing an amnesty law in order to obtain the support of the Catalan nationalist parties in the investiture of Pedro Sánchez as president of the government. As a result of the agreements reached by the PSOE with the nationalist political forces (here, the agreement between the PSOE and ERC: https://estaticos-cdn.elperiodico.com/epi/public/content/file/original/2023/1102/17/acuerdo-psoe-erc-021123-pdf.pdf , and here the one concluded between PSOE and Junts: https://www.newtral.es/wp-

content/uploads/2023/11/231107-Acuerdo-PSOE-Junts.pdf?x73247 , which had already been cited above) in November 2023 the amnesty bill was registered in the Congress of Deputies to which we have already referred and which is currently being processed.

The nationalist demand for an amnesty law is twofold. On the one hand, it resolves the criminal situation of those who have not yet been judged in relation to the events of 2017 (and later, as we will see) and who, therefore, cannot be pardoned (in Spain, pardon cannot be produced before the finality of the conviction). An amnesty, thus, would benefit, on the one hand, Carles Puigdemont and the others investigated for the events of 2017 who have fled from the action of justice and remain abroad. On the other hand, to the hundreds of intermediate officials of the Generalitat who are currently awaiting trial for their involvement in the secession attempt, and who are being investigated for embezzlement (no longer for sedition, once the criminal type has been eliminated) and also for the illegal use of citizens' personal data for the preparation of the census that was used in the referendum of October 1.

The purpose of the amnesty, however, is not limited to favoring the procedural situation of those who are now being investigated; it would also legitimize the actions developed to achieve the independence of Catalonia. This legitimization was found in the proposal presented by the nationalist parties in 2021; as well as in the opinion on the amnesty law presented by the Sumar party; an opinion that has been endorsed by this formation and whose presentation was attended by the Vice President of the acting government of Spain, Yolanda Diaz (available here: https://www.newtral.es/wp-content/uploads/2023/10/Dictamen_Amnistia_Sumar_10oct20231.pdf?x73247).

In the aforementioned opinion, a frontal criticism is made of the judicial action in relation to the attempted secession of Catalonia and, in particular, of the Supreme Court's Judgment of October 14, 2019 by which the leaders of the secessionist process were convicted. Specifically, the aforementioned opinion states that the amnesty law will serve to resolve a political conflict "that was aggravated by a forceful criminal repression and by the lack of proportionality with which certain judicial decisions were adopted", to which it adds, in relation to the aforementioned SC Judgment of October 14, 2019:

> *"it supposed the expression of a criminal policy that made use of a very debatable application of the criminal law in force, without exploring other less afflictive alternatives. In this sense, it should be emphasized that the claim for the independence of Catalonia or the right to self-determination -if preferred- cannot constitute a crime in a system of non-militant democracy such as the one established by our Constitution".*

The text that is currently being processed in the Congress does not include such gross invectives, but it maintains its purpose of correcting the judiciary. Thus, it is indicated that the purpose of the law is to avoid the "disaffection" of a part of the Catalan society, a disaffection that is linked to the "intervention of Justice" and, specifically, in the substantiation of "judicial procedures that affect not only the leaders of that process (which are the least) but also multiple cases of citizens and even public employees who exercise public functions that are not only the leaders of that process (which are the least) but also multiple cases of citizens and even public employees who exercise public functions that are the most important ones, even public employees who perform essential functions in the regional and local administration whose prosecution and eventual conviction and disqualification would produce a serious disruption in the functioning of services in the daily life of their neighbors and, ultimately, in social coexistence".

To the above is added, in the exposition of motives of the law, that Spanish democracy is not militant, with which it is implied that the convictions that would be avoided by the amnesty law would be

based on political opinions. A statement that responds to the nationalist narrative, but that in no way reflects the actions of the courts in the cases opened in relation to the secessionist process, which are based on the commission of crimes such as embezzlement, disobedience or even terrorism. The fact that such crimes were committed with a political purpose does not make the purpose criminal, but the specific actions that were carried out outside the law. The political purpose is not the basis for the investigation or conviction; but neither should it become, as we shall see, a justification for the crime.

Respect for judicial independence prevents the legislative or executive powers from questioning the decisions taken by the courts in such a way as to jeopardize public confidence in the judiciary. We had already seen that this was stated in the 2010 Recommendation of the Council of Europe. The opinion on the amnesty law that we have mentioned, and to the extent that it has received the express support of the Vice-President of the government, it is an unacceptable interference of the executive power in the judiciary.

If the text of the bill maintains this criticism of the judiciary or directly or indirectly questions the actions of the courts, there would already be an involvement of the legislative branch. In any case, and as we have seen above in section II.2.B, this questioning does not operate in isolation, but is constant, both at the state and regional level (as we shall see in section IV.2). As is well known, this type of attitude is absolutely incompatible with the rule of law.

Apart from the above, the amnesty law would imply an interference of the legislative power in the execution of the sentences without constitutional protection (the Spanish Constitution does not foresee the possibility of amnesty) and, furthermore, it would lack objective justification; since only the need to count on the support of the amnestied in order to obtain the investiture of the socialist candidate to the presidency of the government explains its concession. As has already been commented in relation to the pardons, the purpose of these decriminalizing measures of the attacks against the constitutional order is to facilitate them, since the beneficiaries of the pardon or amnesty have neither shown repentance nor renounced the use of unilateral means to achieve secession (https://www.ideal.es/nacional/junts-insiste-renunciara-unilateralidad-20231015113601-ntrc_amp.html).

This dimension also needs to be assessed. In 2017, public authorities expressly acted outside and against the law with the purpose that the Spanish Constitution would no longer be in force in the territory of Catalonia. It is not compatible with the Rule of Law for public authorities to act outside and against the law, so legitimizing these actions is also a way of denigrating the Rule of Law. In this sense, the proposed amnesty is also a violation of essential principles of the EU, insofar as it would admit (and encourage) unlawful behavior. And this without, as has been repeated, there being neither repentance nor a commitment to renounce repeating such behavior in the future.

Finally, it is necessary to consider the crimes to which the amnesty would extend. The text presented in the Congress of Deputies covers all types of crimes with the only exceptions included in Article 2, which are limited to:

(a) Malicious acts against persons that would have produced a result of death, abortion, injury to the fetus, loss or uselessness of an organ or limb, loss or uselessness of a sense, impotence, sterility or serious deformity.

According to the above, for example, malicious injuries that have caused permanent sequelae, such as those suffered by some policemen in the altercations of 2019, would be benefited by the amnesty; insofar as they have not entailed the loss of a limb or sense or a serious deformity.

b) Acts classified as crimes of torture or inhuman or degrading treatment under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, provided that they exceed a minimum threshold of severity.

That is, such offenses, when they do not exceed the minimum threshold of severity, will be subject to amnesty.

c) Acts classified as terrorist offenses punishable under Chapter VII of Title XXII of Book II of the Criminal Code provided that a final judgment has been handed down and they have consisted of the commission of any of the conducts described in Article 3 of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017.

In other words, terrorist offenses, including those falling within the conducts described by Directive 2017/541 will be subject to amnesty if there is still no final conviction. Regarding the facts linked to the process and that would benefit from the amnesty, there are some cases of investigation for terrorism, but that have not yet reached a sentence (and much less, final), so these crimes would benefit from the amnesty, in clear contradiction with the obligations arising from the aforementioned Directive.

d) The crimes of treason and against the peace or independence of the State and related to National Defense of Title XXIII of Book II of the Penal Code.

e) Offenses affecting the financial interests of the European Union.

But not those other crimes of corruption in which these interests were not affected and which, nevertheless, Spain is obliged to prosecute as a consequence of the instruments that have been cited in section B) above.

f) Crimes in the commission of which racist, anti-Semitic, anti-Gypsy or any other type of discrimination related to the religion and beliefs of the victim, his ethnicity or race, his sex, age, sexual or gender orientation or identity, reasons of gender, aporophobia or social exclusion, the illness he suffers or his disability, regardless of whether such conditions or circumstances were actually present in the person on whom the conduct was committed.

This exclusion takes art. 510 of the Criminal Code as a reference point, but with a significant exclusion: there is no reference to discrimination for ideological reasons, which is included in this article of the Criminal Code. The result of this exclusion is devastating: whoever has committed a crime (an aggression, for example) motivated by Hispanophobia (hatred of the Spanish or those who defend the unity of Spain) will benefit from the amnesty if that aggression is part of the defense of the independence of Catalonia or protests against the reaction of the State to the secession process. An aggression against those who defend the secession of Catalonia, on the other hand, would be investigated, judged and the person who committed it would be convicted.

The inclusion in the amnesty of hate crimes based on ideology is also in contradiction with the European instruments aimed at combating this type of crime (see the Communication from the Commission to the European Parliament and the Council on a more inclusive and protective Europe: extension of the list of EU crimes to include hate speech and hate crimes of 9 December 2021, COM(2021) 777 final, https://eur-lex.europa.eu/legal-).content/EN/TXT/HTML/?uri=CELEX:52021DC0777&from=EN] .

Thus, the amnesty would reach crimes of enormous gravity, leaving unpunished aggressions and injuries, even motivated by ideological issues. It would be in contradiction with European obligations

regarding the prosecution of certain crimes. The amnesty would include crimes with specific victims (for example, those who have seen their personal data used illegally or victims of aggressions by nationalists) who would see their right to reparation expropriated by the courts. In these circumstances, an amnesty without justification would be a grievance that would imply an added violation of the rule of law.

Finally, the amnesty, insofar as it is granted to those who have committed crimes for a specific political purpose, and as with pardons, implies discrimination on ideological grounds which, lacking justification, is yet another violation of the rule of law.

In short, the amnesty, as an extension of the pardons and the "à la carte" reform of the Penal Code, confirms a situation of arbitrariness in which certain criminals are authorized by the aforementioned means to defy the rule of law. This in itself constitutes a breach of the rule of law; but it also implies discrimination on the basis of ideology and the lack of protection for the victims of the crimes committed.

It should be pointed out that, after the registration of the bill, without having practically begun to be processed, the government is already trying to make it effective. Thus, a trial that could be affected by the law when it is approved was suspended with the argument that it could be useless if the law is approved. The defendants' petition was supported by the State Attorney (https://www.elconfidencial.com/espana/2023-12-06/fiscal-general-recopila-causas-proces-amnistia_3788305/#:~:text=El%20fiscal%20general%20se%20se%20ha%20dirigido%20a%20a%20a%20todos,entrada%20en%20vigor%20de%20la%20ley%20de%20amnistía). This advanced effect of a rule that does not yet exist and that involves exempting the application of the law for ideological reasons is, in itself, a new breach of legal certainty and the right to effective judicial protection to be exercised by the courts.

4. Partisan use of institutions

A) Infringement of electoral regulations

As we shall see, the partisan use of institutions began at the regional level, especially in Catalonia, but has extended to the central institutions of the State. Specifically, the government of Spain has used institutional acts with some frequency for partisan propaganda, which has led to several sanctions by the Central Electoral Board (JEC). Specifically, in the resolution of the JEC of October 5, 2023 (http://www.juntaelectoralcentral.es/cs/jec/doctrina/acuerdos?anyosesion=2023&idacuerdoinstruccion=123217&idsesion=1054&template=Doctrina/JEC_Detalle) the President of the Government was sanctioned and fined 2200 euros because the interested party:

> *"in the exercise of his responsibilities as President of the Government of the Nation, incurred (...) in the infraction typified in Article 153. 1 of the Organic Law of the General Electoral Regime, by making statements with an evaluative and electioneering content, taking advantage of the public media available to him, in his aforementioned capacity, on the occasion of the press conference held on June 30, 2023, after the European Council of June 29 and 30, causing the consequent breach of the principle of neutrality that all public authorities must respect during the electoral process".*

Previously, the Minister Spokesperson of the Government had already been sanctioned twice for the same reason (taking advantage of institutional appearances to make electioneering statements). The first one for the statements made after the Council of Ministers of April 25, 2023 (Resolution of the CEC of August 3, 2023, http://www.juntaelectoralcentral.es/cs/jec/doctrina/acuerdos?anyosesion=2023&idacuerdoinstrucci

on=122852&idsesion=1049&template=Doctrina/JEC_Detalle); and the second one after the meeting of the Council of Ministers of May 3, 2023 (Resolution of the CEC of August 3, 2023, http://www.juntaelectoralcentral.es/cs/jec/doctrina/acuerdos?anyosesion=2023&idacuerdoinstruccion=122852&idsesion=1049&template=Doctrina/JEC_Detalle). August 3, 2023,http://www.juntaelectoralcentral.es/cs/jec/doctrina/acuerdos?anyosesion=2023&idacuerdoinstruccion=122854&idsesion=1049&template=Doctrina/JEC_Detalle).

It is true that it is not uncommon for public officials to be sanctioned by the Electoral Committee for making partisan statements in institutional acts (for example, and leaving aside those referring to Catalan authorities, which we will deal with in section IV; Resolution of the CEC of October 5, 2023 sanctioning the Counselor and Spokesperson of the Government of the Autonomous Community of Castilla y León, http://www.juntaelectoralcentral.es/cs/jec/doctrina/acuerdos?anyosesion=2023&idacuerdoinstruccion=123215&idsesion=1054&template=Doctrina/JEC_Detalle ; Resoluciones de la JEC de 14 de agosto de 2023 - http://www.juntaelectoralcentral.es/cs/jec/doctrina/acuerdos?anyosesion=2023&idacuerdoinstruccion=122941&idsesion=1051&template=Doctrina/JEC_Detalle - y de 6 de septiembre de 2023 - http://www.juntaelectoralcentral.es/cs/jec/doctrina/acuerdos?anyosesion=2023&idacuerdoinstruccion=122985&idsesion=1052&template=Doctrina/JEC_Detalle -, sanctioning the Secretary and Spokesperson of the Government of the Junta de Andalucía).

B) The abuse of the acting government and of the emergency legislation

The partisan appropriation of the institutions has included, in the last months, an abusive use of the condition of acting government that Pedro Sanchez's government had since the holding of the elections on July 23rd until the obtaining of the confidence of the Parliament on November 16th. In accordance with the provisions of art. 21 of the Law of the Government (Law 50/1997, of November 27, 1997, of the Government, BOE, November 28, 1997), the government ceases to be in office after the holding of the general elections and continues in an acting capacity until the new Government takes office, but during this period certain limitations apply, as established in paragraphs 3, 4 and 5 of the same article. According to paragraph 4, the acting President of the Government may neither propose the dissolution of any of the Chambers or the Cortes Generales nor raise the question of confidence or propose to the King the calling of a consultative referendum. According to paragraph 5, the acting Government cannot approve the draft bill of the general State budget or submit a bill to the Congress or the Senate. Apart from these specific rules, paragraph 3 of Article 21 sets out the principles to be followed by the acting government:

> *"The acting Government shall facilitate the normal development of the process of formation of the new Government and the transfer of powers to it and shall limit its management to the ordinary dispatch of public affairs, refraining from adopting, except in duly accredited cases of urgency or for reasons of general interest whose express accreditation so justifies, any other measures."*

The government of Pedro Sánchez has flagrantly disregarded this limitation, since it has used its condition of acting government to adopt important political initiatives in the framework of the negotiations of the PSOE with the nationalist formations to achieve the investiture of Pedro Sánchez. Specifically, the Ministry of Foreign Affairs initiated the procedure for the reform of the Regulation on the EU language regime (https://www.heraldo.es/noticias/nacional/2023/08/17/espana- include-catalan-euskera-gallego-lengua-oficial-ue-1672282.html . The tweets of the account of the Ministry of Foreign Affairs in relation to this subject can be consulted here:

https://x.com/jmalbares/status/1704042935115825276?s=20 , https://x.com/jmalbares/status/1704123459230429191?s=20 . As the Minister explains in the second tweet cited above, the government's proposal is the result of a "compromise", which, moreover, includes several of the EU institutions; as, moreover, is public knowledge (https://www.publico.es/politica/albares-pidio- officially-metsola-catalan-catalan-galician-euskera-basque-parlamento-european.html).

In other words, the government, despite being in an acting capacity, launched a political initiative within the framework of the negotiations for the investiture of Pedro Sánchez. This partisan use of the government, in this case through its participation in the Council of the EU, clashes head-on with the limitations for the acting government derived from art. 21 of Law 50/1997 and represents a misuse of public power that should be reproached.

Apart from the above, it should also be highlighted that in recent years emergency legislation (decree law) has been used in an abusive manner. In 2021, 39 ordinary laws, 15 organic laws and 19 decree laws were enacted. Twenty-six percent of the regulations of legal rank adopted the form of decree law, and the ratio between decree laws and ordinary laws was one to three. During the year 2022, 20 decree laws were adopted, compared to 39 ordinary laws and 15 ordinary laws. In other words, 27% of the norms of legal rank were adopted by the mechanism of emergency legislation (one third of the ordinary legislation). In 2023, 5 decree laws, 12 ordinary laws and 4 organic laws were adopted. Decree laws accounted for 24% of the regulations with the rank of law (29% of ordinary laws). At the regional level, the abuse of decree laws is even clearer. In Catalonia, during the year 2022, 17 decree laws and only 12 laws were passed. In other words, exceptional legislation accounted for 58.7% of all regulations with legal rank.

The recourse to the decree law implies a significant reduction of the legislative in the elaboration of the norms and, therefore, we are facing a limitation of the democratic principle that requires sufficient justification. To convert extraordinary legislation into ordinary legislation, while maintaining levels close to one third of ordinary legislation, is not admissible and must be corrected.

C) Spurious use of the figure of the bill of parliament

In recent years we have also seen the spurious use of the figure of the bill of parliament. The legislative initiative may correspond to the government as well as to the Congress, the Senate and the legislative chambers of the Autonomous Communities, and the popular legislative initiative is also possible (art. 87 of the Constitution).

The initiative of the government (bills) includes certain initial controls, since the bills must be accompanied by certain mandatory reports and hearings (art. 26 of Law 50/1997, of November 27, 1997, of the Government) which allow the participation, already in this initial phase of the legislative process, of the interested and affected parties, as well as the opinion of consultative and advisory bodies. These controls surrounding the presentation of bills can be circumvented when the government, instead of presenting the initiative as a bill, entrusts the parliamentary groups that support it with the presentation of a bill, since bills do not require this type of reports and hearings during their processing.

This instrumentalization of the legislative initiative of the Chambers must be denounced, because it shows how the legislative power, instead of acting as a control mechanism of the executive, ends up being an instrument for the latter to evade certain controls in its actions.

In the case of Spain, an examination of the legislative procedures of recent years shows this abusive use of the figure of the bill, which is what the governing parties have resorted to when faced with particularly conflictive issues. Thus, the proposal to amend the Organic Law of the Judiciary to reduce the majorities required for the election of its members, referred to in section II.2.A) was presented as a bill by the groups supporting the government (Socialist Group and United We Can). The reform of the LOPJ which limited the powers of the latter when it was in office (LO 4/2021), and to which we also referred in the aforementioned epigraph, as well as LO 8/2022, which modified the previous one to allow the CGPJ in office to propose the judges of the Constitutional Court to be appointed by this body, was also carried by means of a bill of the government groups. It also followed the path of the bill and not the bill for the reform of the Penal Code which eliminated the crime of sedition and modified that of embezzlement (LO 14/2022, of December 22) and to which we referred in section II.3.C). In these days, the Amnesty Law, which we have already dealt with in section II.3.D), is also being processed as a bill of parliament.

5. Government interference in the media

A) Political control of Radiotelevisión Española (RTVE)

A reform of Law 17/2006, of June 5, on state-owned radio and television, carried out in 2017, thanks to a broad political agreement, introduced for the first time the public competition as a previous step to the parliamentary appointment of the ten directors and, among them, the president of RTVE. A committee of experts evaluated the 95 candidates who competed, raising to the Parliament, in December 2018, a list with the 20 best scored so that, among them, deputies and senators proceeded to appoint the positions of the highest management body of the national public broadcaster (the Board of Directors).

Almost two years later, in the autumn of 2020, the Joint Commission (Congress-Senate) for the Parliamentary Control of RTVE decided that the 95 candidates should appear before the appointment commissions of both chambers, thus annulling de facto the public competition. The argument put forward was that there were not enough women in the list of 20 (19, due to the death of the best qualified one, the journalist Alicia Gómez Montano) to guarantee gender parity, something which had not been guaranteed either by the parliamentary groups themselves when appointing the committee of experts, in spite of the fact that the law also foresaw parity in this case.

However, the most shocking fact was that the Partido Socialista Obrero Español (PSOE), the Partido Popular (PP), Unidas Podemos (UP) and the Partido Nacionalista Vasco (PNV) reached an agreement (distribution by quotas) for appointing the ten board members and the chairman of RTVE (the professor of the Universidad Autónoma de Barcelona José Manuel Pérez Tornero), making it public before the end of the appearances of the 95 candidates before the above mentioned appointment commissions. The then leader of Unidas Podemos and Vice-President of the Government, Mr. Pablo Iglesias, later acknowledged in Cadena Ser that his party had accepted to appoint Mr. Pérez Tornero (whom he describes as a "facha") as President of RTVE in exchange for the fact that Unidas Podemos could appoint two members of the General Council of the Judiciary, something which finally did not materialize as the PP broke the pact, always according to Iglesias (https://twitter.com/PabloIglesias/status/1574508279530721281?s=20&t=gbbb-kXOEYgc7c1vuC2-PQ).

From the avalanche of criticisms to this unfortunate process, it is worth mentioning the book published by the journalists Francisca González and Yolanda Sobero (vice-president and president of

the News Council of TVE) *RTVE desde dentro. Lo que no te han no contado. De la moción de censura al fracaso de Pérez Tornero* (Mercurio Editorial, 2022).

Pérez Tornero resigned in September, 2022, after a very controversial management and in which he was unable to implement the program with which he was elected and which had been voted in the corresponding parliamentary body, being appointed as interim president (until today) the journalist and member of the board of RTVE Elena Sánchez (PSOE quota in the above mentioned agreement subscribed by PSOE, PP, UP and PNV). It is very significant that, since she was not appointed, as required by law, by the Congress (a 2/3 majority is required), her powers were very limited. In view of this, the Government decided to extend them (just the opposite of what was done with the General Council of the Judiciary) by means of an agreement of the Council of Ministers of October 4, 2022 (https://www.lamoncloa.gob.es/consejodeministros/referencias/Paginas/2022/refc20221004cc.aspx), which modified the corporate statutes of RTVE for giving it full executive powers (in an election year). This measure has been appealed before the courts by the trade unions. (https://www.elmundo.es/espana/2022/12/02/63889fb521efa022468b45d1.html).

B) A former Secretary of Communication of the Government at the helm of the EFE Agency

In early December 2023 it transcended to the press that the Government is going to appoint Miguel Ángel Oliver, Secretary of State for Communication with the Government of Pedro Sánchez between 2018 and 2021, new president of the prestigious EFE Agency, a public agency pending regulation despite the provisions of Article 20.3 of the Spanish Constitution ("the law shall regulate the organization and parliamentary control of the media dependent on the State or any public entity...").

Oliver, who was also on the PSOE lists for the Madrid regional elections in 2019, was heavily criticized for the leaking of journalist questions he asked at government press conferences during the pandemic (https://www.elconfidencial.com/espana/2020-04-05/ruedas-prensa-la-moncloa-casos-sec_2534680/).

C) Opacity in the transfer of public funds to private media

The General State Administration has foreseen for the fiscal year 2023 an expenditure of 266.11 million Euros in institutional and commercial advertising campaigns (https://www.lamoncloa.gob.es/serviciosdeprensa/cpci/Documents/Plan%202023.pdf). There is no public information on the planning criteria of these campaigns or on how they affect media accounts. An academic research on this matter published by professors Isabel Fernández Alonso and Marc Espín concludes that "the Government of Spain does not seem to have systematized and centralized information on this matter although the contracted agencies have the obligation to provide it with the media plans which, according to the regulations in force and the resolutions of the Council for Transparency and Good Governance, should be accessible to whoever requests them" (http://www.derecom.com/secciones/articulos-de-fondo/item/482-politicas-relative-to-institutional-and-commercial-advertising-of-the-spanish-government-2016-2021).

D) A government-appointed audiovisual regulator

Spain has a (supposedly independent) regulator, the National Commission for Markets and Competition (CNMC), which is a clear exception in the European environment by dealing with the regulation of five sectors, including audiovisual and telecommunications, and the monitoring of competition. With regard to the audiovisual media, it does not have the power to award DTT broadcasting licenses (radio broadcasting licenses are the responsibility of the autonomous communities) or to authorize and control legal transactions such as the purchase and sale or rental of these licenses, which remain in the hands of the Government.

The ten directors of the CNMC are proposed and appointed by the Government, although a congressional committee has veto power (by absolute majority) and can force the proposal to be reformulated (Law 3/2013 of June 4, art. 15). This regulator has had several directors who had been advisors to the government that appointed them, among them the current president of the agency Cani Fernández (https://www.elindependiente.com/economia/2020/06/01/moncloa-coloca-a-la-asesora-estrella-de-ivan-redondo-al-frente-de-la-cnmc/).

E) Restrictions on media who are critical of the government

Restrictions on access to public institutions for media critical of the government have been denounced, both in relation to the Spanish government and the nationalist government of Catalonia.

In relation to the former, the newspaper ABC, with an editorial line critical of the government, has denounced that it has not been allowed to accompany the president of the government on a recent trip to Israel, without clarification of the reasons for which the media is excluded from these trips, unlike other media (https://www.abc.es/espana/sanchez-apea-abc-avion-presidencial-israel-20231126041315-nt.html). This same media outlet had previously denounced having been excluded from other trips of the president of the government (https://www.abc.es/espana/vetos-secretario-estado-comunicacion-abc-20230330164326-nt.html).

In the case of Catalonia, the regional government excluded journalist Xavier Rius, very critical of the nationalist government, from its press conferences (https://www.diaridegirona.cat/redactor/2021/10/31/generalitat-retira-l-acreditacio-per-59004146.html). The journalist appealed the exclusion and the High Court of Justice declared that the withdrawal of his accreditation to participate in the press conferences of the Generalitat violated the fundamental right to receive truthful information (https://www.eltriangle.eu/2022/07/05/la-generalitat-va-vulnerar-un-dret-fonamental-en-expulsar-el-director-de-noticies-de-les-rodes-de-premsa/).

III. The territorial articulation of Spain

Although Spain is not formally a federal State, its territorial articulation has elements that bring it quite close to some federal models and, to a certain extent, surpasses them, as we shall see immediately.

In 1978, when the current Constitution was approved, Spain was a centralized State. The Constitution, however, opened up the possibility of converting the country into a strongly decentralized one, since it allowed the provinces (50) into which the country was divided administratively to create entities called "Autonomous Communities" which would enjoy political autonomy and could assume competences within the constitutional framework, which established

which competences were exclusive to the State (although even these could be transferred to the Autonomous Communities) and which could be assumed by the Autonomous Communities. This assumption of powers would be made, fundamentally, in the basic regulation of each Autonomous Community, its Statute of Autonomy, a regulation which, at the same time, is a State regulation (since it has to be approved as an Organic Law of the State) and the fundamental regulation of the autonomous system. As a result of this empowerment, the entire Spanish territory has been distributed into Autonomous Communities (17), to which must be added two autonomous cities, Ceuta and Melilla, located in North Africa.

It is important to point out that the process of attribution of powers to the Autonomous Communities has not been completed. The Constitution does not establish the limit of competences that the Autonomous Communities can assume, which implies that through the reform of the autonomous Statutes of Autonomy or by other means (transfer laws) the autonomous competences will be transferred to the Autonomous Communities.

In fact, a large part of the relations between the regional nationalist parties and the state parties have been based on the granting of support from the former to the latter in exchange for the latter extending autonomous competences.

Another circumstance to be borne in mind is that not all the Autonomous Communities have the same competences. Given that in many cases the definition of competences is made as a consequence of bilateral agreements with nationalist parties based in one or another Autonomous Community, it may be that the competences held by certain Autonomous Communities are more than those held by others.

In all cases, the Autonomous Communities assume competence in education and health, as well as in consumer protection, universities, culture, transport within the Autonomous Community and public works in the territory of the Community. In the case of Catalonia, Navarre and the Basque Country, the police is also autonomous (which also implies the competences of the administration with respect to the exercise of the right to demonstrate); and in the case of Catalonia and the Basque Country (since 2021 in the latter case), the Autonomous Community also exercises competence in matters of prisons.

The above competences have to be exercised in accordance with the provisions of the Constitution and, in some cases, the State has basic organizational competences which must be respected by the Autonomous Communities; but the control of the administration and of the means by which these competences are exercised are autonomous.

What has just been explained is relevant because, in Spain, the citizen perceives public power through the Autonomous Communities. In an Autonomous Community such as Catalonia, both the police who guard the streets or who must be informed of the call for a demonstration, and the public schools and hospitals, depend on the autonomous authorities. Likewise, the financing of public universities depends on the autonomous government and the prisons are also the responsibility of the autonomous government, as well as most of the public means of transport used and part of the road network.

In contrast, the presence of the State is reduced. It can be seen in border controls, in the issuance of the National Identity Card, in the Treasury (although there is also a regional Treasury) and in the courts of justice, since the judges and prosecutors are State officials, although the personnel in the service of the administration of justice and the material means available to it are also the responsibility of the Autonomous Communities.

We insist on the above because any evaluation of the rule of law in Spain that does not include the activity of the Autonomous Communities will be meaningless, since, as has been explained, citizens are fundamentally governed by the regional power and not by the central power. It is the regional authorities who have the greatest capacity to influence the lives of citizens and who, therefore, are most likely to limit their rights. The evaluation of the performance of these regional authorities according to the parameters set out in Art. 2 of the TEU is essential if a true picture of respect for the rule of law in the EU is to be obtained.

IV. Rule of Law and the State of the Autonomous Regions: the case of Catalonia

1. Approach

In the introduction we mentioned the relationship between the deterioration of the rule of law in Spain as a whole and the deterioration experienced at the regional level. In a certain way, the process followed in the country is a consequence of the questioning in the Autonomous Communities, and especially in Catalonia, of some basic democratic principles. In fact, some of the deficiencies that have been presented in section II and that affect the institutions of the State began to be practiced in Catalonia. Thus, the open criticism by the executive and legislative powers of judicial decisions or the lack of neutrality of public administrations.

Apart from the above, in addition, the constitutional crisis opened in Catalonia since 2013, which had its peak in 2017 and has not yet been resolved has had the effect of straining the basic structures of the constitutional order. In section II we have already seen that some of the manifestations of the deterioration of the rule of law at the state level (political pardons, modification of the Penal Code in order to satisfy the demands of criminals, proposal of an amnesty law that would question judicial decisions already adopted) are directly connected with the objectives of the nationalists. In some way, a contagion effect can be seen from the regional institutions to the state ones, which could even extend to European institutions, as evidenced by the various resolutions and measures adopted by European bodies, as well as the effects of the Catalan crisis on European instruments such as the European arrest and surrender warrants (see R. Arenas García, "European Arrest Warrant for the Arrest and Surrender of Foreign Nationals"). Arenas García, "Orden europea de detención y entrega y defensa del orden constitucional de los Estados miembros de la UE", *Araucaria. Revista Iberoamericana de Filosofía, Política, Humanidades y Relaciones Internacionales*, 2023, vol. 25, no. 53, pp. 359-381, https://doi.org/10.12795/araucaria.2023.i53.14).

This extension of democratic deterioration from Catalonia to the rest of the country cannot be understood without taking into account the nature of the secessionist challenge. This, contrary to what is sometimes perceived from the outside, does not imply a confrontation between the population (the Catalans) and the public power (the Spanish State), but, basically, that a public power (the regional power in Catalonia, the Generalitat, and also, to a large extent, the local administrations) decide to act outside the legal limits, turning the public power at their disposal against the constitutional order. Both the consultation carried out in 2014 and the referendum of self-determination of 2017 were organized by or with the assistance of the public administration; a public administration that, moreover and as has been exposed in subchapter III, is not symbolic, but manages budgets of several tens of billions of euros annually and, among other things, runs a police force with more than fifteen thousand armed agents.

Thus, the process of rebellion against the constitutional order developed by the Catalan regional authorities is, in itself, a breach of the rule of law, since it is a public administration exercising its

public power outside the legal limits - the most basic breach imaginable of the obligation of submission of the public authorities to the law. However, apart from this basic breach, there are other manifestations of the deterioration of the rule of law at the regional level which, as we shall see, partly prefigure what we have later seen in the common Spanish institutions. We will examine them below.

2. Harassment of judges and disrepute of the Courts

In section III we have already indicated that, in Spain, the State retains jurisdiction over judges and courts, while the Autonomous Communities have reduced powers in matters of justice. The Judiciary, therefore, escapes autonomic control. During the events of 2017 it acted as a guarantee of legality in Catalonia, in the face of the open rebellion of an administration that controlled from schools to health centers, from police to prisons. In fact, the courts established a wall of containment to the secessionist plans; and not only by the action of the jurisdictional bodies located outside Catalonia (Supreme Court, National Court and, as a court, although not integrated in the Judiciary, the Constitutional Court), but also by the jurisdictional bodies based in Catalonia. Let us recall, for example, that the violent events of September 20, 2017, when a judicial commission was blocked inside the headquarters of the Ministry of Economy, had their origin in a search warrant issued by an examining court in Barcelona (an account of the events can be found on the Wikipedia page dedicated to the events: https://en.wikipedia.org/wiki/Operation_Anubis).

This lack of control over the courts and the fact that they have become one of the few visible presences of the State in Catalonia may explain why from nationalism an intense campaign of harassment and pressure on the courts has been developed and has not ceased since 2017.

In this sense, and without pretending to be exhaustive, it can be recalled that in the months of September and October 2017 the independentists encouraged an assault on the headquarters of the Superior Court of Justice of Catalonia (https://www.libertaddigital.com/espana/2017-09-21/thousands-of-independentistas-asedian-el-tribunal-superior-de-justicia-de-cataluna-6062181/).

In this regard, it is significant that already in October 2017, the TSJC asked the National Police (dependent on the State) to complement the surveillance of the institution's headquarters, until then entrusted to the Mossos d'Esquadra, the Catalan autonomous police (https://www.poderjudicial.es/cgpj/en/Poder-Judicial/En-Portada/El-presidente-del-Tribunal-Superior-de-Justicia-de-Cataluna-acuerda-que-el-Cuerpo-Nacional-de-Policia-apoye-los-Mossos-de-Esquadra-en-la-vigilancia-del-edifico-del-Palacio-de-Justicia).

The harassment was not limited to the institutions. Some magistrates also suffered it personally. In particular, the magistrate Pablo Llarena, instructor in the Supreme Court of the case against the leaders of the secessionist movement, suffered several cases of harassment (https://www.elconfidencial.com/espana/2018-08-20/pablo-llarena- acoso-independentista-cdr-cataluna_1605050/).

It is not unfounded to link the actions that have been described in the preceding paragraphs with the constant stigmatization of justice practiced by the authorities of the Generalitat. It is a long-standing practice of which we find a relevant example in the reaction of the then president of the Generalitat, José Montilla, to the Constitutional Court's ruling on the constitutionality of the 2006 reform of the Statute of Autonomy of Catalonia [STC (Plenary) 31/2010, of June 28, 2010, ECLI:ES:TC:2010:31]. As soon as the ruling became known, President Montilla, in an institutional intervention, harshly

criticized the Constitutional Court and called for a demonstration to protest against the ruling (of which only the operative part was known at the time, https://www.lavanguardia.com/politica/20100628/53954703157/montilla-convoca-a-.los-ciudadanos-para-mostrar-la-indignacion-catalana-por-la-sentencia-del-tc.html).

This is an attitude that clashes with the Recommendation of the Committee of Ministers of the Council of Europe that has already been cited and that opened the way for a systematic disqualification of the courts by the public authorities that has continued to the present day. Without claiming to be exhaustive, here are some examples of attacks by members of the Catalan regional government in the face of certain decisions of the courts of justice.

- Roger Torrent, president of the Parliament of Catalonia at the time when the STS of October 14, 2019 was issued, stated that the sentence was unjust and the condemnation miserable, adding that it was a sentence against all the people of Catalonia and that injustice could not be accepted in silence (This and the rest of the statements outlined in relation to the STS of October 14, 2019 can be consulted at the following link: https://www.lavanguardia.com/politica/20191014/47953266729/sentencia-trial-process-1-o-junqueras-pedro-sanchez-torra-politicos-presos-independentistas-condenas-en-directo.html).

- Gabriel Rufián, deputy of ERC (ruling party in Catalonia at that time), before the same sentence declared that this sentence was the biggest aggression since the farce trial of President Companys (referring to the conviction by Franco's regime of the former president of the Generalitat Lluís Companys).

- Pere Aragonès, currently president of the Generalitat and in 2019 vice-president of the government of the Generalitat, in relation to the same sentence declared that the sentence was not justice, but revenge, attributing it to a corrupt and cowardly State.

- Joaquim Torra, president of the Generalitat when the sentence of October 14, 2019 was issued declared that the sentences were unjust, adding that the sentences condemned all the people of Catalonia and that democracy lost, with this sentence, all its credibility.

- Pere Aragonès, president of the Generalitat, after establishing the finality of the TSJC Sentence that obliged the Generalitat to teach at least 25% of the teaching in Spanish declared that this sentence was an interference of the courts and a lack of respect for teachers and professors (https://www.elnacional.cat/ca/politica/aragones-catala-escola-no-toca-25-castella_673925_102.html).

- In relation to this same sentence, the Minister of Education declared that it was a serious attack on the foundations of the Catalan school model "perpetrated from a distant court and ignorant of the sociolinguistic reality of the educational centers". He continued that the content of the sentence was an anomaly and that it belittled education professionals (https://www.elnacional.cat/ca/politica/aragones-catala-escola-no-toca-25-castella_673925_102.html).

A few months later, the same Councilor of Education, described the order of forced execution of the sentence as "aberrant" (https://cronicaglobal.elespanol.com/politica/20220509/cambray-aberrante-la-ejecucion-castellano-generalitat-recurrira/671182921_0.html).

- More recently, in the face of decisions of the Superior Court of Justice of Catalonia recognizing the right to bilingual education for specific students, the Minister of Education declared, and this was published on the official web page of the Generalitat (https://govern.cat/salapremsa/notes-

premsa/551023/consellera-simo-al-tsjc-li-son-igual-lleis-educatives-pedagogia-sociolinguistica), that the Superior Court of Justice exceeded the limits of its jurisdiction.

The High Court of Justice was overstepping its functions, that it did not care about education laws, pedagogy and sociolinguistics, that the Court politicized education and language policy, and that it acted with a political bias.

It is obvious that these attacks on the courts of justice by the executive power are not compatible with the demands of judicial independence that derive from the Recommendation of the Committee of Ministers of the Council of Europe that has already been cited; and in the case of Catalonia we can observe how, indeed, the contempt of the courts by the executive power ends up affecting the compliance with the sentences and the prestige of the judiciary. It is for this reason that we have already mentioned that the harassment of judges and courts in Catalonia cannot be separated from the regional government's treatment of judicial decisions.

3. Non-compliance with judicial decisions

The discrediting of the courts does not operate in isolation, but is accompanied by the non-compliance with all those judicial decisions that affect the core elements of the nationalist program. Thus, already in 2017 the image of the then president of the Generalitat posing with the various injunctions received from the Constitutional Court in a defiant attitude and conveying the message that he would not abide by them (as, indeed, he did not abide by them, can be seen in the tweet disseminated by Carles Puigdemont himself:

https://x.com/KRLS/status/851751028022280192?s=20).

This attitude of contempt has been maintained until today, being especially clear with regard to decisions on language in school.

The Generalitat imposes an education in which the only vehicular language is Catalan. Such an imposition is contrary to the constitutional right to have Spanish as the language of instruction. As a result of the claims of specific families, the courts have recognized the right of these families to have their children receive an education in which Spanish is present in at least 25% of the teaching. Despite the clarity of the decisions, when another family requests this bilingual education (in Catalan and Spanish), the educational administration systematically denies the request, forcing all families to initiate a judicial process to have their right recognized.

This practice would be contrary to the doctrine established by the Court of Luxembourg in its recent judgment of 14 September 2023 [STJ (Second Chamber) of 14 September 2023, C-113/22, DX and Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS), ECLI:EU:C:2023:665], which imposes the obligation to compensate those who the administration denies a right that has been judicially recognized previously in other cases.

Apart from the above, the reaction of the Generalitat to the Ruling mentioned in the previous section, which obliges it to provide an education in which at least 25% of the teaching is in Spanish, in this case for all students and not only for those who request it individually, is also significant. We have seen how the Minister of Education and the President of the Government of the Generalitat tried to discredit the courts for having issued this decision and ordered its forced execution; but, apart from this, they made it clear that they would not abide by it and that they would not adapt the educational system to the requirements derived from this ruling.

On the same day that the ruling was announced, the president of the Generalitat declared that "Catalan in schools is not to be touched" (https://www.elnacional.cat/ca/politica/aragones-catala-escola-no-toca-25- castella_673925_102.html) and, in fact, no enforcement measures were taken. On the contrary, the Department of Education urged schools not to comply with the court decision (https://www.rac1.cat/info- rac1/20211124/4103320893809/conseller-educacio-gonzalez-cambray-carta-directors- escoles-desobeir-sentencia-classes-castella.html), a request that was reiterated in the following months, and a Decree-Law was issued with the declared aim of avoiding the enforcement of the court decision.

Obviously, this explicit refusal to comply with the decision, going so far as to order non-compliance to officials dependent on the Department of Education is incompatible with basic requirements of the Rule of Law, with the result that non-compliance with the decision, coupled with the denigration of the courts causes a situation of helplessness for citizens and weakening of public confidence in the jurisdiction. The damage this causes to the rule of law is, it seems to us, undeniable.

The non-compliance with judicial decisions or those of the electoral administration that are connected to the lack of neutrality of the Catalan public administrations deserve a specific section. That is why we will consider them in the following epigraph, which we will dedicate to this specific manifestation of the degradation of the Rule of Law.

4. Lack of neutrality of the administrations

In section II we warned of the partisan use of the institutions that can be seen at the state level and also in some Autonomous Communities. However, it is in Catalonia where this appropriation of the institutions by those in power is most clearly seen, to the point that it could be argued that it has been the practice of this appropriation, without apparent consequences, over many years that has led it to spread outside the Autonomous Community.

This partisan appropriation translates into the use of institutions, places or buildings that are publicly owned for the broadcasting of partisan messages or for the display of symbols that are not the common ones (official flags). Before 2017, it was observed on the one hand the introduction in public buildings, especially town halls, of pro-independence flags (esteladas), while removing the Spanish flag, which by legal imperative has to fly in all buildings of the central, institutional, autonomous, provincial, insular and municipal administrations of the State (art. Third, one, of the Law 39/1981, of October 28, which regulates the use of the Spanish flag and other flags and ensigns, BOE, 12-XI-1981).

Both the introduction of pro-independence flags and the removal of the Spanish flag are symbols that support nationalist approaches in Catalonia and are therefore incompatible with the obligation of neutrality of public administrations.

After 2017, yellow ribbons (in reference to those under investigation for the attempted secession of Catalonia) began to be displayed on public buildings, as well as banners in support of those who had been arrested or had fled abroad to escape prosecution. These symbols were also contrary to the obligation of neutrality of public administrations.

The adoption by public universities of resolutions in support of those who had tried to repeal the law was also considered contrary to the obligation of neutrality of public administrations.

In electoral periods, the electoral administration has ordered the removal of these symbols and declared the illegality of the cession of public University spaces for partisan acts (agreement of the JEC of August 3, 2023 in relation to an act held at the University of Barcelona on July 13, 2023, http://www.juntaelectoralcentral.es/cs/jec/doctrina/acuerdos?anyosesion=2023&idacuerdoinstruccion=122856&idsesion=1049&template=Doctrina/JEC_Detalle); but on occasions the public authorities have refused to abide by the orders of the Electoral Board.

As a consequence of one such refusal, the former president of the Generalitat, Joaquim Torra, was convicted of disobedience and eventually disqualified (https://www.poderjudicial.es/cgpj/en/Poder-Judicial/Judicial-News/Judicial-News/The-Supreme-Court-confirms-the-condemnation-of-one-and-a-half-years-of-disqualification-of-the-President-of-the-Generalitat--Joaquim-Torra--for-the-crime-of-disobedience#:~:text=The%20Chamber%20II%20of%20the%20Court,disobeyed%20of%20repeated%20forma%20repeated%20and).

Outside the electoral period, the ordinary courts must be the ones to ensure respect for institutional neutrality, but only individuals or civic associations have undertaken the work of achieving this neutrality. Thus, a group of professors at the University of Barcelona managed to obtain a declaration of incompatibility with the duty of neutrality of public administrations of the adoption of resolutions by the bodies of public universities in favor of those who had participated in the 2017 secession attempt [STS (Sala de lo Contencioso, Sección 4ª) of 21 November 2022, ECLI:ES:TS:2022:4334, https://www.poderjudicial.es/cgpj/en/Poder-Judicial/Noticias-Judiciales/El-Tribunal-Supremo-confirma-la-nulidad-del-manifiesto-del-claustro-de-la-Universidad-de-Barcelona-sobre-las-condenas-por-el-1-O] and it has been the association Impulso Ciudadano who managed to have a banner in support of those investigated for the events of 2017 ordered to be removed from the regional government headquarters outside the election period. The disobedience to the Court's orders to take down the banner ended up leading to a new criminal conviction for disobedience against Joaquim Torra (https://impulsociudadano.org/la-audiencia-de-barcelona-confirma-la-condena-a-torra- por-desobediencia/).

It cannot be considered that we are in a situation of democratic normality when the president of the regional government disobeys orders from the electoral administration and the courts and ends up disqualified, when the courts issue sentences declaring the violation of the obligation of neutrality of the administrations (and, therefore, also of the right to ideological freedom of citizens) and when public authorities openly defend the breach of court rulings and order civil servants to do so.

The seriousness of the deterioration of the rule of law in Catalonia is the consequence of lustrums in which anti-democratic actions by the authorities were developed with little opposition, little criticism and no consequences for the offenders. Now it is difficult to reverse the situation, and, moreover, as we have seen, we are faced with behaviors that have already spread to the state level.

5. Stigmatization and harassment of dissenters

There is yet another serious manifestation of the breakdown of the rule of law that can be seen clearly in Catalonia and not yet so clearly at the state level. We refer to the stigmatization and harassment of dissenters. A stigmatization to which the public authorities are added and which then results in violent actions in the street.

It is inadmissible that the public authorities use hate speech against those who disagree with their political approaches; in this case the nationalism practiced by those who govern the Generalitat; but, nevertheless, this is what happens.

Recently, on October 3, the spokesperson of the government of the Generalitat branded as Catalanophobic the conveners of a demonstration against the granting of an amnesty to those who had attempted the secession of Catalonia in 2017 and considered that the demonstration was called "against the Catalans" (https://www.youtube.com/watch?v=2JBTCsp9E44).

This finger-pointing is not new. Two years ago, the then Councilor for Universities, Gemma Geis, described as fascist a civic entity (the Assembly for a Bilingual School in Catalonia, AEB) that had obtained from the courts a decision for the university entrance exams to be distributed, on equal terms, in Catalan, Spanish and Aranese, the three official languages in Catalonia (https://cronicaglobal.elespanol.com/politica/20210908/la-consejera-geis-la-aeb-castellano-selectividad/610439123_0.html).

This stigmatization of non-nationalists and the practice of hate speech against them from the institutions ends up having consequences. Among the most striking are the attacks on the youth organization "S'ha Acabat!", which opposes nationalism and has suffered boycotts and attacks on several university campuses. In this regard, it is particularly serious that the aforementioned Councilor for Universities, Gemma Geis, explicitly supported such harassment (https://cronicaglobal.elespanol.com/politica/20221002/la-consellera-universidades- senala-sha-acabat-boicot/707679268_0.html) and that the president of ERC, the party that currently holds, through Pere Aragonès, the presidency of the Generalitat, described the attacks on S'ha Acabat! that are now being investigated by the courts as "peaceful demonstrations" (https://cronicaglobal.elespanol.com/politica/20221002/la-consellera-universidades-). (https://twitter.com/junqueras/status/1706564940033617920?s=20).

Previously, and within the framework of the conflict derived from the Generalitat's failure to comply with the sentence ordering it to provide bilingual education to all Catalan students studying in publicly funded schools, a singularly serious event took place. An agreement of the Government of the Generalitat directly threatened those who demanded compliance with the aforementioned sentence with the demand of responsibilities by the corresponding means, "political, penal, administrative or of any other nature" (Agreement of the Government of the Generalitat 1/2022, January 4, DOGC, 5-I-2022, https://dogc.gencat.cat/es/document-del-dogc/?documentId=917763). It is disturbing that the government, in this case of a region, uses the Official Gazette to address threats to civil society. I think we will all agree on the seriousness of such conduct.

There is a link between the lack of neutrality of public administrations, their partisan appropriation, the singling out of dissenters from those same institutions, the use of hate speech against them, the use of violence to silence them and the support from the public authorities for the use of such violence.

It is as serious as it seems and the time has come to stop looking the other way.

V. Conclusion

The evidence gathered here leaves little doubt about the deterioration of the rule of law that is being denounced. Principles that are basic to the architecture of our democracies (judicial independence, neutrality of the administrations, objectivity of the public media, respect by the authorities for civil

society, equality among citizens, legal certainty, protection of the rights and interests of individuals and the general public interest) are being questioned or violated. It is difficult to analyze the causes and consequences of this situation; but it is unavoidable in order to advance in its solution.

First of all, it should be noted that the crisis affecting the institutions of the state, which we have discussed in section II, is preceded by a significant breakdown in the rule of law at the regional level; a breakdown that was not properly addressed at the time either by the Spanish authorities or by the European authorities.

In a state with the degree of decentralization that Spain has, democratic deficits that originate at an infra-state level are unlikely to remain at that level. Leaving aside the gravity of attacks on democratic principles at any level of administration, it must be borne in mind that without a timely reaction to them, they will spread to other levels. In this sense, the case of Spain can serve as a warning for other cases.

Secondly, a significant part of the deficits identified is linked to the confusion between political parties and public institutions. At the regional level, the problems began, to a large extent, when nationalist parties decided to use public administrations as tools for the development of their partisan political projects instead of attending, even formally, to the care of the general interest. The transformation of public administrations into party extensions may be subtle at first, but it ends up having devastating effects.

This confusion has been transferred to the level of Spain as a whole. Examples related to the media have been given, but it goes beyond that. Thus, the instrumentalization of the figure of the bill or the transformation of the parliamentary mechanism for the selection of the members of the CGPJ or the magistrates of the Constitutional Court into an open and frank negotiation between parties that will only pass through Congress and the Senate for a merely formal ratification.

The instrumentalization of the institutions by the parties, moreover, ends up affecting the rights of citizens, as we have shown. In this sense, it is particularly serious when people or institutions of civil society are directly threatened by those in power, or when a discourse of hatred is generated against them by those in power, which, unfortunately, ends up having physical consequences: violence against those who disagree.

Unfortunately, the case of Spain is a perfect example of how the breakdown of principles that appear to be only formal (neutrality of institutions, independence between the different powers) ends up leading to the violation of citizens' rights, the breakdown of their equality, discrimination based on ideology, the admission of hate speech and tolerance of criminal actions that can become violent.

We believe that there is still time to act, but there is less and less time left.