

Crisis of the Rule of Law in Europe: The Cases of Hungary, Poland and Spain

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Democracy is an instrument at the service of a noble purpose: to ensure the freedom and equality of all citizens by guaranteeing the civil, political and social rights contained in constitutional texts. Among the great principles on which this instrument rests is the division of powers, which consists, substantially, in the fact that power is not concentrated, but that the various functions of the State are exercised by different bodies, which, moreover, control each other. Well, the increasingly aggressive interference of the Executive and, to a lesser extent, the Legislative in material spheres that should be reserved exclusively for the Judiciary, violates this principle and, for this reason, distorts the idea of democracy, an alarming trend that, for some time now, are observed in European Union countries such as Hungary, Poland and Spain. Preventing the alarming degradation of European democracy, of which these three countries are an example, requires not only more than necessary institutional reforms to ensure respect for these principles and prevent the arbitrariness of the public authorities, but also a media network and an education system that explains and promotes these values and principles, that is, one that makes citizens aware of and defend constitutionalism.

Keywords: *Rule of law; Democracy; Separation of powers; judicial independence; Europe.*

Introduction

As various indices measuring the quality of democracy worldwide reveal¹, in recent years we have witnessed a significant deterioration of democracy in different regions of the world, a deterioration that is particularly striking in the European Union (EU), where thirty years after the fall of the Berlin Wall and the theoretical triumph of liberal democracy, the progressive erosion of liberal-democratic principles is not limited to the recently acceded Eastern Bloc countries², but also affects Western European countries. It is a democratic decline

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¹The *Global State of Democracy* (by International Institute for Democracy and Electoral Assistance), the *Democracy Index* (by The Economist) and the *Rule of Law Index* (by World Justice Project).

²On 1 May 2004, the largest enlargement of the EU ever, in terms of both size and diversity, became a reality with ten new countries: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia. In 2007, Romania and Bulgaria joined, and in 2013 Croatia joined, bringing the EU then to 28 Member States.

that has in the political aggression to the judicial independence, one of its most worrying manifestations³.

It is well known that one of the basic dogmas to which the Constitutional Movement⁴ entrusted the construction of its new theory of power -as subordinate to the Law- is the principle of separation of powers, whose classical formulation we owe to Montesquieu⁵ and which proposes the distribution of power among three powers, each of which must operate as a brake on the others: the Legislative (Parliament), the Executive (Government) and the Judiciary (Judges and Courts). The principle of judicial independence has therefore been one of the cornerstones of the rule of law since its creation, because only the existence of a judiciary that is bound only to the law and not to any of the other branches of government makes it possible to effectively safeguard - free from pressure - this submission of power to the law.

However, judicial independence is under harassment not only in dictatorships/self-governments, but also in European Union countries, especially in Hungary, Poland and - to a lesser extent - Spain, which is the subject of our interest in this paper. It is therefore not surprising that the 2019, Scoreboard for Justice in the European Union⁶ shows a more than worrying result: the public's perception of the lack of independence of judges and courts has increased in three fifths of the Member States, mainly due to a growing sense of political interference in justice⁷.

On the other hand, the political divisions in society have been notably accentuated in these countries and in other democracies such as the United States, Brazil or even the United Kingdom - traditionally a paradigm of moderation - political polarization that we fear will become extreme in the context of the economic crisis provoked by the Covid-19. This is a disturbing phenomenon with potentially lethal consequences for the future of democracy, which, as an expression of pluralism, requires the existence of a consensus on the rules of the political game and on the fundamental principles and values of the constitutional state. This is compounded by another alarming trend which, under the pretext of achieving "real equality" for previously oppressed groups, is undermining another foundation of the liberal and democratic state based on the rule of law: the principle of equality before the law, which requires that no discrimination on the

³As denounced by the European Parliament, both in plenary and in the Commissions - specifically in the Parliamentary Committee with competence in the area of Freedom, Justice and Home Affairs, known as the LIBE Committee- when it dealt extensively with the challenge posed by the alarming signs of deterioration and regression of democracy in the EU during the 2009-2014 and 2014-2019 European legislatures.

⁴See Codecho (1974).

⁵Montesquieu (1748). See also Locke (1690) and Garrorena Morales (2011).

⁶An instrument developed by the European Commission from 2013 that provides a comparative analysis of the quality, independence and efficiency of the judicial systems of the EU Member States, while at the same time providing information to national authorities to improve their judicial systems.

⁷As regards national prosecutors' offices, the Scoreboard indicates that in some Member States there is a tendency to concentrate management powers, such as evaluation, promotion and the transfer of prosecutors, in the hands of a single authority. See also https://ec.europa.eu/commission/presscorner/detail/es/IP_19_2232

grounds of birth, race, sex, religion, opinion or any other personal or social condition or circumstance may prevail.

The global crisis provoked by Covid-19 has also revealed another fundamental problem of contemporary democracies for which neither political theory nor practice has provided a minimally satisfactory response: the structural inability to adopt long-term agreements and decisions. On a small and large scale, we see that organised and short-term (minority) interests have prevailed for decades over the general interest that democracy seeks to shape and guarantee.

Let us not forget that the constitutional State, characterised by respect for the great principles whose mission is to limit the exercise of political power in order to guarantee the fundamental rights of citizens (popular sovereignty as legitimacy of power, political representation, full subordination of public powers to the law, separation of powers, equality before the law, legal security, pluralism and the principle of constitutional supremacy), represents the most advanced form of political organization in the history of mankind. Its current political and institutional degradation, particularly in democracies that we have hitherto considered to be exemplary, is truly disturbing.

The Alarming Democratic Deterioration in Hungary

A New Partisan Constitution

The Hungarian government of Viktor Orbán, in power since 2010, promoted in 2011 a new Constitution which, adopted on 18 April 2011 by the National Assembly of the Republic of Hungary exclusively with the votes of the deputies of the ruling parties⁸, that it to say, without any political or social consensus, it came into force at the beginning of 2012⁹ and has already been reformed several times. The Hungarian Fundamental Law (FL) presents many controversial aspects from the perspective of respect for the basic principles of the rule of law, of which the following should be highlighted, trying to summarise them:

a) The FL incorporates several laws that the Hungarian Constitutional Court (CC) had declared unconstitutional. As an example, and in clear violation of the right of the ordinary judge predetermined by law, the new constitutional text gives the President of the Hungarian judiciary the power to choose the court for any legal dispute, which may lead in some cases to the indirect decision of the judge for a specific dispute. A similar power is also held by the State Attorney General in criminal cases. Similar provisions of the Code of Criminal Procedure had been annulled by the CC for contravening the European Convention on Human Rights and the Constitution then in force¹⁰. Likewise, following the constitutional reform

⁸The "national consultation" on the Constitution, moreover, consisted of a list of twelve questions on very specific issues drawn up by the ruling party (which thus had the possibility of inducing obvious answers) and did not include the text of the draft basic law.

⁹Its transitional provisions (Transitional Acts) were approved in a different parliamentary procedure on 30 December 2011, also entering into force on 1 January 2012.

¹⁰Likewise, the FL incorporates the law that prohibits the insertion of electoral propaganda in private channels, the one that criminalises homeless people who settle in "certain public spaces", the

of 11 March 2013 (Fourth Amendment), most of the transitional provisions annulled by the CC in 2012 on the grounds that they were not of a truly transitional nature were incorporated into the text of the FL¹¹.

b) The FL reserves for organic or cardinal laws, the adoption of which requires a two-thirds majority, a wide range of issues relating to Hungary's institutional system, the exercise of fundamental rights and other matters of importance to society (such as the protection of the family and the tax and pension systems), which virtually blocks political action by future governments that do not have a two-thirds majority in Parliament.

c) The FL provides that the approval of the State Budget Act requires the prior consent of the Budget Council, a body composed of three members¹² for a period of 6 years (beyond the term of the legislature). This power of authorisation of a non-parliamentary body jeopardises the budgetary sovereignty of Parliament and is an obstacle to the action of future governments.

d) The CC, most of whose members are appointed by the Government, has very limited powers. Thus, its powers to examine *ex post* the constitutionality of laws with budgetary implications are reduced to violations of an exhaustive list of rights, which hinders the examination of constitutionality in case of violation of other fundamental rights such as the right to property, the right to a fair trial and the right not to be discriminated against¹³. It also excludes the possibility that CC can pronounce on the substantive content of the constitutional amendments, and leaves without force all the CC's judgments prior to the entry into force of FL, thus preventing the Court from using its own jurisprudence to argue its decisions and interpret the new cases.

e) The FL provides for selective personal continuity in independent institutions. In fact, all those who were elected in accordance with the previous Constitution will remain in their functions, except for the Data Protection Commissioners (institution that would be abolished and replaced by a Data Protection Authority) and the President of the Supreme Court, whose mandate is terminated early after two years of a six-year term, a measure only acceptable after the end of a

law that obliges religious creeds to be registered -and to be approved by the Parliament- in order to be considered as such (except all Christians and Jews), as well as the rule that obliges university students who study with a scholarship to work in Hungary after finishing their studies for a certain period of time or to return the amount of the scholarship. All of them had been declared unconstitutional by the CC.

¹¹Judgement Nr. 45/2012, 28 December, following a constitutional request by the Hungarian Commissioner for Fundamental Rights.

¹²Article 44.4 FL: "The members of the Budget Council are the President of the Council, the President of the National Bank of Hungary and the President of the National Court of Audit. The President of the Budgetary Council is appointed by the President of the Republic for a period of 6 years".

¹³If the public debt exceeds half of the gross domestic product, CC can examine the compatibility with FL and, consequently, annul the State Budget Laws, the Laws on their implementation, the Laws regulating the tax modalities, the special taxes and contributions, the customs duties, as well as the conditions set by the State for local taxes, exclusively in connection with the right to life and human dignity, with the right to personal data protection, with the freedom of thought, conscience and religion or with the rights linked to the Hungarian nationality. Of course, this control extends only to a small part of all possible parameters.

dictatorship or in case of violations of the law by the judge, which are not present here.

In addition, there has been frenetic legislative activity that has been criticised by the UN, the Council of Europe (Venice Commission¹⁴) and the European Union (EU), as well as many human rights organizations. As far as the EU is concerned, the European Commission has initiated sanctioning procedures against Hungary (for alleged violations of Community law) because of the legislative reforms on the Central Bank, on the authority responsible for supervising data protection and on the advancement of the retirement age of judges. This last measure, which fully affects the principle of judicial independence, is dealt with below.

The Controversial Advancement of the Retirement Age of Judges

The 2011 amendment of the organic laws on the judiciary (Act CLXI of 2011 on the organization and administration of courts, and Act CLXII of 2011 on the legal status and remuneration of judges), among other measures, it raised the retirement age for judges, prosecutors and notaries (from 70 to 62) and gave great power to the National Office of the Judiciary -its president is elected by the Government for a nine year term- which is empowered to decide on the appointment of judges, directors and other judicial officials and to transfer cases and judges between courts.

The European Commission, following the appropriate¹⁵, denounced the Republic of Hungary before the Court of Justice of the European Union (CJEU) in June 2012¹⁶ for breach of Directive 2000/78/EC on equal treatment in employment and occupation, the purpose of which (Article 1) is “to establish a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation in the field of employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment”.

Although on 16 July 2012 the Hungarian Constitutional Court declared the change in the retirement age of judges unconstitutional, its decision did not have direct retroactive effect, as it did not automatically result in the judges already

¹⁴Venice Commission, or European Commission for Democracy through Law, is a consultative body of the Council of Europe whose primary task is to advise countries on constitutional matters to improve the functioning of their democratic institutions and to protect human rights. It has 61-member states: 47 members of the Council of Europe and 14 other countries. On the Venice Commission see, among others, Craig, P. (2017) and Biglino Campos (2018).

¹⁵On 17 January 2012, the Commission requested Hungary, pursuant to Article 258 TEU, to submit a statement of objections concerning the infringement of Articles 1, 2 and 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, the purpose of which was to set the new age limit for judges, public prosecutors and notaries. Although Hungary denied any infringement in its reply of 17 February 2012, the Commission maintained its position in its reasoned opinion of 7 March 2012. In that opinion it set a deadline of one month for Hungary to bring the alleged infringement to an end. However, Hungary did not change its mind in its reply of 30 March 2012.

¹⁶CJEU also denounced Hungary for not respecting the independence of the data protection authority. Instead, the Commission accepted the Hungarian government's commitments to adopt measures to guarantee the independence of the Central Bank.

retired from service being reinstated (for this they had to go to the competent Hungarian courts), so the judgement of the CC did not end the dispute with regard to the judges concerned. As the Advocate General states in his Opinion¹⁷:

"The sudden retirement of the judges concerned raises doubts as to the independence and hence the quality of the courts. The concept of judicial independence involves two aspects: one external and one internal. Of relevance in the present case is the external aspect of independence, which requires that the body to be adjudicated must be protected from external interference or pressure which might jeopardise its independence in the prosecution by its members of disputes brought before it. The executive cannot therefore remove judges from office during their term of office. This is certainly not a question of executive action against individual judges or procedures. However, it does involve serious interference in the administration of justice, namely the removal of a considerable number of judges who, under the previous rules, were still required to serve up to eight more years. For this interference to be relevant, it is not necessary that there is a real intention to influence the administration of justice: even any appearance of influence must be avoided".

The Court of Luxembourg (First Chamber)¹⁸ finds that that new Hungarian national legislation governing the legal status of judges and prosecutors establishes a difference in treatment which is either not appropriate or not necessary to achieve the objectives pursued, in breach of the obligations arising from Directive 2000/78/EC.

The Persistence of the Democratic Deficit

More recently, the European Parliament has denounced Hungary's authoritarian drift in its report of 4 July 2018, which calls on the Council, under Article 7 of the Treaty of European Union (TEU), notes the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, set out in Article 2 TEU: respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

Indeed, the European Parliament has expressed its reservations about the situation in Hungary; in particular, it is alarmed at the functioning of the constitutional system and, in particular, the electoral system, the independence of the judiciary and other institutions, the rights of judges, corruption and conflicts of interest, data protection and privacy, freedom of expression, academic freedom, freedom of religion, freedom of association, the right to equal treatment, the rights of persons belonging to minorities and the fundamental rights of immigrants, asylum seekers and refugees, and economic and social rights.

¹⁷ECLI:EU:C:2012:602, paragraphs 54, 55 and 56.

¹⁸Judgement of 6 November 2012, *European Commission v. Hungary*, C-286/12, ECLI:EU:C:2012:687.

The European Commission decided in 2018 to bring Hungary before the CJEU for the so-called "Stop Soros Law"¹⁹, for preventing non-EU nationals with permanent residence permits from exercising their profession of veterinary surgeon and for the situation of immigrants in the transit zones near the border with Serbia, the latter case having recently been ruled on by the CJEU (judgment of 14 May 2020), which found that Hungary was illegally detaining asylum seekers in the transit zone of its southern border with Serbia and demanded their release, as their detention was in breach of EU law²⁰.

Finally, Orbán has taken advantage of the coronavirus to promote a legal amendment, approved by the Hungarian Parliament on 30 March 2020, on the basis of the article of the Constitution that allows the Government to be given extraordinary powers in the event of a "situation of danger" (Article 53), which authorises the Executive to govern by decree for an indefinite period. The new law allows the Hungarian leader to extend indefinitely the state of emergency without the need for parliamentary approval, to suspend the application of certain laws by decree, to deviate from legal provisions and to block the dissemination of information "that may hinder or make impossible the defence" against the epidemic, setting penalties of up to five years in prison for the dissemination of false news.

Nine press organisations had asked the EU to oppose the adoption of this law. The Office of the United Nations High Commissioner for Human Rights has said it "accompanies political developments in Hungary with concern" and the Council of Europe has warned that "an indefinite and uncontrolled state of emergency cannot guarantee respect for the fundamental principles of democracy"²¹.

The Constitutional Crisis in Poland

The Blockade of the Constitutional Court

In Poland, what started as a dispute over the integration of the Constitutional Court (CC) has turned into a constitutional and political crisis that threatens the rule of law in this Central European Republic of 38 million inhabitants²².

According to the Polish Constitution of 1997 (Article 194), the CC is composed of fifteen judges individually elected by the Chamber of Deputies (the Sejm) for a period of nine years. In 2015, the Sejm, dominated by the then

¹⁹This law provides for prison sentences for individuals and organizations that assist asylum seekers and allows asylum seekers to be locked up in transit zones, with severe restrictions on applying for protection.

²⁰That decision was preceded by the judgement of the Grand Chamber of the European Court of Human Rights (ECHR) in the case *Ilias and Ahmed v. Hungary* of November 2019, in which the Strasbourg Court found that Hungary was in breach of its human rights obligations by returning asylum-seekers to Serbia without considering the danger of inhuman and degrading treatment they might face upon arrival. The CJEU goes one step further than the ECHR, stating that the confinement in the Röszke transit zone, in the absence of a formal decision and due process safeguards, constitutes arbitrary detention.

²¹See Sánchez (2020).

²²See Chmielarz-Grochal, Sulkowski & Laskowska (2017).

governing party (Civic Platform), passes, on the one hand, a new Constitutional Court Act (CCA) on 25 June (four months before the legislative elections that would give victory to Law and Justice), and, on the other hand, appoints - according to the new CCA- five new magistrates (called 'the October judges') in the last parliamentary session before the elections, on 8 October: three to replace the judges whose terms were due to end in November 2015, and two to replace the judges who were due to end in December. The CC reviewed both decisions (the CCA and the election of the five judges) and concluded that the 7th Sejm legislature should have elected three judges -not five, as it did- and the incoming one (8th legislature) should have elected the other two.

Days after the first session of the 8th legislature, the Sejm, already with the numerical strength of the absolute majority of Freedom and Justice, reformed the CCA (November 19) to undo the changes made to it by the Civic Platform and its allies in June 2015, annulled those five appointments (November 25) and proceeded to elect five new candidates (December 2).

In other words, the Sejm filled the two vacancies that legally corresponded to it, but exceeded its powers by annulling the election of three legally elected judges during the 7th legislature. The CC declared this reform unconstitutional (sentence of 9 March 2016), and although its opinion was clear and obliged the President of the country to swear in the three judges mentioned (those appointed in the 7th legislature), the TC refused and appointed the five new ones. The Prime Minister also refused to publish the judgement.

The Sejm then approved a new Constitutional Court Act on 22 July 2016, which was in turn declared partially unconstitutional by the CC (sentence of 9 August 2016), annulling twelve points of the new law, such as the possibility for four judges to block court verdicts, or the obligation of the CC to hear cases in the chronological order of the filing date.

The Definitive Assault on the Judiciary

Under the Act of 8 December 2017, the retirement age of judges of the Polish Supreme Court (SC) has been brought forward from 70 to 65, a new Disciplinary Chamber is created within the SC to resolve issues related to the disciplinary regime, forced retirement and labour and social security law of judges (previously decided by the Social Chamber of the Court) and the system for appointing members of the National Council of the Judiciary (NCJ), the body responsible for ensuring the independence of the judiciary.

With this reform, the judge of the SC who had reached retirement age could only continue in office if he requested to continue in this situation between six and twelve months before reaching the age of 65 and also had the favourable opinion of the NCJ; but the reform also applied to judges who had reached the age of 65 before its entry into force (03/04/2018) or in the following three months, as they would be in retirement after three months if, within the month following the entry into force, they did not present the favourable opinion of the NCJ.

Since the SC was to be renewed with new appointments and the continuation of the active pensioners was to be reported favourably, this law closed the circle of

political control of the SC by modifying the system of appointment of the members of the NCJ, and by extension of the judges of the SC. In fact, if before this legal reform 15 out of 25 members of the NCJ were judges elected by all judges, after the reform these 15 judges were to be elected by the Sejm's Diet (a kind of commission), i.e. by the Legislative (although 2,000 citizens or 25 serving judges could propose candidates to the Diet).

The Court of Justice of the European Union (CJEU), having suspended (in a historic decision of 19 October 2018) this reform provisionally, ordering that all the judges concerned be retained in their posts and that any new appointments be made, declares in its judgment of 24 June 2019 (Case C-619/18 *European Commission v. Poland*) that by lowering the retirement age of judges and applying it to serving judges, as well as conferring on the President of the Republic the discretionary prerogative to extend the term of office, the irrevocability and independence of the judges of the SC had been infringed and Poland had failed to fulfil its obligations under Article 19 TEU, paragraphs 1 and 2; a judgment requiring Poland to reverse the retroactive application of the retirement age.

In a further legislative twist in its attack on judicial independence, on 20 December 2019 the Sejm adopted a law tightening the disciplinary regime for judges by providing, among other measures, for sanctions -including dismissal- for those judges who question the legality of appointments resulting from judicial reform and for those who engage in public activities that may undermine the position of judicial neutrality. Under this Act, the organs of judicial self-government lose the right to express their opinions on candidates for judges and senior judicial posts, as well as the right to adopt critical decisions on changes in the administration of justice. In addition, judges are required to disclose their membership of judicial associations and the President may correct deficiencies in the procedure for appointing judges.

But for the second time in just 18 months (8 April 2020), the CJEU has suspended the reform as a precautionary measure with immediate effect, thus paralysing the application by the Disciplinary Chamber of the SC (created, as we know, in the 2017 reform) of the new disciplinary regime to the country's judges, in that "the objective circumstances in which the tribunal in question was formed, its characteristics and the means by which its members were appointed are likely to create legitimate doubts as to its imperviousness to outside factors, in particular the direct or indirect influence of the legislature and the executive"²³.

²³As the latest episode of tension between the European Union and Poland, the Education, Audiovisual and Culture Executive Agency (EACEA) announced on June 29th 2020 that it has blocked European funding to six Polish cities in the framework of the "Europe for Citizens" project's European town-twinning programme, because of their rejection of the LGBTI community of homosexuals, transgender and intersex people.

Main Signs of Democratic Degradation in Spain

Despite the fact that the most rigorous rankings on the quality of democracy in the world place Spain among the "full democracies"²⁴, this country is involved in a deep crisis (territorial, economic, political and judicial institutions), and this is reflected in the surveys, which have made the actions of our political representatives one of the main concerns for citizens. We will now briefly address the three main causes of the current deterioration of Spanish democracy²⁵: the secessionist challenge of the Catalan authorities to the constitutional order, the intensification of political interference in the justice system and the relegation of the role of Parliament.

The Putsch Attempt in Catalonia

Based on Kelsen's classic definition of a putsch or coup d'état: "A revolution, in the broad sense of the word, which also includes a coup d'état, is any non-legitimate modification of the Constitution - that is, not carried out in accordance with the constitutional provisions - or its replacement by another. From a legal point of view, it makes no difference whether this change in the legal situation is carried out by an act of force directed against the legitimate government, or by members of the same government; whether it is carried out by a movement of the masses of the people, or by a small group of individuals. What is decisive is that the valid Constitution be modified in a way, or replaced entirely by a new Constitution, which is not prescribed in the previously valid Constitution²⁶, what happened in Catalonia in the autumn of 2017 cannot be described in any other way: the Parliament of this Autonomous Community approved Law 19/2017, of 6 September, on the referendum on self-determination, and Law 20/2017, of 8 September, on the legal and foundational transitory nature of the Republic, which the Spanish Constitutional Court (CC) declared unconstitutional and null²⁷; the regional government, chaired by Carles Puigdemont, convened by Decree 139/2017 of 6 September (also annulled by the TC²⁸), held on October 1²⁹; and on 10 October the Catalan Parliament approved (with 70 votes in favour, 10 against and 2 abstentions, out of a total of 135 regional MPs) the "Declaration of Independence".

²⁴The *Democracy Index 2019* places Spain in nineteenth position among the 167 states analysed, the same position it holds in the *Rule of Law Index 2020* (in this case, out of 128 countries).

²⁵We leave for another moment the analysis of other problems of interest for the Spanish democratic quality, such as the suspension of transparency - at least of the "passive" transparency - during the state of alarm, because the Government has not processed the requests of transparency formulated by the citizens and organizations of the civil society.

²⁶Kelsen (1960) at 138.

²⁷Judgements 114/2017 of 17 October and 124/2017 of 8 November, respectively.

²⁸Judgement 122/2017 of 31 October 2017.

²⁹In a letter dated 2 June 2017 addressed to Puigdemont, the President of the Venice Commission rejected the invitation for that institution to cooperate in the holding of the referendum on 1 October. As explained in that letter, the alleged cooperation of the Catalan authorities with the Commission had to be carried out with the agreement of the Spanish authorities and also recalled that the Venice Commission has placed particular emphasis on the need for any referendum to be conducted in full compliance with the Constitution and applicable laws.

That ineffective declaration of independence was the result of a legislative process that was carried out in open and stubborn opposition to all the requirements formulated by the Constitutional Court, and did not take practical shape given that on October 27, the Senate Plenary issued a ruling, at the proposal of the Government of the Nation in application of the provisions of Article 155 of the Constitution -and following the mandatory requirement of that article which was not met- an agreement approving the measures necessary to guarantee compliance with constitutional obligations and for the protection of the general interest by the Government of Catalonia and providing for the immediate dismissal of all members of the regional Government, the dissolution of the Parliament of Catalonia and the calling of regional elections. Puigdemont and other members of that regional government fled Spain, while other secessionist leaders -including the vice-president, Oriol Junqueras- were sentenced two years later by the Supreme Court, among other crimes, for sedition³⁰.

The Catalan secessionist process continues today to be a serious factor in the DE legitimization and destabilization not only of Spanish democracy, but of the European Union as a whole³¹, mainly for two reasons. Firstly, because it is promoted by public authorities that form part of the same Spanish State (the Catalan government and the majority of political groups represented in the autonomous legislative chamber), against the constitutional and legal order of that State and without unilateralism and disobedience having been ruled out throughout this time. Secondly, because the secessionist political parties condition the current Spanish Government in the Congress of Deputies.

Indeed, those disloyal parties³² allowed the motion of censure that made the Secretary General of the Socialist Party (PSOE), Pedro Sanchez, President of the Government on June 1, 2018, and on which the stability of the current PSOE-Podemos coalition government largely depends, in exchange for controversial concessions such as the constitution of the so-called "Table of dialogue on the political conflict in Catalonia" agreed upon between the Sanchez government and the Catalan government presided over by Quim Torra, generating a bitter controversy and political and legal controversy, especially when Torra was condemned in December 2019 by the Catalan High Court of Justice to not hold any public office for 18 months for disobedience³³, which led the Central Electoral Board to disqualify Torra as an autonomous deputy and president of Catalonia, since being a member of the Catalan Parliament is an indispensable requirement for being the head of the autonomous government.

³⁰Judgement (Criminal Chamber) Nr. 459/2019 of 14 October 2019.

³¹Although there is no doubt that it has had a negative effect on Spain's image abroad, in no case is it a question of structural damage, it also demonstrates the confidence of the EU institutions and Member States, reiterated in public and in private, in the Spanish constitutional system.

³²PDeCAT (today JxCAT), the party of Puigdemont, and ERC, chaired by Oriol Junqueras.

³³For failing to comply with the order of 11 March 2019 of the Central Electoral Board to remove the secessionist flags and symbols from the public buildings.

The Aggravation of the Politicization of Justice

The Group of States against Corruption (GRECO), body dependent on the Council of Europe to improve the capacity of Member States in the fight against corruption, warned Spain again at the end of 2019 that the "Achilles' heel of the Spanish judiciary: its alleged politicisation" remains unaddressed. These are the words of the report by the body that analyses the degree of compliance with which the Spanish State has responded to one of the most important recommendations that GRECO itself made to him six years ago: to change the way in which the judges' governing body, the General Council of the Judiciary (CGPJ), is elected, without taking any action in this regard for the time being.

Article 122.3 of the Spanish Constitution (CE) provides for a system of appointment of the members of the CGPJ in which there must be 12 judges or magistrates (plus the President, who also presides over the Supreme Court), and 8 jurists of recognised prestige proposed by the Congress of Deputies (4) and by the Senate (4), elected by a reinforced majority of 3/5. The first model of selection of the members of the CGPJ that was adopted, that contained in the Organic Law 1/1980, regulating this body, established a system of selection of the 12 judicial members by the judges themselves. But since the reform of the Organic Law of the Judiciary of 1985 (LOPJ), with a PSOE government, the selection of all the members of the Council corresponds to the Chambers.

The Constitutional Court (Judgment 108/1986 of 29 July, legal argument Nr. 13) admitted that the 12 judicial members did not necessarily have to be appointed by judges and magistrates, although it also recognised that "there is a risk that the Chambers, when making their proposals, forget the objective pursued and, acting with criteria that are admissible in other areas, but not in this one, attend only to the division of forces existing within their own ranks and distribute the positions to be filled among the different parties, in proportion to the parliamentary strength of these. The logic of the state of parties pushes towards actions of this kind, but this same logic obliges us to keep certain spheres of power out of the party struggle"³⁴.

When the Popular Party (PP) came to power in the 6th legislature, it wanted to amend the issue, seeking a different Council configuration. This opened a process that in 2001 gave birth to the model currently in force. A mechanism that leaves the election of the 12 candidates for "judicial" members in the hands of the Chambers, but from a list of 36 candidates presented by the associations of judges and non-associated judges³⁵. The mixed technique that was established was the result of the agreement that the two big parties -PP and PSOE- managed to reach on this matter, receiving the consequent criticism for their bilateralism.

This model has ended up promoting a system of agreements between the majority parties in the Spanish Parliament on who is to form part of such a body, with a selection criterion that seems to be based more on reasons of loyalty to the political party than on indisputable prestige, proven independence or professional excellence. In short, it is a question of establishing political distribution quotas, with the judicial associations having enormous power to influence the appointment

³⁴See Serra Cristóbal (2013).

³⁵LO 2/2001, of 28 June on the composition of the CGPJ, amending LOPJ.

of the members of the court. Although the members elected by the Chambers do not receive an imperative mandate from them, there does seem to be a subliminal mandate that responds to their ideological or associative convictions. Thus, as long as we do not have a truly independent CGPJ, as the fathers of the Constitution intended by reserving 12 of the 20 seats on the Council for judges and magistrates of all judicial categories, it will be virtually impossible to eliminate the continuing shadow of suspicion that hangs over the judiciary as a whole.

Furthermore, the Spanish Government intends to reduce by the end of 2020 the majority required for the Parliament to elect the 12 judicial members of the CGPJ, dangerously increasing its control over the Judiciary³⁶.

Spain has also failed to comply with the GRECO Report's recommendation to establish objective evaluation criteria for the appointment of senior members of the judiciary, in order to ensure that the process of selecting them does not give rise to any doubts as to their independence, impartiality and transparency. In this regard, it should be recalled that in our country the appointment of senior officials in the judicial career is generally made by competition³⁷. All these positions are covered at the proposal of the CGPJ, in accordance with the provisions of Regulation 1/2010 of 25 February, which regulates the provision of discretionally appointed positions in judicial bodies. In addition, 1/3 of the positions in the Civil and Criminal Chambers of the High Courts of Justice of the Autonomous Communities will be filled by jurists of recognised prestige appointed at the proposal of the GPCJ from a list of three candidates presented by the regional parliament (art. 330.4 LOPJ)³⁸.

As regards the Public Prosecutor's Office, the appointment earlier this year of Dolores Delgado, former Minister of Justice in the Pedro Sanchez government³⁹, as State Attorney General was received by all the prosecutors' associations as "a slap in the face to the independence and impartiality of the Public Prosecutor's Office", and provoked an unprecedented situation in the CGPJ, which approved with a very narrow majority the suitability report required by law before his official appointment. Moreover, the Government's announcement of its intention to reform the Criminal Procedure Act (LECr) so that prosecutors will conduct criminal cases instead of investigating judges has given rise to great doubts, precisely because it is not accompanied by any other reform to strengthen the independence of the Public Prosecutor's Office⁴⁰.

³⁶To this end, the political parties in government, PSOE and UP, presented a proposal to reform the LOPJ on 13 October 2020 in the Congress of Deputies.

³⁷Except for the Presidents of the Courts, High Courts of Justice of the Autonomous Communities and National Court, Presidents of Chambers and Supreme Court Judges (article 326.2 LOPJ).

³⁸See Gutiérrez (2020).

³⁹As a Minister, Dolores Delgado was disapproved three times by Parliament in the previous legislature.

⁴⁰As the associations of judges and prosecutors have warned, it would be devastating for the rule of law if the Government, through the Attorney General, could remove an investigating prosecutor (for investigating, for example, one whom the Government does not want investigated), or give orders to a prosecutor to investigate or not, an eventuality which, under the current Organic Statute of the Public Prosecutor's Office, is now possible.

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The recent dismissal, agreed by the Minister of the Interior, of Colonel Perez de los Cobos as the head of the Guardia Civil in Madrid for refusing to leak to the Director General of this body the judicial proceedings on 8-M⁴¹ also represents an attack on judicial independence, as the proposal for dismissal itself has shown, which justifies the deposition "for not informing the development of investigations and actions of the Guardia Civil, within the operational and judicial police framework, for purposes of knowledge", because when the police act as the judicial police, they depend on the judges and the Government cannot -nor should it- know the content of the judicial investigations, especially if the investigation affects someone related to the Government on which these police officers organically -but not functionally - depend⁴².

The Undermining of Parliamentary Work

The fragmented composition of the Spanish Parliament as a result of the various general elections held since 2015⁴³, marked by the decline of the two large majority parties and the emergence of new political formations, now decisive for governance, together with the recent declaration of the state of alarm - and its successive extensions - for the management of the health crisis situation caused by the Covid-19⁴⁴, has profoundly affected all parliamentary functions, especially the legislative power and the control function of the Government, reducing the main role that, in any democracy, must be played by Parliament. Because of its undoubted impact on the principle of the division of powers, we would highlight the following practical trends:

a) The new parliamentary arithmetic has produced a complete turnaround in the practice of the power of the Government of the Nation, recognised in article 134.6 CE, to oppose the parliamentary processing of those bills that imply an increase in credits or a decrease in budgetary income (known as the power of "budgetary veto"), since from its almost total disappearance it has become a frequent use. In fact, once the first post-constitutional times had passed, successive Executives had generally avoided making use of this veto power, mainly due to its

⁴¹The Court of Instruction number 51 of Madrid agreed to investigate the Government Delegate in Madrid for an alleged crime of administrative prevarication and injuries due to professional negligence for allowing the march for the International Women's Day last March 8, despite the warning's days before the European Centre for Disease Control and Prevention about the risk of infection by coronavirus. Finally, the case has been provisionally closed.

⁴²See Articles 126 CE, 548.1 LOPJ and 283 LECr.

⁴³Since that year, four general elections have been held: 20 December 2015, 26 June 2016, 28 April and 10 November 2019.

⁴⁴The Government declared the state of alarm in Royal Decree 463/2020 of 14 March and has extended it, with the authorisation of the Congress of Deputies, on six occasions, ending on 21 June.

political cost, preferring to act through their parliamentary majority to reject the consideration of this type of proposals in the corresponding plenary session.

However, the Government headed by Mariano Rajoy vetoed, during his term in the 12th legislature (from July 2016 to May 2018⁴⁵), 45 bills presented by the opposition in the Congress of Deputies; two of these vetoes were, in turn, rejected by the Congressional Bureau, which prompted the Executive to bring a conflict of powers before the Constitutional Court, which was resolved in 2018 in favour of Congress⁴⁶. The government of Pedro Sanchez, for its part, although it began by reconsidering the vetoes made by the previous government on 18 opposition bills, in the current legislature (the 14th) it has vetoed 3 bills⁴⁷.

b) Although it was to be expected that greater vigour in our parliamentary system associated with parliamentary fragmentation would correct - at least in part - the abuse of decree-laws that the government has been making since the 1978 Constitution came into force, and which has turned this exceptional source of law into an almost ordinary way of legislating, the abuse of this type of regulation reaches truly alarming proportions in the new multi-party context. Thus, in the period between 1979 and 2015, the volume of State decree-laws accounted for 29% of all legislation⁴⁸; in the 12th legislature (from July 2016 to March 2019) the decree-laws represented more than 60% (specifically 61.53%) of all legislative production; and during the 13th legislature (the most fleeting in democracy, from May to September 2019) and the time we have been in the current legislature⁴⁹ no law has been passed and yet 28 decree-laws have been validated (7 in the 13th legislature and 21 in the current one), so that, for the first time since the Spanish Constitution came into force, the decree-laws represent 100 % of the national legislation⁵⁰.

To all this we must add another fact that is also worrying: a large number of these decree-laws (specifically, the last 6 decree-laws approved during the 12th legislature and the 7 decree-laws validated in the 13th) have been approved by the Permanent Delegation of the Congress of Deputies, which is reprehensible for two reasons.

Firstly, because -with some exceptions⁵¹- these decree-laws -described by the Government itself as "social"- do not seem to respond to an urgent and extraordinary need. Although it is true that this is not the first time that the Permanent Delegation of the Congress has validated decree-laws, it is no less true that the vast majority

⁴⁵Until his resignation on June 1, 2018, due to the approval of the motion of censure that brought Pedro Sanchez to the presidency, the first motion of censure since the restoration of democracy in 1978.

⁴⁶Judgements 34/2018 of 12 April 2018 and 44/2018 of 26 April 2018.

⁴⁷Sources: Own elaboration, with final date of data consultation July 30th 2020, through the website of the Congress of Deputies: <http://www.congreso.es>.

⁴⁸See Martín Rebollo (2015).

⁴⁹Sources: Own elaboration, with final date of data consultation 31 August 2020, through the website of the Congress of Deputies: <http://www.congreso.es>

⁵⁰The same trend, although less pronounced, can be observed in all nine Autonomous Communities with this type of legislation.

⁵¹For example, the decree law on 'brexit', which was originally due to take effect on 30 March 2019.

of those previously validated were aimed at adopting urgent measures to alleviate the damage caused by disasters.

Secondly, because it is only possible for the Permanent Delegation of the Congress to validate or repeal them, without being able to process them as bills, so that they are incorporated into the system without the possibility of correcting, through a real legislative procedure with the intervention of the two Chambers that make up the Parliament, the defects of constitutionality that they may eventually suffer.

Finally, the reprehensible use of the singular law decree has been maintained, if not accentuated, that is, for the regulation of particular cases. With the figure of the special decree law, not only does the Government occupy the space proper to Parliament, dictating rules that affect rights and obligations in general outside the narrow constitutional parameters in which this situation was considered justified, but, even more seriously, it does so without the guarantee or counterweight of control by the judiciary, thus violating not only the principle of separation of powers, but also the fundamental right to effective judicial protection⁵².

c) Article 116 CE, after giving the Government to declare the state of alarm for a maximum period of fifteen days, entrusts the Congress of Deputies with the tasks of controlling the scope and content of the Government's declaration and, if necessary, agreeing to extend it. However, the parliamentary activity before and after the Government's declaration of the state of alarm on the occasion of Covid-19⁵³ has not been normal or habitual, since it was affected by a series of decisions of the Presidency and the Bureau of the Congress of Deputies which, in our opinion, violated the legal system⁵⁴.

Thus, on March 10, 2020, the President of Congress, after meeting with the Board of Spokespersons, agreed to dispense with the plenary session of that week. Likewise, that same day, the Bureau of the House agreed to cancel all parliamentary activity, with the exception of the appearance of the Minister of Health, Salvador Illa, before the Health and Consumer Affairs Commission to report on the evolution of the coronavirus. Finally, two days later the Bureau suspended the parliamentary activity of the Congress of Deputies for two weeks, including the aforementioned appearance. It is also completely anomalous that in the week of

⁵²To illustrate this, we will cite two examples of recent unique decree-laws: Royal Decree-Law 17/2019, of 22 November, which adopts urgent measures for the necessary adaptation of remuneration parameters affecting the electricity system and which responds to the process of ceasing the activity of thermal generation plants; and Royal Decree-Law 10/2018, of 24 August, which modifies Law 52/2007, of 26 December, which recognises and extends rights and establishes measures in favour of those who suffered persecution or violence during the Civil War and the Dictatorship.

⁵³Royal Decree 463/2020, of 14 March, declaring the state of alarm for the management of the health crisis situation caused by COVID-19 (BOE no. 67, of 14 March 2020).

⁵⁴Specifically, article 116.5 CE, according to which the functioning of the Congress of Deputies, as well as that of the other constitutional powers of the State, cannot be interrupted during the state of alarm; articles 1.4 and 8. 1 of Organic Law 4/1981, of 1 June, on the states of alarm, exception and siege, according to which the declaration of the state of alarm "does not interrupt the normal functioning of the constitutional powers of the State", and "the government shall inform the Congress of Deputies of the declaration of the state of alarm and shall provide it with the information required"; and articles 31, 32 and 162.1 and 3 of the Regulations of the Congress.

23-29 March the Permanent Commissions were not meeting to monitor the actions of the Ministers to whom the Royal Decree declaring the state of alarm granted important powers⁵⁵.

In short, neither the Spanish Constitution, nor Organic Law 4/1981 of 1 June 1981, regulate states of alarm, exception or siege, and the Regulations of the Congress of Deputies do not empower the Presidency or the Bureau of the Congress of Deputies to agree to the suspension, interruption or postponement of parliamentary activity, including the activity of controlling the Government⁵⁶. As Professor Manuel Aragón recently stated:

*"The declaration of the state of alarm cannot legitimise the annulment of the Government's parliamentary control, as it seems to be happening, because the Constitution establishes that the functioning of the Chambers cannot be interrupted during the validity of any of the exceptional states, and because the absence of provisions in the regulations of the Congress and the Senate for circumstances such as the present one is not an obstacle for the presidents of the respective Chambers to use the power they have to substitute those regulations in cases of omission and to adapt the parliamentary functioning to the limitations on meetings or even their non-presential modalities that the situation requires"*⁵⁷.

Conclusions

Democracy today, in its essence, remains the government of the people. However, democracy is an instrument at the service of a noble purpose: to ensure the freedom and equality of all citizens by guaranteeing the civil, political and social rights contained in constitutional texts. Among the great principles on which this instrument rests are the division of powers, which consists, substantially, in the fact that power is not concentrated, but that the various functions of the State are exercised by different bodies, which, moreover, control each other.

Well, the interference - increasingly aggressive - of the Executive and, to a lesser extent, of the Legislative in material spheres that should be reserved exclusively to the Judiciary, violates this principle and, for this reason, distorts the idea of democracy. When political power takes over the different organs of the State and prevents the possibility of controlling each other, the guarantee for the good democratic functioning that the division of powers entails is deactivated, and the whole edifice of the rule of law is seriously damaged. That is precisely what, for some time now, is happening in European Union countries such as Hungary, Poland and, to a lesser extent, Spain, as we have analysed in this paper.

The sixteenth goal of Agenda 2030 (Peace, justice and strong institutions) includes among its goals those of "promoting the rule of law at national and international levels and ensuring equal access to justice for all", as well as "building effective and transparent institutions at all levels that are accountable",

⁵⁵Permanent Commissions on Defence, Transport, Mobility and the Urban Agenda, Home Affairs, Justice and Foreign Affairs, among others.

⁵⁶See Alonso Prada (2020).

⁵⁷Aragón Reyes (2020).

with the understanding that the rule of law and development are significantly interlinked and mutually reinforcing, and thus essential for sustainable development at national and international levels. The political and institutional degradation of democracy in Europe, in some cases exacerbated by the current health emergency caused by the Covid-19 pandemic, is an obstacle to progress in the respect for human rights which inspires Agenda 2030, by undermining the positive influence which consolidated democracies must have on the well-being of mankind.

The constitutional regime, in short, is not only articulated in a series of legal and political institutions and mechanisms (rule of law, political representation, equality before the law, counterbalance of powers, guarantee of fundamental rights and public liberties), but it also requires ideological and mental guidelines, a political culture that favours, for example, mutual respect, coexistence between different people, rejection of any kind of discrimination, peaceful alternation in power or the renunciation of taking justice into one's own hands, to mention some of the most elementary references.

Avoiding the alarming democratic degradation that we have denounced here, therefore, not only requires effective monitoring by the international community and more than necessary institutional reforms that make these principles respected and prevent arbitrariness by the public powers, but also a media network and an educational system that incorporates the explanation and promotion of such values and principles, that is, that makes the citizen aware and a defender of constitutionalism and liberal democracy.

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