AMNESTY IN SPAIN

CONSTITUTION AND RULE OF LAW

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AMNESTY IN SPAIN: CONSTITUTION AND RULE OF LAW

This book arose from the perplexity of its three promoters: hearing a significant number of proponents of amnesty (whether politicians, journalists, or jurists) claim that the majority of jurists were expressing support for its constitutionality and that the few who did not were presenting very weak arguments. As this was not the impression they held, they set out to compile opinions contrary to the constitutionality of amnesty. The result proved remarkable: over sixty highly respected authors contributed 78 critical texts concerning the amnesty arising from the PSOE-Junts pact. Readers are invited to assess the quality of the arguments presented and to pursue their enquiries regarding the number of jurists who have defended amnesty. To us, the balance seems clear in terms of both the sheer number of jurists and the strength of the arguments.

To address amnesty in the most comprehensive manner possible, the book is divided into five legal chapters and a sixth from broader perspectives:

1. An overview of the Rule of Law in Spain after the July 2023 elections.
2. The general unconstitutionality of amnesty.
3. The Spanish amnesty from the point of view of european law.
4. The parliamentary bill for an Organic Law on amnesty for institutional, political and social normalisation in Catalonia.
5. The harassment of judges.
6. Five outlooks beyond the law.

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WILL EUROPE SAVE US FROM OURSELVES?[1]

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We have been deeply concerned since the cost of the first payment of Pedro Sánchez's presidential investiture in the form of an amnesty for all those involved in the independence process and for all types of crimes committed became known in the summer of 2023. Peaceful citizens have taken to the streets waving European flags as only seen in Catalonia in 2017. Many are looking to the European Union (EU) in the hope that the political and legal nonsense of an illegitimate amnesty[2] "Brussels" can stop it. This means that citizens and many jurists doubt whether constitutional control in Spain will survive.

The rule of law is the sentinel of democracy. The concept of the rule of law is highly developed by the Court of Justice of the EU (CJEU) in the wake of its ruling/dismantling in Poland and Hungary. Moreover, we have an agreed and detailed description of what the twenty-seven states understand by the rule of law[3]. A democracy ceases to be a democracy when there is no counterweight

1 A first version of this article was published in the *ABC* newspaper on 5 December 2023 with the abbreviated title - due to headline space requirements in *ABC's* "La Tercera" - "Will Europe save us?"

2 My position on the unconstitutionality of the bill and the illegitimacy of the amnesty law is set out in "Una Constitución maltrecha", in a monographic issue on 45 years of the Spanish Constitution and the amnesty bill in *El Cronista del Estado Social y Democrático*, n.º 108-109, December 2023-January 2024, pp. 108-113.

3 A seminal EU "law" described the rule of law: "It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law" (Art. 2(a) of

to the/ on the rule of law and there are doubts about a constitutional control that is no longer independent and impartial. This happens — as the CJEU points out — when "legitimate doubts" arise, in the minds of citizens, "as to the imperviousness of judges...to external factors and, in particular, to direct or indirect influence of the legislature and executive, and as to their neutrality with respect to the interests before them" (CJEU, C-824/18).

For this reason, the CJEU considers in this judgement that it is necessary to examine how the high courts or the National Council of the Judiciary itself were elected or renewed (coming directly from the political power and with other defects in their election), the abuse or misuse of power, etc., as the *combination of* these aspects gives the dimension of the rupture with the rule of law. And let us not forget that several of the repeated condemnations of Poland were due to the pro-government position of its Council cloned from the Spanish system — as modified in 1985 — of the General Council of the Judiciary (CGPJ) with no options for the judges themselves.

Suspicions have run deep since the Spanish coalition government decided in November 2022 to capture the Constitutional Court for its government project by appointing two magistrates closely linked to the government (without going through the cooling-off period to avoid the revolving doors rejected by both the Venice Commission and the European Commission's Rule of Law reports). To these two appointments was added another one wrested from the CGPJ after being subjected to maximum pressure. The government was plotting a comfortable majority of militant magistrates at the service of the merged executive-legislator tandem.

The Venice Commission reacted to the capture of the Polish Constitutional Court by stating that it removes a crucial mechanism that ensures that conflicts with European and international norms and standards can be resolved at the national level without the need to resort to European or other courts (Venice Commission, Opinion no. 833/2015). Let us not forget that since the Polish government tamed the Constitutional Tribunal — which had declared several laws unconstitutional before 2015 — it appointed en masse (ten out of fifteen there; in Spain, seven out of eleven) people collaborating with the government programme. Thus, in Poland the TC ended up being "a tool for legalising the illegal activities" of the Polish government, as the EP declared [Resolution 2021/2935(RSP)].

But let no one stand still thinking that the EU will save us from ourselves. I am sorry to lower hopes. The EU's capacity to enforce the rule of law has limits and takes time. The half-dozen instruments at the EU's disposal to counter and sanction deviations from the rule of law did not bear the expected fruit in Poland (only partial) or Hungary. Although acts of dismantling the rule

Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget, OJ L 433/I, 22.12.2020).

of law in Poland and Hungary began around 2010-2012, the mechanism for recognising the threat of serious and systematic violations of values (Art. 7 of the EU Treaty) was not activated until 2017-2018. And once activated, they got bogged down in the European Council as neither Art. 7 TEU nor the Treaty on the Functioning of the EU provided for any deadline for adopting the decision and sanctions; Art. 7 TEU has become a dead letter; apart from the unanimous vote that allows vetoes and assistance between autocratic states.

A second instrument was the "frameworks for dialogue", which ended up being a ruse or a "hot cloth" to buy time for offenders. The annual reports on the rule of law were not useful either; it is true that they reveal transparency and x-ray Spain as a state with serious bankruptcies — as they did with Poland and Hungary — but they do not transcend, they are of little use because autocratic governments hide behind their parliamentary majorities.

A fourth means of pointing the finger at the offending states in the EU has been the Commission's effective actions before the CJEU against Poland and Hungary, as well as preliminary rulings at the request of courageous Polish judges. Thanks to the judgements of the CJEU we have proof of the illegalities of the Polish autocracy (and less so of the Hungarian autocracy, which has been very sibylline and has concentrated on restricting freedoms with less impact on the judiciary). However, the fifth means of combating the democratic decay of states — the blocking of budgetary funds — was distorted by the war in Ukraine and the need for Polish and Hungarian support for the large amounts of aid granted to the attacked state.

In Poland or Israel (Netanyahu's project to overturn sentences that do not please the executive) it was society and judges who resisted for months and years against the autocrats. Only in Romania did then Commission President Jean-Claude Juncker save them in 2019 from the indignity of an amnesty law for the corrupt partners of the Romanian government. At a press conference in Bucharest, Juncker told the Romanian president to his face that respect for the rule of law could not be the subject of political compromise and that amnesty for corrupt and political allies was contrary to the EU's demands. Romania dropped out of the project. They were like Mario Draghi's words in the 2008 financial crisis. *Divine words*.

A similar attitude is not to be expected from President Ursula von der Leyen: she has no such determination, wants to be renewed in July 2024 and will need Sánchez's vote (although a qualified majority is enough to extend her mandate at the head of the European Commission). At least two Commissioners from her team dared to call for "consultations" — in the traditional diplomatic sense — and they made Minister Bolaños sweat ink, always installed in his parallel reality.

Let us be clear: neither the Court of Justice of the EU nor the European Commission (guardian of the treaties) will examine whether the Spanish

Constitution (SC.) permits amnesty, nor whether the law to be passed infringes it. It is not the EU's competence; nor is the CJEU the guardian of the Spanish Constitution.

What does fall to the Commission and, if necessary, to the CJEU is whether the amnestiable offences (corruption-misappropriation, terrorism, treason — agreements with Russia to finance and militarily protect independence —, etc.) and the judicial procedures leading to the recognition or nonrecognition of amnesty for whatever reason comply with the binding elements of the rule of law (for example, Articles 4, 10 and 11 of the Parliamentary Bill amnesty law raise serious suspicions, which are more appropriate to a situation of armed conflict or a state of emergency).

The draft amnesty law and the fact that it entrusts the judges with rapid, unquestioning handling of the case ("immediately" it says several times in the draft) and limits the guarantees of judicial protection without precautionary measures and other remedies — on pain of parliamentary committees of enquiry — violates judicial independence and jeopardises effective judicial protection as proclaimed in the Treaties and interpreted by the CJEU.

The draft probably violates the right of judges to raise the question of constitutionality as provided for in Art. 163 CE and the LOTC, with the obligatory "provisional suspension of the proceedings in the judicial process until the Constitutional Court rules on its admission" and, once admitted, the process would be suspended until it "definitively resolves the question". The fear lies in the combined effect of Articles 4, 10 and 11 of the bills, which seems to leave constitutional prescriptions and the powers of the Constitutional Court itself up in the air, by ordering judges to dismiss the case or, where appropriate, to acquit it and to give "preferential and urgent decisions in compliance with this law, whatever the stage of the proceedings" of the case. This could open the door to allow evasion of the automatic suspension of the application of the law to the specific case in questions of unconstitutionality.

The draft is very confusing when it says that judges and courts will decide on its application to cases that come before them "as a matter of priority and urgency" within a maximum period of two months, "without prejudice to subsequent appeals, which shall not have suspensive effect". Very serious crimes can be investigated for years and years without anything happening; the granting of amnesty should be immediate, all within two months. Of course, if the judge orders the amnesty proceedings to be dropped before the TC's judgement, the ruling will lose its useful effect and would be merely declaratory. If they are dismissed, and any subsequent unconstitutionality is recognised, they cannot be "de-amnestied" as this would affect fundamental criminal principles such as *non bis in idem* and "res judicata". Even if parliamentary groups and Autonomous Regions proposed unconstitutionality appeal, when the TC's judgement arrives, the beneficiaries will be on the

street "clean" of everything. And if the law were declared unconstitutional in whole or in part, it would be a toast to the sun, a dead letter, because nothing paralyses, and it will be difficult to restart the criminal proceedings against the seditionists.

The judicial and party actions are set aside without any precautionary measures; judicial protection of which the parties are deprived and its granting by the judge, which is contrary to the EC (Art. 24), EU law (Art. 19 TEU and the Charter) and the European Convention on Human Rights (Art. 6).

Spanish judges called upon to apply the amnesty law may find it necessary to clarify whether the new law is in line with Spain's obligations as interpreted by the CJEU in terms of EU principles (equality, respect for the law, fair trial, independence of judges, precautionary measures to ensure effective protection, etc.).

Among these elements to be examined by the CJEU are the independence of judges — including whether the Spanish TC is a real court or not independent by allowing "revolving doors". It is worth recalling that for the European Parliament the Polish Constitutional Court was not *a court* because it is neither independent nor impartial. As I have already pointed out, for the EP this court became an "instrument for legalising the illegal activities of the authorities". In addition to being illegal, for the EP it was illegitimate because it was subordinate to the Polish government: "the illegitimate 'Constitutional Tribunal' not only lacks legal validity and independence, but is also unqualified to interpret the Constitution in Poland" [EP Resolution, 2021/2935)(RSP)].

And for the European Court of Human Rights, the Polish Constitutional Court, affected by the illegality of the appointment of at least one of its judges, is not a court in accordance with Article 6 ECHR (fair trial) and does not meet the criteria of "tribunal established by law" (case 4907/18). In December 2023, the CJEU rejected a reference for a preliminary ruling from the Disciplinary Chamber of the Polish Supreme Court on the grounds that it is not a 'court or tribunal' within the meaning of Article 267 TFEU due to the circumstances surrounding the appointment of its judges (C-718/21, *Krajowa Rada Sądownictwa*).

The CJEU can also explore whether effective and precautionary judicial protection is respected in the future amnesty law, so that the powers of judges and the rights of the parties to the proceedings remain unchanged when applying both EU and national amnesty law, as required by European case law (Cases C-585/18, C-624/18 and C-625/18). The current draft eliminates the possibility of interim or suspensive measures and establishes limitations to the fair trial for judges and parties in summary amnesty proceedings. The primacy of EU law must be maintained even in the face of exceptional laws such as the amnesty law.

Effective judicial protection implies that judges must be protected against any external interference that could jeopardise their independence of their

judgements, as stated by the Court of Justice of the EU (C-506/04, *Wilson*). National judges are at the same time judges of EU law, that is to say, they are organically national and, at the same time, *functionally European* courts, and in all their procedural actions they must in any case ensure that the guarantees of EU law are respected (Art. 19.1 TEU and 47 Charter of Fundamental Rights, cited judgement C-585/18).

The decision as to whether to refer the matter to the CJEU for a preliminary ruling is a discretionary right, proper and exclusive to the judge in the case before which the amnesty is sought. If the judge or court decides to raise a preliminary ruling, the judge must suspend the actual amnesty process by making a preliminary ruling without having to close the process of recognising the privilege. The preliminary ruling has suspensive effect despite the amnesty law. The preliminary ruling cannot be controlled or intercepted by any domestic authority.

The referral to the CJEU, with its seat in Luxembourg, therefore entails, without any exceptions or supervening limits, the suspension of the proceedings that gave rise to the preliminary ruling. The judgement of the CJEU is not an authoritative opinion or opinion but a judgement that binds the judge in his ruling; the national judge will issue his judgement conditioned by the interpretative ruling of the CJEU.

Spanish judges — in this case, the Supreme Court for the beneficiaries under its jurisdiction — also have the power to examine, ex officio, on their own initiative, the compatibility of the amnesty law with EU law (its values, Art. 19 TEU, etc.) and the case law clarified by the CJEU and to leave inapplicable on *the authority given to them as European judges,* the provisions of a national law that they consider to be contrary to EU law. Diffuse control has been recognised since the famous *Costa v.* ENEL and *Simmenthal* judgements and is not an option, but an obligation if the contradiction is upheld.

In any case, what is advisable and appropriate in the context of the amnesty law is to request a preliminary ruling before opting for nonapplication. And the non-application or the option for a preliminary ruling is not affected by the fact that there is a prior declaration of the constitutionality of the law by the TC, as they are different normative patterns.

Moreover, if the Supreme Court raises the foreseeable preliminary question, it can suggest the suspension of the law by the CJEU; this was ordered, for example, by the Vice-President of the CJEU, Spain's Rosario Silva, and Poland had to stop applying the law on the Disciplinary Chamber (the delay in implementing the suspension cost Poland more than €600 million in fines). Not to mention other suspensions of laws by the powerful German parliament before their entry into force. I see this as unlikely, but it must be attempted if the lack of fair trial is maintained.

As was said about what happened in Poland, Hungary, and Israel, also in Spain, more than legal reforms they are a change of the democratic system

towards an autocratic regime. Autocracies invoke the constitution, disguise themselves in its garb and twist the constitution and legality to mould them to their ambitions for power until consummating a process of decomposition constitutional and political with a territory without counterweights: without opposition, without judges and without critical civil society.

From autocracy we will only be saved by peaceful citizenship and the thousands of independent judges and the Supreme Court of Spain.

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