



## REPORT ON CATALUNYA

For some months now, Catalonia has been focusing international attention. The political, legal and institutional conflict with Spain is becoming increasingly complex. We do not want to enter here into a debate on the right of self-determination of the Catalan people or in the most political aspects of confrontation, we will not insist either denouncing well-known facts, such as the police violence on civilian population on October the first. In this report we will focus on an issue of general legal interest, which we believe should attract the attention of an association such as the AED, an issue that in Catalonia is nowadays at the forefront of the debate. We refer to the question of the judicialisation of politics and the consequent irruption of judicial branch as a direct political agent in the Catalan conflict, working for the interests of one of the political parties. This is a fact that endangers a basic principle of any democratic society as it is the separation of powers.

### THE FACTS:

In September 2015 elections were held in Catalonia to choose a new Parliament and regional government, within the strictest current legislation. These elections were attended by several pro-independence parties under the same political program: an explicit agreement to call a binding referendum of self-determination, in which the Catalan people would be called to decide between their stay within the Spanish State or the creation of a new independent State in the form of a republic. With this program, whose legitimacy nobody questioned at that time, the independence parties obtained a large absolute majority in the Parliament (72 deputies out of 135), which allowed them to form a government under the presidency of Carles Puigdemont. From this moment, the Catalan government, in compliance with the commitment made and democratically ratified by the electorate, repeatedly tried to initiate talks with the central government, in order to obtain from it the transfer of powers to call a referendum within the legality and reach an agreement on the conditions for holding it. The Spanish government completely refused to even speak on the subject, arguing that the call for a referendum of self-determination, even non-binding, was in contradiction with the constitutional principle of the indissoluble unity of Spain, and adopted an attitude of absolute inhibition, without taking any political initiative during the following months that allowed to deal with sovereignty claims within the constitutional legality.

Given the evidence that the stagnation of the Popular Party government made not possible to achieve the goal of a negotiated referendum with the State, Catalan government and political parties that supported Catalan government moved forward with the commitment acquired with voters, and called a referendum under a new legality, coming from Catalan parliament. This decision

contributed to the enormous mobilization of a very important part of Catalan society in favour of the referendum, which gave rise to massive demonstrations. The decision was taken, finally, on 6 and 7 September 2017, when Catalan Parliament approved by absolute majority two laws: the first, enabled the government to call a referendum of self-determination, and the second established the legal and administrative foundations to make possible a peaceful transition, in case the result of referendum was favourable to the creation of an independent republic. Then, the Catalan government called the consultation for October the 1st, without prejudice to maintain the offer of negotiation with the State, in order to find a political solution to the potential conflict. Without getting into the argument of constitutional legality, legal effectiveness or the political success of the decisions and actions of the Catalan government and its Parliament, we must affirm categorically that at no time in this process was any crime committed by the promoters and agents of the referendum, in accordance with current Spanish legislation. The organization, promotion or convocation of a referendum, even outside current legality, must never be qualified as a crime, since it does not exist such a crime in the Spanish Penal Code since the Organic Law 2 / 2005, approved by the socialist government of Rodríguez Zapatero, expressly recognized that such behaviours were not criminal matters and, consequently, abolished section 506 bis of the Criminal Code. Such section was introduced by previous government of José María Aznar that declared illegal and made a crime to participate in a referendum.

Once again, the central government rejected any offer of dialogue or mediation proposed by the government of Catalonia, and immediately appealed to the Spanish Constitutional Court the laws of Referendum and Legal Transitoriness approved by the Catalan Parliament, and requested as a precautionary measure the immediate suspension of the call for the Referendum. The Constitutional Court, with celerity unknown until then, admitted the appeal and processed the requested suspension, prohibiting, under threat of criminal responsibility, the holding of the consultation as well as any activity related to its preparation or promotion. From this moment, the Spanish government left in the hands of police violence and judicial repression the resolution of a conflict that didn't want to face in political terms. However, the government failed in its attempt to prevent the holding of the October 1st referendum, as well as the proclamation of its affirmative result. Neither could he stop that on the 26th and 27th of the same month, the Catalan Parliament approved by an absolute majority, to require the government of the Generalitat to proclaim the independent Catalan Republic. This requirement was carried out by Catalonian President in a purely symbolic act, and did not materialize in any legal or administrative measure. Therefore, it did not have any legal effect. The reaction of the Spanish government was to increase repression through criminal complaints, and to cease the entire government of the Generalitat, dissolve the Catalan Parliament and call new elections for December 21st, 2017, with the approval of the Constitutional Court and with the approval of a Senate with an absolute majority of the Popular Party. All of it was made possible by an interpretation of section 155 of the Constitution, extensive, disproportionate way that violates fundamental rights.

## SPANISH GOVERNMENT'S ESTRATEGY

Spanish government has not been able to offer a political alternative to the demands of self-government of Catalan society, and it has opted for the judicialisation of the conflict. Its strategy is to turn political adversary into criminal offenders and to trust that criminal courts and tribunals will do their job until the problem is solved. It is about criminalizing the independence movement, not only in its performance but also in its ideology, with the aim of achieving its political marginalization. This strategy has met with the difficulty of finding criminal materials to give some credibility to the criminal actions undertaken against the independence movement, because this movement has always expressed itself in a peaceful way and has been used exclusively for its purposes democratic instruments of political participation. It is an evidence that has been recognized by any impartial observer. The call for the referendum of October the 1st, even though it may be considered an illegal act, it is not a criminal offense. Crime of disobedience to the judicial authority, committed by those who have ignored the prohibition to participate in the referendum is only applicable, according to the Spanish criminal law, to civil servants and to certain public officers, which would have been expressly and personally required to comply with the judicial order. In any case there are no imprisonment penalties for the accused.

For the Spanish government and its media, the importance and seriousness of what was considered a challenge to a constitutive principle of the Spanish State, such as the unity of the fatherland, demanded a quicker response and more forceful effects, even if it means violating its own legality and violating fundamental rights and freedoms. Therefore, Spanish government did not hesitate to charge two prominent leader of the independence movement (the Jordis, Sánchez and Cuixart) with crimes of rebellion and sedition, asking for their arrest and imprisonment, a measure that was also adopted against all the members of the government of the Generalitat and the Parliament's Bureau, immediately after the formal declaration of independence. The charge of very serious crimes of rebellion and sedition has penalties that can reach thirty years of imprisonment. Within the civic and political process developed over the last seven years there has not been a single act of violence. That is why these severe charges become a scandal that has been criticized by eminent Spanish and foreign jurists, since there is no element of "violent uprising" that constitutes a necessary element of the crime of rebellion (Article 472 of the Criminal Code) neither the criminal purposes of the crime of subversion of public order.

To develop its repressive strategy, the government of the Popular Party has had the Office of the Prosecutor, a hierarchical body that depends on the General Attorney of the State, who is directly appointed by the government, and who has acted as a promoter of repressive actions, urged by the executive power. On the other hand, the Office of the Prosecutor has not taken any action to prosecute possible crimes committed by the State security forces in their violent and disproportionate interventions against peaceful persons exercising their right to vote on October the 1st. The role of the judiciary authorities has been even more disturbing, and especially National High Court (Audiencia Nacional), Supreme Court and Constitutional Court. With some significant exceptions, the

majority of judges and criminal courts, both Catalan and Spanish, have assumed without reservation the role of executors of the repressive strategy of the executive power. Its resolutions, based often on extra-legal arguments, reflect the full identification of the higher instances of the judiciary authorities with the ideological criteria and the political objectives of the executive branch, in its crusade against the Catalan democratic independence movement.

It is impossible in this report to detail the innumerable cases of judicial resolutions in which the ideological or political ideas have prevailed over the legal criteria. With judicial authorization, debates and meetings have been banned, posters and documents have been confiscated, private correspondence has been opened, websites have been closed and print houses and media have been registered. There have been serious violations of fundamental rights to a fair trial, rights to an impartial judge and freedom of the person. At the request of the Public Prosecutor's Office, and under judicial order, it has been arrested and, in many cases, has been ordered to imprison many people for the simple fact of having supported the holding of the referendum on October 1 - which does not constitute a crime, as it has been explained - or acted in favour of the independence of Catalonia, a perfectly legal political option. Some of these people are ordinary people; others, activists who legitimately exercised their freedom of speech, right of assembly or right to peaceful demonstration. On October 16<sup>th</sup> 2017 the arrest warrant and entry into prison - where they still remain - of Mr. Sánchez and Mr. Cuixart, already mentioned, took place due to their participation in a popular demonstration to protest against the detention of 14 people, including high government officials of the Generalitat, and the police search of several governmental departments. These measures were taken by Judge Lamela, judge of the investigative court No. 3 of the National High Court (Audiencia Nacional). She admitted the prosecutor's accusation of sedition, without the prosecution providing the slightest evidence, not even a police report. On October 30<sup>th</sup>, three days after the proclamation of the Catalan Republic, the Attorney General submitted a criminal complaint against the president and all the members of the Government of Catalonia, before the National High Court, for the crimes of rebellion, sedition and embezzlement of public funds. Its investigation fell back again on Judge Lamela.

There are serious evidences that the Prosecutor waited these three days to bring the criminal complaint so that it coincides with Judge Lamela's guard's shift. On November 2<sup>nd</sup>, the judge took a statement from the Vice President and nine government members. He ordered pre-trial detention for eight of them, and issued a European arrest warrant against President Puigdemont and other members of his government who did not attend the summons and chose to go into exile in Belgium. In both cases, Judge Lamela acted illegally, since the National High Court lacks jurisdiction over the alleged crimes denounced (Article 65 of the Organic Law of the Judiciary power). On the other hand, preventive imprisonment was manifestly contrary to law as well. According to all the Spanish jurisprudence and that of the European Court of Human Rights, pre-trial detention is an exceptional measure and applies only when certain circumstances occur, which were not given in these cases. Therefore this measure violates fundamental right to freedom. Due to the manifest lack of

competence of the National High Court, on November 24<sup>th</sup> both cases were transferred to the Supreme Court, and Judge Llarena was appointed to continue the investigation.

On December 4, 2017 Judge Llarena reviewed the precautionary measures of pre-trial detention and set a bail of 100,000 € for six members of the Catalan government, but extended the detention of the Vice President and the Minister of the Interior, and for Mr. Sánchez and Mr. Cuixart. All of them are still being deprived of their liberty. On the same date, the judge of the Supreme Court charged the president of the Parliament of Catalonia and its Bureau with the crimes of rebellion, sedition and embezzlement of public funds. The charges were based on having allowed the parliamentary debate and the approval of the laws that enabled the holding of the referendum. The judge decided for all of them a pre-trial detention with bail. An unknown number of people are currently under police investigation and pending to be called by the court. Judge Llarena's resolutions constitute a true monument to the politicization of justice. In his effort to maintain the charges of rebellion and sedition, the investigating judge distorts the truth and interprets that peaceful exercise of the right to demonstrate becomes an act of violence, and victims of the police aggressions of October 1 turn out to be responsible for the damages suffered, for their efforts to deposit their vote in a prohibited consultation. The political content of the judicial resolutions that have kept four people in prison for months is even more evident. These resolutions are based on considerations about the pro-independence convictions of the accused, which suggest the repetition of their criminal political activities once in freedom.

## TOWARDS THE END OF THE DIVISION OF POWERS. THE LATEST EVENTS

President of the Spanish government Mariano Rajoy, convinced of having decapitated the independence movement with the previous repressive measures, enacted dissolution of the Parliament of Catalonia and called for elections, relying on the activation of section 155 of the Constitution. He attributes himself some competences not provided by the current legislation and violating the Statute of Autonomy of Catalonia, as well as fundamental rights to political participation of the electors and political participation of the deputies illegally dismissed. Independent parties attended to the new elections, convened for December 21, 2017. They included in their lists candidates who were in prison, on bail or investigated, and in exile, pending to appear before the Spanish courts. This is the case, for instance of President Puigdemont. These candidates were admitted without reservation or condition by the Central Electoral Board, because all of them had all their civic and political rights. After elections, independence political parties have once again obtained an absolute majority in the new parliament (70 over 135 deputies), and have proposed as the only candidate for President of the Generalitat the dismissed president Carles Puigdemont. In order to avoid what would certainly represent a clear political defeat, the Spanish government has openly declared its willingness to prevent by all means Puigdemont from being President. To this end, Spanish government has asked again, against the mandatory opinion of the State Council, the Constitutional Court to declare unconstitutional the investiture of

Puigdemont, for his status as a “fugitive from justice”. Spanish government has also asked, as a precautionary measure, the suspension of the parliamentary session scheduled for January 30 to discuss and vote on this investiture. The Constitutional Court, on January 27, issued a surprising resolution suspending admission to the proceeding, but, taking some precautionary measures that nobody had requested in a procedure that had not yet been admitted for processing: it prohibits Puigdemont to appear in the investiture debate by telematic means or by delegation. It also obliges him to be physically present in the parliamentary session to be invested, but to do that he should appear before the investigating judge Llarena, who should authorize his appearance before the Parliament.

The interference of the judiciary power in a main democratic process as it is the election of the president of a government by a parliament cannot be more evident. With absolute arbitrariness, the Constitutional Court has taken the regulatory functions that are exclusive competence of the Bureau of the Parliament. The Constitutional Court is taking decision on the form and conditions of the investiture session, limits the exercise of the political rights of a candidate who is in full possession of his rights to vote and to stand for election, and limits the rights of all the deputies, who are deprived of the freedom to vote for whom they wish. Finally, with this decision the Constitutional Tribunal is leaving to the discretion of an investigating judge the decision on who will be the next President of the Generalitat, with contempt for the decisions of a legitimate parliament, which democratically represents the majority of citizens. We claim that the institutional situation that exists nowadays in Catalonia is a serious infringement of the principle of the separation of powers and it has significance for any democratic society.

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Associació Catalana per a la Defensa dels Drets Humans