OBSERVATION REPORT

SPECIAL CAUSE NUM. 20907/2017

SPANISH SUPREME COURT

BARCELONA – 2019

The authors of this report are M**ercè Barceló i Serramalera** and **Iñaki Rivera Beiras**, members of International Trial Watch.

This report has been possible thanks to the work of the rapporteurs of International Trial Watch: **Rachele Stroppa**, **Joan Baeza Morral** and **Laura Moreno Yuste**.

Acknowledgments:

ITW wishes to thank, in the first place, the thousands of anonymous citizens who, with their donations, have made this project possible. Secondly, all the volunteers who have lined up at the door of the Supreme Court so that the observers could enter as public, since the Court did not recognize them any status. Thirdly, the organisations that have given us their support and disseminated our project.

In fourth and last place, the dozens of observers who, without any remuneration, have come from all over the world to participate in this task of observation, monitoring and denunciation.

Barcelona, 9th July 2019

International Trial Watch, platform of observation of Special Cause num. 20907/2017, issues this report at the moment in which the said cause has been submitted for judgment.

The object of this report is the oral trial held before the Supreme Court, although elements stemming from the phase of instruction and the prospective investigations that started in 2012 have also been taken into account.

The considerations resulting from this observation are grouped into two blocks: those referring to the substantive aspects of the case and those related to the procedural aspects.

The following organizations have adhered to this report:

• ACDDH – Associació Catalana per a la Defensa dels Drets Humans (Barcelona)

• AED – Avocats Européens Démocrates/European Democratic Lawyers

• ALAZ – Asociación Libre de Abogados y Abogadas de Zaragoza (Zaragoza)

• Antigone – Associazione per i diritti e le garanzie nel sistema penale (Italia)

• APDHA – Asociación Pro Derechos Humanos de Andalucía (Andalucía)

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• IDHC – Institut de Drets Humans de Catalunya (Barcelona)

• Irídia – Centre per la Defensa dels Drets Humans (Barcelona)

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• OSPDH – Observatorio del Sistema Penal y los Derechos Humanos (Barcelona)

• Salhaketa Nafarroa (Navarra)

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I. SUBSTANTIVE ASPECTS

In this case, twelve people are tried for very different facts but, according to the prosecutions, they share a common goal: the holding of a referendum on self-determination in Catalonia on 1st October 2017. This is what makes nine of them to be charged, among other offenses[1], with the crimes of rebellion (State Prosecutor's Office and popular accusation) and sedition (State Attorney's Office).

However, the common charges of rebellion or sedition should not make one lose sight that what has been judged are three very different actions:

- The participation in meetings and public demonstrations and, occasionally, their convening by leading activists of two civil society organisations[2].

- The processing of several resolutions and laws, with their corresponding debates, declared unconstitutional afterwards, by who enjoyed parliamentary inviolability for the exercise of her parliamentary functions[3].

- The organization of a referendum on self-determination[4].

Although they share points in common (as it will be seen in section A), each group of actions generates legal problems of very different nature (analysed in the section B).

[1] The offenses of criminal organization, embezzlement and disobedience are also present in the case, but this report will refer exclusively, in its substantive part, to the crimes of rebellion and sedition insofar as they are the more serious crimes and those that the defendants in prison have in common. The remaining offenses will be addressed in the Academic report promoted by ITW, and which will be released once the ruling is available.

[2] Jordi Cuixart: rebellion (State Prosecutor, popular prosecution-VOX); sedition (State's Attorney). Jordi Sànchez: rebellion (State Prosecutor, VOX); sedition (State's Attorney).

[3] Carme Forcadell: rebellion (State Prosecutor, VOX); sedition (State's Attorney).

[4] Oriol Junqueras, Jordi Turull, Raül Romeva, Joaquim Forn, Josep Rull and Dolors Bassa: rebellion (State Prosecutor, VOX) or sedition (State's Attorney), in addition to embezzlement. Not covered by the charges of rebellion / sedition, there would be Carles Mundó, Meritxell Borràs and Santiago Vila (embezzlement and grave disobedience).

A. COMMON ISSUES

1. Stemming from the cause

a) The decriminalization of illegal referendums

Since the passing of the Organic Law 2/2005, of 22nd June, of modification of the Criminal Code, and the deletion from it of articles 506 bis and 521 bis, the convening of electoral processes or popular consultations by means of a referendum, by those lacking the competencies to do so, as well as the facilitation, promotion or assurance of the realization of such processes or behaviours was decriminalised.

Consequently, and leaving aside that participation in such consultations has never been criminalized, the decriminalization of its facilitation, promotion, assurance or its convening is the result, as stated in the Preamble of the aforementioned Organic Law, of behaviours that do not have the sufficient entity to deserve a criminal reproach. Criminal law, as will be emphasized later, is governed by the principles of minimum intervention and proportionality, as indicated by the Constitutional Court.

Consequently, if the legislator decided that these conducts cannot be criminally prosecuted and having the legal system sufficient mechanisms to ensure that legality and democratic institutions are respected, its criminalization by means of alternative criminal offenses (rebellion, sedition) constitutes a convoluted misuse of the law as well as a breach of the mentioned principles of minimum intervention and proportionality.

b) The principle of minimum intervention in criminal law

The principle of minimum intervention, in addition, indicates the unfairness of the application of criminal law when the tools that could have curbed the behaviour have not been used *a priori* and it is later on that a decision is taken to pursue them criminally. Therefore, if the instruments at the service of the State to avoid criminal behaviours have not been activated, it is that such behaviours were beyond the remit of criminal law and are not prosecutable later on.

If throughout September-October 2017 there was an uprising in Catalonia (mandatory action in the offense of rebellion or sedition), the mechanism of constitutional defence provided for by the current legal system to counter it would have been the declaration of the state of siege in accordance with Article 32.1 of Organic Law 4/1981 on the States of Alarm, Exception and Siege: "*When an insurrection or act of force occurs against or threatens the sovereignty or independence of Spain, its territorial integrity or the constitutional order, which cannot be resolved by other means, the Government [...] may propose to the Congress of Deputies the declaration of the state of siege*".

Yet such a mechanism was never activated at the time. If it was not deemed necessary at that moment -which points to the inexistence of an uprising or insurrection- the criminal law is now not a valid instrument to prosecute the events of September-October 2017, in accordance with the principle of minimal intervention. The opposite may indicate an incrimination of political dissent.

c) The basic elements of the crimes of rebellion and sedition

The defining behaviour of the crime of rebellion (article 472 CC[5]) consists in raising publicly and violently in order to achieve any of the seven goals considered in the offense (all of them the destruction of the core of the constitutional order). As per the crime of sedition (Article 544 CC) it also consists of rising, in a public and tumultuous way, to prevent the application of laws or to prevent any authority, official corporation or public official from exercising their legitimate functions or the compliance of their decisions or administrative or judicial resolutions.

The defining action of both offenses is "to rise", which could be defined as an "uprising", a "mutiny" or an "insurrection" against the legitimate order or authorities. Therefore, before assessing if such an uprising is "public", "violent" or "tumultuous", it must be first verified whether the uprising did take place.

However, neither the indictment nor the writs of conclusions of the prosecutions have been able to point out when and where such an uprising took place. In all of them, the confusion is clear as they do not indicate –thus contravening the accusatory principle- whether such an uprising occurred on a specific date, if it lasted a few days or persisted even weeks (all without the state of siege being enacted). Without specifying when the uprising took place, the concepts of "violence", "environmental violence", "normative violence" or "tumult" are devoid of any legal validity to assess the existence of the criminal offenses of rebellion or sedition.

Even so, neither "violence" nor "tumultuous" actions (which, in any case, would also require violence) have been proven. In this obstinate idea of arguing the existence of violence, the State Prosecutor's Office has focused, essentially, on the events that occurred on 20th September and 1st and 3rd October. However, it has not been able to demonstrate that during those days there was a state of generalized violence -neither physical or psychic. At the most, it has only been possible to demonstrate that, in the thousands of concentrations of those days, "faces of hatred" were seen, that some "spits" and sporadic kicks, as well as a fence or empty bottles and cans were thrown.

Likewise, the damage suffered on 20th September by three Civil Guard cars parked outside the Ministry of the Economy has been highlighted as one of the elements of that supposed violence, even though it has not been possible to attribute such damage to a specific person. Still, even accepting all these facts, it would still be true that those alleged violent and individual behaviours that occurred before, during or after those days carried out by persons other than the defendants are not attributable to them since, in criminal law, the principle of objective liability does not apply. Instead, the subjective principle for one's acts does.

It neither been proved the prosecutor's thesis that the accused, with the ultimate goal of achieving the independence of Catalonia, envisaged the use of violence by means of the violent or tumultuous action of thousands of citizens, instigated by them, and the

[5] Translator's note: Criminal Code.

collaboration of the Mossos[6] (*intent*). Nor has it been proven the twisted argument that, although the use of violence was not considered from the beginning, the decision to continue with the call [of the referendum], assumed the risk of violent acts (*recklessness*).

Furthermore, by definition, "*a rebellion is carried out by a group that has the purpose of illegitimately using weapons of war or explosives with the purpose of producing the destruction of the constitutional order*" (CCJ[7] 199/1987). Yet no trace of weapons or explosives has been found in those days (the basic offense of rebellion requires "weapons", and the aggravated one mentions the actions of *wielding* and *showing* them with the intention of intimidating. Likewise, in both cases, the action of surrendering the weapons acts as an attenuating circumstance).

There is no "tumult" either, necessary element in the offense sedition requested by the State Attorney's Office, as no evidence has been provided that indicates that the defendants have induced, provoked or led any tumultuous uprising -which would also require violence- with the purpose of avoiding compliance with the law -unless it is interpreted that promoting the exercise of the fundamental right of assembly or expression is enough to incur in this criminal offense.

Therefore, the requisites of the offense are not fulfilled. Nor are the necessary behaviours currently prosecuted able to achieve the goals of each offense. Indeed, as is well established, the criminal consummation in both types exists regardless of the effective realization of its purposes. It is enough to objectively adopt the behaviour to achieve them at the time of realization: they are crimes of mere activity and of abstract danger. That is precisely why the behaviour individually considered must be potentially capable of subverting the established political order. However, it has not been established the objective suitability of the *ex-ante* behaviour to the achievement of a serious alteration in the normal functioning of certain state institutions (sedition), or the derogation, suspension or modification of the Constitution or the independence of Catalonia (rebellion).

The accusations have not in any way been able to establish that the (not proven) uprising was potentially capable of assuming its ends. In actual fact, this could not be established because the instrument (the referendum) that would have made possible the end pursued (the independence of Catalonia) was objectively incapable of generating any effect: the effects of the referendum were deactivated by the Constitutional Court, first through the suspension of the call, later by the declaration of unconstitutionality. It was so objectively incapable of achieving such goal that, as already mentioned, there was no activation of the state of siege provided for in Article 116 SC[8].

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[6] Translator's note: Mossos d'Esquadra is the name of the Catalan Police force.

[7] Translator's note: Constitutional Court Judgment

[8] Translator's Note: Spanish Constitution.

For all the reasons above, the prosecuted conduct must be considered nonconforming by virtue of the absence of a risk for the protected legal asset in each of these two crimes, as the Higher Regional Court of Schleswig-Holstein also considered -for this precise reason- in its resolution of 12th July 2018, in which the extradition of Mr. Puigdemont for the crime of rebellion was declared inadmissible (as no violence could be established and failure to comply with the requirement of suitability with § 81 StGB[9]).

2. Stemming from the oral trial

a) Interpretation of the criminal offenses in the presence of fundamental rights

According to the constitutional perspective, when fundamental rights are alleged in a criminal case as a cover for the defendants' actions, a concrete order of examination is imposed between the former and the criminal offenses, in favour of fundamental rights. Indeed, as the Constitutional Court has repeatedly stated, it is not possible to commit a crime while being protected by a fundamental right. As such, before examining whether the elements of the criminal offense exist, it must be verified that the prosecutions actions were not covered by a fundamental right.

In this regard, both the indictment, the interrogations of the prosecutions and their writs of conclusions have shown a complete disregard for this interpretative imperative stemming from the constitutional supremacy, thus ignoring the presence of fundamental rights in the trial and deliberately criminalising behaviours protected by them.

b) Chilling effect of the prosecutions' interrogation on fundamental rights

Not only has the presence of fundamental rights in the process been disregarded, but any reference to them has sought to discourage their exercise. Thus, from the prosecutions' interrogations it would follow that to meet and shout, to sing "*They shall not pass*" or "*We will vote*", to look to police agents with disdain, to show disapproval for police charges, or to insult police officers once these have taken place, are the defining elements of the crimes of sedition or rebellion.

The strategy of the prosecution also implies an interpretation of the concept of "violence" that would have severe consequences for the criminalization of protest or dissent and the limitation of the free exercise of fundamental rights and freedoms (an issue that will be addressed in more detail in point B).

Obviously, the negative effects of this treatment of fundamental rights are not limited to the trial's defendants as they can extend well beyond it if the judgment of the Supreme Court does not correct this approach, unfitting in a democratic context, as the European Court of Human Rights has repeatedly pointed out.

[9] Translator's Note: German Criminal Code.

c) Lack of proportionality between the seriousness of the prosecution's charges and the evidence provided in court

Besides the weak arguments of the prosecutions and the fact that they can only be upheld on a criminal law alien to the Criminal Code in force by twisting the law to create new criminal offenses (on the basis, for instance, of the new concept of "normative violence" or "coup d'état"), the evidence submitted in court, with all its limitations (see *II. Procedural aspects*), has been equally unable to prove many of the facts described in the writings of accusation. There has been no sign of the bloody violence on which the prosecutions sustain their accusations, nor has the evidence provided by them complied with the necessary rigor, given the seriousness of the accusations: decontextualized mails, anonymous diaries, repeated witnesses, undated videos; an endless sequence of grave errors indicative of malpractice as well as of an ironclad belief that the accusation, whether properly or poorly argued, would prevail.

In short, as it will be addressed in the second part of this report, the evidence provided in court do not objectively allow the construction of the crimes of rebellion or sedition.

Meanwhile, nine of the defendants have been kept in provisional detention.

B. SPECIFIC ISSUES

1. Participation in public meetings and demonstrations and, occasionally, call or invitation to participate in them: the cases of J. Cuixart and J. Sànchez

a) Factual basis of the accusation

According to the indictment, Mr. Cuixart and Mr. Sànchez would be the "social" branch -together with the "parliamentary" and the "executive" ones- of a strategy -called the *process*- perfectly planned, concerted and organized to break the constitutional order with a view to achieve the independence of Catalonia.

Thus, and according to this indictment, these defendants are prosecuted for having the "(...) *capacity to mobilize hundreds of thousands of followers of the pro-independence organisations, through their speeches in the media, and multiple messages on digital platforms with thousands of followers, they drove a mass of force that would face the police obligation to prevent the vote, to withdraw the electoral material, and reach the vote count on 1st October*"(2nd legal reasoning).

b) Position of the prosecutions during the oral phase of the trial

In the interrogation, the prosecutions have ignored the fact that the defendants may have been exercising fundamental rights and have taken a dissuasive stance as regards their exercise. The intention of the evidence submitted -especially witnesses- was to demonstrate the convening power of these two defendants in a context of "*environmental violence*." At no time have they been linked to an uprising (the date and place of which are unknown).

c) Final writs of conclusions

The final writs of conclusions do not substantially alter the accusation. It is still considered that, in the organizational framework of the rebellion/sedition, these defendants were in charge of the "*social*" strategy, playing a crucial role through popular mobilization as an instrument of pressure to force the State to capitulate against the birth of the new republic.

Also in this phase of the trial the prosecutions fail to specify the time and place of the uprising or the relationship of these two defendants with it.

d) Legal issues

i. The legal problem that arises with Mr. Cuixart and Mr. Sànchez is whether the acts that the trial has established that they carried out -the calling of meetings and demonstrations- were covered by the exercise of fundamental rights, in particular by ideological freedom, the right of assembly and freedom of expression. Should that be the case, and given what has already been said, their behaviour could not be any criminal offense.

ii. Leaving aside the fact that many of the demonstrations and protest rallies alluded to during the trial were not convened (or not only) by the defendants, the fact is that any call from them, as it has been seen, was to a responsible exercise of the freedom of assembly in the sense of Article 21 of the Constitution (that is, a "*peaceful and unarmed assembly*").

iii. In accordance with this constitutional precept, the call to protest against the arrests of government and administration officials in peaceful demonstrations, or the call to take part in the multitudinous expression of the citizens' position on the future of Catalonia as a political community on 1st October, are only calls to freely express ideology, devoid of any link to a hypothetical uprising. Being in favour of independence and calling for the realisation of an independent state is something protected by the Spanish Constitution, according to countless judgments by the Constitutional Court on the concept of "militant democracy" (CCJs 48/2003, 5/2004, 235/2007, 12/2008 and 42/2014, to name but a few), and it remains being so when it is jointly done, for example, symbolically through a voting, in public, peaceful and festive gatherings.

iv. If there were any violent episode in the demonstrations called by the defendants, the direct culprit is the one who caused it, both from a criminal perspective (in which prevails the subjective liability principle for one's actions, and not that of objective liability), as from the perspective of administrative disciplinary law (in accordance with Article 30.1 of the Organic Law 4/2015).

v. As a result, what can be observed in their behaviour is not any criminally punishable fact but an exercise of fundamental rights.

2. The processing of several resolutions and laws, subsequently declared unconstitutional, by someone enjoying parliamentary inviolability in the exercise of her parliamentary functions: the case of C. Forcadell)

a) Factual basis of the accusation

According to the prosecutions, Ms. Forcadell would be the "parliamentary" branch of the rebel or seditious strategy. Thus, the indictment states that Ms. Forcadell "*has had a key role since the first moments of the independence process as president of the ANC*[10]*. Later on, she assumed the presidency of the* [Catalan] *Parliament,* [a position] *from which she submitted to the members of parliament the approval of the supporting legislation that serves as a legitimating alibi to the* [pro-independence] *process, even against the repeated prohibitions and requirements by the Constitutional Court. In any case, her participation has gone hand in hand with the violence manifested in the last phases of the action. She was present at the demonstration on 20th September. Aware of its consequences, she called to the mobilization in the rally that, the following day, took place in front of the Superior Court of Justice of Catalonia, as she also did in succeeding public declarations. She received the international observers who arrived in Catalonia during the days and hours prior to the vote, to try to reinforce the vote's image of legitimacy, and finally put the parliamentary institution at the service of the violent result obtained with the referendum and the proclamation of the republic*" (2nd legal reasoning).

b) Position of the prosecutions during the oral phase of the trial

The prosecutions have tried to prove that Ms. Forcadell, as President of the Parliament's Bureau, was obliged to interfere in the legislative process, and examine the content (and not just the form) of any initiatives that could challenge the instructions of the Constitutional Court to prevent or paralyze any initiative ignoring or circumventing its rulings (dictated through a writ of execution). Very specifically, she should have paralysed the processing of the laws adopted, respectively, on 6th and 7th September 2017.

c) Final writs of conclusions

The final writs of conclusions do not substantially modify the accusation. They still consider that, in the organisational framework of the rebellion/sedition, this defendant was in charge of the "parliamentary" strategy, responsible for allowing the processing and facilitating the approval of resolutions, laws and legal norms openly

[10] Translator's note: Founded in 2012, Assamblea Nacional Catalana (ANC) is one of the biggest and most influential non-partisan, civil society organisation working for Catalan independence. ANC is best known for the organisation of the yearly pro-independence demonstrations convened every 11th September.

unconstitutional, as a normative coverage of the new State that would replace the current democratic legality.

d) Legal issues

i. Mrs. Forcadell is incriminated as President of the Parliament's Bureau but, also and significantly, for having been president of the ANC and discharge the functions inherent to this position (as calling for demonstrations, for example). If this is not the case, then it impossible to understand why she is not being prosecuted before the Superior Court of Justice of Catalonia like the rest of her parliamentary colleagues who discharged an identical role to hers. From this perspective, Mrs. Forcadell behaviour, as president of the ANC before becoming a member of Parliament, would be protected by the same fundamental rights as those discussed in the previous point in relation to Mr. Cuixart and Mr. Sànchez.

ii. Regarding her role as president of the Parliament's Bureau, the existing fundamental legal problem is the extent to which she had an obligation to paralyse the processing of parliamentary initiatives because their content was contrary to the original mandate of the Constitutional Court to cease any support "*To the opening of a constituent process in Catalonia aimed at the creation of the future Catalan Constitution and the independent Catalan state in the form of a republic*" (declared unconstitutional by CCJ 259/2015).

iii. The question, then, is simple: to what extent can a constitutional court order a legislative power which resolutions, motions, propositions or projects it can or cannot process? And the answer is univocal: a constitutional court cannot order a parliamentary bureau what it should or should not process - not only because in a State governed by the rule of law the division of powers must be respected, or because the Spanish legal system does not have any rules in this sense, but because it is also supported by the constitutional jurisprudence itself.

iv. Indeed, the Constitutional Court, from the CCJ 95/1994 and 124/1995 onwards, has argued that parliamentary bureaus should circumscribe themselves to a mere verification of the formal requirements necessary in accordance to the regulations, without it being necessary for the bureau to make any assessment of the content of the initiative or draft (also CCJ 38/1999, 40/2003 and 208/2003, among others). The Court has consistently considered that the debate in the plenary of the Parliament plays an important representative role and that it is precisely what allows parliamentarians to exercise their right and defend or reject initiatives, or discuss their adequacy to the constitutional order, as this is what allows citizens to get to know the opinion and decisions of their representatives on a specific issue.

Otherwise, according to consolidated doctrine, the bureau would be taking a political decision which belongs only to the Plenary, under a pretended technical judgment; and, from a democratic perspective, it would be blocking the possibility of holding a public debate between the different political forces with parliamentary representation. Further, and along the same lines, in CCJs 108/2016 and 109/2016, the Court indicated that Article 23.2 SC does not contain some fundamental right to the constitutionality of parliamentary initiatives and refused to grant protection to members

of parliament arguing a violation of the mentioned precept by a bureau that had processed an initiative manifestly contrary to the Constitution.

v. However, on one single occasion -CCJ 46/2018- some nuance is introduced into the Court's previous consolidated position (note that this sentence is subsequent to the facts indicted): the possibility that the Bureau's decision to admit a proposal may constitute a manifest contravention of decisions by the Constitutional Court. In these cases, in which the Bureau is expressly compelled to comply with the rulings of the Court -as a result of the adoption of enforcement measures issued in accordance with Art. 92 LOTC[11]. Indeed, in that case, and according to the aforementioned ruling, a direct impact would take place on the *ius in officium* of the members of the Parliament, so that the powers of the Bureau regarding the admission to processing new initiatives would be restricted by the imposition of a specific duty to paralyse them, in view not to violate the fundamental rights of the parliamentarians. It would be, then, the blatant breach of this duty - and not the material content of the concrete initiative- what would determine that the Bureau, upon admitting the proposal, could incur in the aforementioned constitutional violations.

This doctrine, however, does not alter the one initially exposed, which, moreover, is assumed by this last judgement, but it does indicate when the door can be opened on the grounds of a possible violation of Art. 23 SC- to parliamentarians who disagree with the admission of initiatives by the governing body of the Parliament. Such violation can only by determined by the Court if it also considers that that specific admission contravenes any of its commands.

vi. It could not be interpreted otherwise. The parliamentary inviolability proclaimed in the Constitution (Art. 71 SC) and in the Statutes of Autonomy[12], is a special characterisation of Parliaments as organs of democratic representation, not susceptible to being interfered with by any of the other powers of the State. It is, thus, a legal supra-category that encompasses many others, including the inviolability and immunity of parliamentarians. Likewise, it includes the principle of self-organization of Parliaments, their exclusive authority to dictate its own norms of operation, and the Bureau's and the plenary's unique ascendancy regarding all the functions related to the exercise of its powers.

As such, there is no superior jurisdiction that may impose Parliaments a mandate of any kind. When the Constitutional Court intervenes, it does so, either through the preliminary appeal of unconstitutionality -and against some types of norms-, or by challenging the laws once they have entered into force. Also, the activity of parliamentary bodies is legally controllable on the occasion of parliamentary decisions that may affect the right of participation of parliamentarians when these rights of representation may be violated by the Parliament itself.

[11] Translator's note: Organic Law on the Constitutional Court.

[12] Translator's note: The Statute of Autonomy is the highest-ranking norm foreseen in the Spanish Constitution, which regulates the competences and self-government institutions of Spanish regions.

Consequently, the Constitutional Court cannot impose to a Bureau, by definition and because its constitutive law does not allow it -not even after the reform of the LOTC in 2015- the inadmissibility of certain types of parliamentary initiatives. It can, however, determine *ex post* -and if such a decision is appealed- whether that admission was a violation of fundamental rights.

This is how the scope of CCJ 46/2018 should be interpreted: in relation to the legal system as a whole, and especially to the Constitution and the division of powers that it establishes. To interpret it differently would be to expressly recognize a system of government by the judges.

vii. Another consequence of the above, is that the members of the Bureau or of the Parliament's plenary, cannot be criminally prosecuted in case of not fulfilling that mandate of the Constitutional Court.

Indeed, the inviolability is a parliamentarian's prerogative aimed at ensuring the independence of Parliament from the other powers of the State. At the state level, Art. 71 SC establishes that deputies and senators (and also members of regional parliaments in accordance to their respective Statutes of Autonomy) will enjoy inviolability for the opinions expressed in the exercise of their functions. Such opinions obviously include the votes they cast (CCJ 36/1981). Inviolability, according to the Constitutional Court, prevents the opening of any type of procedure against them. Therefore, it does not only guarantee the legal non-responsibility of parliamentarians for the opinions and votes cast in the exercise of their functions, but it also constitutes a true privilege against the very initiation of any procedure against them; it is an absolute limit to the jurisdiction, whatever the content of the opinion or the vote cast (CCJ 30/1997). This inveterate constitutional doctrine, as is well known, has not been respected in the case of Ms. Forcadell.

viii. From the previous legal framework it follows that:

- The prosecutions have not specified when and where the uprising took place, even less the direct relation of Mrs. Forcadell with this uprising, unless the currently non-existent concept of "normative violence" in the Criminal Code is used as the Public Prosecutor's Office has been forced to do in order to criminalise the behaviour of the former president of the Parliament.

- The parliamentary initiatives that were processed with the favourable votes of the defendant (and of other members of the Bureau) did not fit the purposes foreseen by the crimes of rebellion or sedition, since all these initiatives were suspended and/or annulled by the Constitutional Court.

- Ms. Forcadell exercised her fundamental right to perform her public office (Art. 23.2 SC), issuing -as President of the Bureau- her favourable vote to process the parliamentary initiatives for which she is prosecuted, being as it is that the Bureau cannot be asked, according to a recurrent constitutional jurisprudence, to examine the content of such parliamentary initiatives.

- Ms Forcadell, as a member of the Bureau and guarantor of the inviolability of the Parliament against the interference from other State powers, scrupulously and at all times fulfilled with her parliamentary function, which was also protected by constitutional jurisprudence on the scope of the supervisory power of the Bureau regarding the different parliamentary initiatives.

- Parliamentary inviolability protected Ms. Forcadell against the opening of any procedure against her by the issuance of her opinion or vote in the performance of her functions.

3. The organization of a referendum of self-determination and the criminal prosecution of political ideas: the case of O. Junqueras, J. Forn, J. Turull, R. Romeva, J. Rull, and D. Bassa

a) Factual basis of the accusation

According to the prosecutions, these defendants were the "executive" branch of the rebellious or seditious strategy, perfectly planned, concerted and organized, together with the already covered "social" and "parliamentary" branch.

The essential mission of the Government of the Generalitat, as reported in the indictment, was the convening and holding of a referendum on self-determination that would legitimise internationally the project of territorial segregation, as well as the creation and development of parallel state structures that could replace the legally constituted state organs in all fields (Treasury, Social Security, Judicial Power, etc.), including the external action outside the state territory.

The indictment states that "*the meticulous design of the strategy with which in was intended to imposed independence in the territory, allows us to consider that the main responsible for these events always considered that the process would end up resorting to the instrumental use of force.* (...) *Even more so if this was the only available mechanism to overcome the opposition of the State, which was inevitable in accordance with the legal system. In any case, and even if the content of the indictment is considered not to provide an absolute justification for that initial intention, the account of the events that has been described shows that those who made major contributions to the core of the event after 20th September, necessarily imagined that the violent fanaticism of many of their followers would be unleashed. And the persistence in their criminal determination with that knowledge, shows their willingness to incorporate the use of force into the mechanism to achieve a secession to which they did not want to renounce. It was decided to use the power of the masses to, with it, face a police action that they knew aimed at making the referendum impossible. That would allow the vote to go ahead, enabling and favouring, not only that the results of the referendum would allow the proclamation of independence as provided for in Law 20/2017, but also that the rule of law surrendered to the violent determination of a part of the population that threatened to expand. In this way, the analysed crime is fully attributable to those who, knowing the unavoidable social outbreak inherent in the*

facts, incorporated it into their criminal behaviour and persisted in making essential contributions that would promote the illicit behaviour displayed."

b) Position of the prosecutions during the oral phase of the trial

The prosecutions have tried to demonstrate that the defendants charged with rebellion/sedition were aware of the violence that could be triggered the completion of the process. As a government they should have called off the vote of 1st October.

All the questions in the interrogation phase have been aimed at demonstrating the violence of the demonstrators at the rallies that took place in the months of September and October 2017 in Catalonia. None of the writings, however, specify when or where the uprising took place, a necessary element in the crimes of rebellion and sedition.

c) Final writs of conclusions

The final writs of conclusions do not substantially modify the accusation. They still consider that, in the organisational framework of the rebellion/sedition, these defendants were in charge of the "governmental" strategy to organise and hold the referendum and declare the independence of the territory of Catalonia.

d) Legal issues

i. The legal problem posed by the charges against the members of the Government of the Generalitat for the crimes of rebellion/sedition is to which extent this accusation responds to the persecution of a certain political idea, given that, as it has been proven in trial, the facts do not fit the description of such crimes, at least according to the current Criminal Code.

ii. Thus, to secure a condemnatory judgment based on what the prosecution considers criminal conducts constitutive of an uprising (without date or place) -such as massive concentrations of peaceful protest-, it would be necessary to redefine these crimes outside the current Criminal Code in order to add to them, *in malam partem*, elements such as "environmental violence" or "normative violence or uprising" and dispensing with the current ones. This would contravene the principle of criminal legality (Article 25.1 of the Constitution).

iii. Indeed, without uprising there is no rebellion or sedition. And, in the case at hand, neither the processing order, nor any writing by the prosecution has been able to specify when and where such an uprising took place. With such basis, talking about "violence" or "tumult" is superfluous. Moreover, the prosecution has not been demonstrated in trial neither the "violence" nor "tumultuous" actions (which, in any case, would also require violence). At most, the existing evidence has only been able to prove that, the hundreds of concentrations that took place in Catalonia between 20th September and 27th October 2017, provoked isolated and odd incidents, such as shouting, insults, damages to three cars, sit-ins, spitting, kicking or the throwing of some objects. However, as it has already been pointed out, criminal law is governed by

the principle of subjective responsibility for one's actions. As such it is not possible to attribute such alleged sporadic and spontaneous violent acts to the defendants.

iv. Therefore, the defining elements of these criminal offenses as currently defined are not present in this case. Nor has it been proven the indictment and the prosecutions' thesis according to which the defendants considered the use of violence through the violent or tumultuous action of thousands of citizens instigated by the defendants and with the collaboration of the Mossos (*intent*). Even less so the twisted argument that, although the use of violence was not considered from the beginning, the decision was taken to go ahead with the call to vote, thus assuming the risk of violent acts (*recklessness*).

v. Moreover, the persecuted behaviours were not suitable to achieve the ends sought by neither of these crimes. The people the defendants allegedly launched to the streets to rise, were citizens who gathered by their own will to protest against several police and judicial actions that were taking place (e.g. arrests and searches without a warrant), without preventing police officers to carry out their mission. Or -on 1st October- they voluntarily went to express their opinion on the political future of Catalonia in an act devoid of legal validity and incapable of generating the destruction of the core of the constitutional order, nor of preventing the public authority from fulfilling its mission.

vi. Despite all this, the accusation of rebellion / sedition[13] remains substantially unchanged after the analysis of the evidence in court, and once it has been established that there was no uprising, no physical or psychic violence, no violent tumults, no weapons, nor the possibility to achieve those crimes' ends. There was, however, and according to the jurisprudence of the European Court of Human Rights, a massive exercise of fundamental rights (meeting, expression, free ideology) by part of the citizenry. And yes, there was, also, police violence particularly bloody on that 1st October. But the prosecutions have not analysed the excesses occurred in the compliance with a duty that did not respect the criteria of congruence, opportunity and proportionality, nor the right of assembly, nor the Order by the Superior Court of Justice [of Catalonia] of 27th September, thus turning the citizens' exercise of fundamental rights (meeting, expression, protest, free ideology) into an illegal activity that required the police intervention and against which there is no place for a legitimate defence (Chilling effect).

vii. In accordance with the principle of criminal legality (Article 25.1 of the Constitution), the prosecutions' obstinacy in maintaining an impossible accusation allows us to conclude what was pointed out at the beginning: although the conduct of this third group of defendants was not directly covered by the exercise of fundamental rights, as in the previous cases examined, it does not constitute the criminal conduct required by the current Criminal Code's descriptions of these two offenses. Likewise, convening popular consultations by those who are not competent to do so (or facilitate, promote or ensure the realization of such electoral processes) is not criminally prosecutable. All

[13] As already pointed out, the analysis of the other charges will be done in detail in the academic report to be issued once the judgment has been issued.

this corroborates that this criminal process has been a process against the political ideas of the defendants.

II. PROCEDURAL ASPECTS

1. Right to be judged by the ordinary judged predetermined by law
(Art. 24.2 SC and art. 6.1 ECHR)

The Constitutional Court has repeatedly understood that this right requires: i) that the court has been previously created, respecting the principle of legal reservation in the matter; ii) that this law has vested the court with jurisdiction prior to the act triggering the judicial process; iii) that the court's organic and procedural regime does not allow it to be qualified as an ad hoc or exceptional judge; and iv) that the composition of the judicial body be determined by law, following in each specific case the procedure legally established for the appointment of its members.

The problems relating to the jurisdiction of the courts that have intervened in this process are numerous and of diverse nature. Thus, in the first place, it should be noted the lack of jurisdiction of the National High Court. This court understood that sedition, when committed with the objective of changing the territorial organisation of the State, must be considered as an offense against the form of government, which would give it jurisdiction on the matter. However, this is an erroneous interpretation of the legislation because the jurisdiction of the National High Court is limited to certain specific offenses, which do not include sedition nor rebellion. A ruling of 2nd December 2008 by the Plenary of that same court determined that the crime of rebellion has never fallen under its jurisdiction.

Neither can it be argued that the transfer of the case to the Supreme Court can remedy the previous irregularities, since, from a strict criminal guarantee, the alleged jurisdiction of a subsequent court does not correct the nullity originated from the lack of competence of the preceding body.

Moreover, neither is the Supreme Court the judge predetermined by law since, in accordance with the current legislation (Article 57.2 Statute of Autonomy of Catalonia), the acts committed in the territory of Catalonia in relation to *aforados*[14] must be judged by the Superior Court of Justice of Catalonia.

Moreover, the problem of the violation of the right to the ordinary judge predetermined by the law is aggravated in the case of individuals lacking the condition of *aforados* whose prosecution is affected by those who may be. Another aggravating factor is the impossibility of having a right to a second hearing in case of a possible appeal, since the only and possible appeal before the Constitutional Court, neither constitutes an ordinary appeal of a second hearing, nor can it prevent the conclusiveness of a judgment that the Supreme Court will dictate in a single hearing (in a serious breach of the provisions of Article 13 ECHR on the "right to an effective remedy" and in Article 2 of Additional Protocol No. 7).

[14] Translator's note: In Spain's legal System, individuals entitled by law to a special jurisdiction on the grounds of their public functions.

Likewise, the parties' unawareness of the criteria used to elect the members of the Court could represent - together with the question of the objective jurisdiction of the Supreme Court itself to prosecute these facts - another aspect of the violation of the right to the ordinary judge predetermined by law, taking into account that this has been a court created *ad hoc* for this process (formally referred to as a "*special*" case), against whose decisions it is not possible to file any ordinary appeal whatsoever.

Another issue linked to the matter of the "natural judge" is the one referred to the right to express oneself in one's own language (Article 3 SC and Article 9.1 of the European Charter of Regional or Minority Languages) and the translation problems arisen in the oral sessions of the trial. Indeed, problems of a linguistic nature have not been alien to the examined cause. As has been well known, the entire oral phase of the trial has been conducted in Spanish, against political and social leaders from Catalonia. From the first moment, it became clear that the declaration in Catalan of any witnesses would not be allowed (a right that could have been exercised if the process had been held before the ordinary judge predetermined by law[15]), and that in the case of the defendants, only a successive, non-simultaneous translation would be made available. All the defendants have renounced this system because, in their opinion, it lacks spontaneity to the answers and eliminates fluency. In practice, it has implied the renunciation of the use of one's own language. Most of the defendants complained about this and considered that this could violate the right to equality of procedural arms and affect their right of defence, as well as their linguistic rights[16].

2. The fragmentation of judicial investigations

The breakdown of this criminal proceeding in four different cases (before the Supreme Court, before the National Court, before the Superior Court of Justice of Catalonia and before the Court of Instruction No. 13 of Barcelona) causes very important problems that affect fundamental rights and procedural guarantees recognized in Art. 24 SC, both in their nature as right to effective judicial protection (section 1), as well as guarantees of the guarantees of "due process" and the specific guarantees of the criminal process (ap 2). Indeed, this fragmentation has prevented the defence teams of the defendants in the process before the Supreme Court, to know, for instance, the actions carried out before the Court of Instruction no. 13 of Barcelona. Yet it is precisely from the latter that the prosecutions have drawn a large number of elements that they have subsequently submitted as documentary evidence that was not previously known or challenged by the defences. On the contrary, the defence teams

[15] See ITW weekly reports from Week 2 onwards.

[16] Indeed, the defendants protested the fact that they could not express themselves in their language, criticizing the option given by the Court to use consecutive translations. Some defendants (Mr. Turull, session 4 on 19th February, Ms. Forcadell, Session 7 on 26th February), also regretted that economic or technical reasons were claimed in order not to enable simultaneous translation. A similar situation has occurred with many witnesses who have had to submit to this system. Just to offer one relevant instance, it is worth mentioning the incident in week 14 with a witness who was threatened by the President of the Court to be expelled from it -and to be disciplinary and criminally prosecuted-, for having submitted a letter requesting to declare in Catalan.

claim that the prosecutions have indeed been part in those other procedures thus triggering yet another breach of the principle of equality between the parties, given that defences have not been able to know, assess and challenge documents on various police investigations, or to examine the cause to assess if some of its elements could be favourable to their clients.

Specifically, during the week devoted to documentary evidence, for instance on Monday 27th May, the defences expressly alleged this violation, pointing out that many documents which admission was requested by the prosecutions (and accepted by the Court), came from other jurisdictional bodies in which the parties had not appeared as such. In particular, the proceedings of the Superior Court of Justice of Catalonia were evoked (pointing out lawsuits and police investigations), as were those of the Central Court of Instruction no. 3 and those of the Court of Instruction no. 13 of Barcelona. In this last case, the defences emphasized that:

> i) they had not been able to obtain documents from it; ii) that documents have been obtained behind the backs of the lawyers of defendant tried in the Supreme Court; iii) that that is a general and prospective cause that, among other measures, allowed many telephone interventions that would be used later on; iv) that that cause contains numerous police records that the defences do not know, in more than sixty-eight volumes of police investigations; v) that many unidentified tweets and emails on which the chain of custody or technical validation of authenticity were proven to have been compromised; and that vi) for all these reasons, these elements "contaminate" any subsequent evidence.

Everything being pointed out also implies that people who should have taken part in these proceedings as defendants, have done so as witnesses. This has generated distortions in the order of depositions (which has been manifest for several weeks, as it was the case, in particular, of the Major of the Mossos d'Esquadra, Mr. Trapero, who should have declared as defendant before, for instance, Mr. De los Cobos did[17]). Another possible attempt to the right of defence could stem from a limitation to the questioning of witnesses by the non-proponent parties and, ultimately, a limitation to the opportunity to establish the truth of the facts (especially during week 5).

Moreover, this situation has led to actions and/or statements that could affect witnesses who decided to avail themselves of the right not to testify against themselves. The references in one of the interrogations to Ms. Núria Llorach, among others (investigated by the Court of Instruction no. 13 of Barcelona), are a good sample of it (as was seen in week 6 of the sessions of the oral phase of the trial).

[17] Translator's Note: Mr Trapero was the highest-ranking official in charge of the Catalan police (Mossos d'Esquadra) until its removal by the Spanish Government on 28th October 2017. He stands accused of sedition in a case before the National High Court. Mr. De los Cobos was the Civil Guard Colonel appointed by the Spanish Government to coordinate and oversee the joint police operations against the voting on 1st October 2017 and has been extremely critical about the role of the Catalan Police.

3. The impartiality of the Court in relation to the right to a fair trial
(Article 24.2 SE and 6.1 CEDH)

When examining the possible breach of the right to an impartial tribunal, the European Court of Human Rights has distinguished between a subjective and an objective dimension. If impartiality is ordinarily defined as the absence of prejudice or bias, its existence can be identified, especially in accordance with article 6.1 of the Convention, in a number of manners. Thus, the Court distinguishes, between a subjective aspect that tries to find out the personal conviction of a judge in a particular case, and an objective aspect, which refers to whether the said judge offers sufficient guarantees to dispel any reasonable doubt on the matter (Piersack v. Belgium, judgment of 1st October 1982, para. 30).

The fact that the Supreme Court adopted various decisions during the course of the process, mainly through the resolution of appeals against the decisions of the investigating judge and those affecting the personal situation of the defendants, has required the Court to take a previous position on the cause. Among the magistrates of the Court judging Special Cause 20907/2017 there are some who, according to the Agreement of 11th January 2018, is part of the "Court of Appeals" of the said resolutions.

As for the precautionary measures, the Court judging the case 20907/2017 has had to repeatedly rule on the provisional detention of the defendants, and in their resolutions in this regard insist that it "has not been in contact with the pre-trial proceedings "(Ruling of 26th July 2018 and, in very similar terms the subsequent rulings). However, the Court, on 25th October 2018, issued two orders, the first confirming the conclusion of the indictment and the second decreeing the opening of the oral trial. The impossibility of accessing the contents of the first of these Rulings -for it is has not published in the CENDOJ[18] nor does it appear in private jurisprudence databases- prevents an assessment of the scope of the control exercised by the Court and to what extent such control did involve a contact with those pre-trial proceedings.

As per the introduction of the facts in the process, the objective impartiality could be put into question given the question that, in application of art. 708-II LECrim[19], the President of the Court formulated on his own initiative to one of the witnesses (Session 17, 14th March 2019, week 5). On that occasion, the President asked the witness Mr. Trapero, about a meeting that he would have organised with both political and police authorities. The President said he was asking that question in order to "establish the facts" that had been declared by Mr. Trapero; and that with the question he wanted to know what concern had motivated the witness to call such a meeting; that is "the message he wanted to convey to those political leaders." The question denotes that the President acted as part of the process instead of remaining in the impartial role that corresponded to him. Indeed, as CCJ 13/02 has established (interpreting precisely Article 708 of the LECrim), the guarantee of objective impartiality requires, in any case,

[18] Translator's note: Centre of Judicial Documentation.

[19] Translator's note: Criminal Procedure Law.

for the judge to keep neutrality and do not engage in a covert questioning activity substituting the prosecution or amending the latter's accusatory activity.

From a double perspective, both subjective and objective, during the development of the oral phase of the trial, there have been other situations compromising the impartiality of the Court. In the session of 25th April 2019 (week 11, session 36) the President of the Court considered that it would be an "insult" against the members of the Court that the witness, a professor of Constitutional Law, would speak about the right of self-determination. In the session of 6th May 2018 (week 13, session 39), during the interrogation of a witness, one of the defence teams asked him why a certain union had encouraged to participate in the protests after 20th September 2017. Considering that she was asking the witness for a valuation of the facts from the Union's perspective, the President addressed the lawyer and urged her not to ask more questions in that regard, adding: "You're wrong in your defensive strategy, it has no transcendence."

In the session of 14th May 2019 (week 14, session 44), the President of the Court constantly conditioned the statements of witnesses, whom he interrupted to make them abandon certain considerations. The situation was all the more evident in the case of the second witness of that session. From the beginning of her deposition, the President claimed that, in view of her answers, the interrogation was not on a good track and, appealing to her condition as professor of philosophy, ordered her to dispense with any sort of assessment or evaluation of the facts. Likewise, the constant interruption to the defence lawyer Mr. Benet Salellas made him eventually desist from continuing the interrogation, to what the President spitefully retorted "much better." This also attests to the breach of the principle examined here.

Finally, the fact that two of the magistrates of the Court were, in turn, members of the Central Electoral Board, in no way helps the image of impartiality analysed. It is not stated in Agreement 55/2019, of the Central Electoral Board, that the two magistrates of the Court that were also part of this body refrained from taking part in the vote which banned the Catalan institutions from displaying yellow ribbons on their facades (week 5).

4. The right to equality of procedural arms
(art. 24.2 SC and 6.1 and 6.3 ECHR)

The concept and precision of the right to equality of arms has been widely configured by the European Court of Human Rights, which has stressed that this principle arms - one of the elements of the broadest concept of fair process requires that each of the parties in a process be offered a reasonable possibility of making their case in such conditions that it is not placed in a disadvantageous position with respect to its opponent (Case Kress v. France, judgment of 7th June 2011, para. 72).

As far as the Spanish Constitutional Court is concerned, in its CCJ 307/2005, it highlighted that the need for contradiction and balance between the parties is reinforced by the validity of the accusatory principle, which is also part of the

substantial guarantees of the process. Likewise, SCJ 677/2015 reassessed that right by pointing out that from the principle of equality of arms -logical corollary of the principle of contradiction- stems the need for the parties to have the same means of attack and defence and the same possibilities and obligations of allegation, proof and challenge, in order to avoid imbalances between their respective procedural positions. On this, there shall be no other limitations on said principle beyond the modulations or exceptions that may be established during the investigation (or indictment) phase due to the very nature of the research activity that takes place, aimed at ensuring the success of the investigation and, ultimately, the protection of the constitutional value of justice.

There are several examples of the breach of the right examined. One instance, as it will be addressed later on, is the Court's refusal to exhibit videos which would have allowed to verify the truthfulness (or not) of numerous witnesses of the prosecution. Another on is manifested by the impossibility to show witnesses documentation (other than the said videos) which are part of the case: thus, in session 9 (28th February), Mr. Cuixart's defence asked witness Mr. Zoido if on 4th October he had received a letter from the Commissioner of Human Rights of the Council of Europe. He answered affirmatively but added that he did not remember the reason for the Commissioner's concern, so the lawyer requested the display of the letter. The President of the Court did not allow it.

Weapon inequality was also revealed when, for instance, any discussion was forbidden on the twitter account belonging to the police agent under the pseudonym of "Tacitus" in social networks (cf. session 22, 26th March) despite the curious fact that tweets have been profusely referred to in this process. It was neither possible to ask the court's official (leading character in the events of 20th September 2017) about her involvement in an association (see session 12, 6th March), despite the fact that a great many witnesses were asked if they belonged to Omnium Cultural or to the ANC (see, among many others, sessions 9, 15 and 35). Likewise, on several occasions, the Court refused to suspend the trial, as requested by some defences, in order to incorporate documentation that the defence parties did not have while the prosecution did. It will be necessary, once the sentence is passed, to examine to what extent this procedural anomaly, which could break the principle of equality of arms, becomes a cause of material defencelessness and, therefore, a violation of Art. 24 SC.

5. The right of defence and the principle of contradiction

(art. 24.2 CE and 6.1 and 6.3 ECHR)

First, it is worth highlighting that all that precedes and what will follow has a clear impact on the right of defence. Thus, while what has already been covered is equally valid here, in a general way, this section focuses on some specific aspects which, although are not addressed in detail, are representative of defencelessness.

a) The impossibility of having the time and facilities to prepare the defence

Mr. Cuixart, Mr. Sànchez and Mr. Junqueras did not have the necessary time to prepare their defence immediately before being summoned before the National Court,

which decreed their imprisonment, as the United Nations Working Group on Arbitrary Detention has recently pointed out (among other elements). Beyond what is already covered in the section devoted to the deprivation of liberty (see below), it is obvious that such a burdensome measure must have impaired the preparation of the defences, which lacked the necessary time and means.

b) Long, strenuous sessions

The duration of the numerous sessions - for so many days and for over four months- of the oral phase of the trial has been exhausting for the defendants (and especially so for those deprived of their liberty). This has prevented them from following with the sufficient energies the trial and thoroughly prepare their defence. Thus, for instance, during the statements of the defendants in weeks 2 and 3, the jailed defendants were in the Court from 8 am until 10:30 pm, when the interrogation ended (second day). They arrived at jail around midnight, when there was no hot dinner and no possibility of taking a shower and having to get up at 6 o'clock the next day to return to the Court. Some defences complained that the defendants had to testify in these conditions, as they were not in their full capacities to face an interrogation for hours (See ITW Report of week 2).

Also, in weeks 5 and 6 the physical state of extreme tiredness of the defendants became visible, when leaving the Court at around 10 pm, repeating the same transfer to the prison and back to Court in the following days. Consequently, the right to a night rest of Art. 77.2 of the Penitentiary Regulation that states that “in any case, eight hours of rest will be guaranteed at night” has not been respected.

c) Arbitrary alteration of the order of witness testimony (weeks 2 and 3)

The order of the witness phase has not been followed. Instead, the choice of the order of the statements responded to whether the witness had held a political position, regardless of which party had proposed him/her.

Some defences requested, for example, that their proposed witnesses (Ms. Núria de Gispert, Mr. Gabriel, Mr. Albano Dante, Mr. Iñigo Urkullu, Mr. Ernest Benach and Mr. Juan Ignacio Zoido) testify after the prosecution witnesses in order to guarantee the defendants’ right of defence (knowing the full content of the accusation would allow to effectively challenge it).

In the courtroom, the President of the Court announced that he would agree to this request but, nevertheless, in the measure of organisation of 22nd February, these witnesses continued to appear for the following week.

d) The order in the evidence review

Regarding the order of the assessment of evidence, Article 701 LECrim establishes that the prosecution witnesses will declare first, followed by those requested by the defences.

The witnesses requested by the defendant's teams, in their role as evidence, are part of the right of defence and, therefore, it is essential to have fully concluded the accusation beforehand so that it can be challenged.

Exceptionally, the Court can modify the order of depositions by means of a reasoned decision. However, this has not been done. Rather, it has been established by means of measures of organisation by a Court's counsel. For instance, in week 3, the depositions by the top political figures took place, regardless of whether their testimony had been requested by the defences and, from the following week, the trial continued hearing the witnesses of the accusation.

In addition, the "disorder" in the appearance of witnesses prevented a focused examination of the various crimes charged by the prosecution, thus affecting the right of defence (See, among others, ITW's reports of weeks 5 and 9).

The parties were never aware of the full calendar of the trial, which greatly hindered the preparation of the interrogations (for example, in week 2). Week after week, parts of the immediate calendar were released, which limited the possibilities of deploying a defence strategy based on an established calendar.

Indeed, the unawareness of the complete calendar and of the witnesses' order made a good preparation of the defences impossible (See ITW's Report of weeks 2, 3, 6, 9 and 10).

e) The limitation of interrogations

The limitation of interrogations carried out without legal coverage and established as a "methodological guideline" by the President of the Court did not allow a party to ask a witness about matters not covered during the interrogation by the party that had proposed that witness. That was especially the case when it came to questions by the defence teams (especially, from week 3 onwards).

Furthermore, lacking the legal coverage, the President did not allow to challenge witnesses by showing them documents or videos, in what could be contravening Art. 6.3.d. ECHR in so far as this did not allow to test or question the credibility of witnesses' statements. Thus, the adversarial principle and the right to defence are undermined. This limitation affected, especially, when dealing with the possible violence of the concentrations in Catalonia from 20th September 2017 onwards (see, among others, weeks 3, 4, 7 and 8).

In addition, allowing an immediate challenging would have facilitated the possibility of detecting possible cases of false testimony, as it seemed to be the case of the statements of some civil guards and national police officers, whose expressions and wording will be discussed later (See, particularly, ITW's Reports on weeks 6, 7 and 8).

On the other hand, the President repeatedly interrupted the defence lawyers in their interrogations of witnesses, especially when they pointed to contradictions or tried to challenge their statements with other piece of evidence in the case: previous statements by witnesses, information appearing in the media, statements by

defendants or audio-visual materials. The credibility of witnesses cannot be verified rigorously if their statements cannot be confronted by means of other questions or the display of documents or audio-visual material allowing the adversarial principle characteristic of criminal jurisdiction.

f) The protection of some witnesses (of the prosecution) by the Court's president

The presidency has protected some witnesses of the accusation (See, for instance, ITW's Report on week 4). Several cases regarding the standard preliminary questions have raised controversy. It is worth evoking two of them: the first case involved Mr. Pérez de los Cobos, whom the President forgot to ask him if he had been previously prosecuted on the day of his statement. The next day the President had to correct that flaw and the witness had to acknowledge that he had indeed been prosecuted. The second instance regards Mr. Trapote, who denied any previous criminal responsibilities although the press latter revealed that he was the author of a shot in the back that killed a person in 1974. It is not a minor detail that, although very little came up in these standard preliminary questions, up to six commanders (including from the Ministry of the Interior, the National Police and the Civil Guard) had criminal records for crimes of torture and some others for crimes against the moral integrity (some having even resulted in condemnatory sentences against Spain by the ECtHR for violation of Art. 3 ECHR)[20].

6. The right to use the appropriate evidence
(Art. 24.2 CE and art. 6.1 and 6.3 ECHR)

a) The interrogation of the defendants

First off, it should be noted that Art. 6 ECHR and Art. 24 SC consider the statement by the defendants as a fundamental right, and as a means of defence. Art. 24.2 SC indicates that defendants may use the evidence appropriate to their defence and have the right not to testify against themselves, not to plead guilty and to be presumed innocent. Given that the LECrim does not regulate the interrogation of defendants in the oral phase of a trial, its development must be subjected to the guarantees indicated by the aforementioned Art. 24.2 SC.

Although the Court allowed the declaration of the defendants, there were numerous interruptions by the Public Prosecutor's Office which made it unduly difficult for them to expose their arguments. Likewise, in relation to the defendants' interrogation, it should

[20] Some of these police officers also share an obscure professional past with cases of torture, ill-treatment, death of detainees or alleged involvement in such cases. This has also been the case of a commander of the Civil Guard (TIP N29100C, secretary of the investigations linked to the 1st October Referendum), who had been prosecuted for a crime of torture, convicted in the first instance, and acquitted by the Supreme Court (and, it is worth recalling, by two members currently part of the Court). What has not been said of the witness, however, is that, finally, the ECtHR issued a conviction against Spain for violation of Art. 3 ECHR (prohibition of torture). As such, these statements may have been contaminated at source by officials involved in very dubious episodes (See ITW's Report on week 10).

be noted that, on some occasions, the Public Prosecutor's Office incurred in inaccuracies and questions that could be provocative and/or leading. It was the case of the interrogation of Mr. Rull (Session 5, 20th February), who was attributed with expressions which did not exist in a document (the confusion was acknowledged later on); or the one regarding Ms. Bassa (Session 5, 20th February), who was asked about an alleged email that does not appear in the proceedings, or about the misinterpreted content of a tweet in Catalan. During the interrogation of Mr. Forn (Session 3, 14th February), the President had to intervene on numerous occasions to ask the prosecutor to ask specific questions without inducing the defendant to adhere to the prosecution's interpretation of some documents, which fuelled the accusatory climate of the trial.

Likewise, and despite the fact that the Court, in deciding about the preliminary maters (Session 3, 14th February), had warned that interrogations could only address factual aspects and not lead to the introduction of debates on ideological elements, this did not prevent the Court from allowing the representatives of the prosecution to ask questions on the political and ideological affiliation of the defendants. Examples of this were the questions asked to Mr. Forn (Session 3, 14th February) regarding whether he was a member of Òmnium Cultural[21] and the Catalan National Assembly; and to Mr. Turull about whether he was a member of Òmnium Cultural (Session 4, 19th February). Likewise, the State Prosecutor's Office and the State Attorney repeatedly asked about attendance to demonstrations, or on whether they went to vote on the day of the referendum (for example, during the interrogation of Mr. Carles Mundó, Session 5, 5th February). All this can be interpreted as the introduction of criminalization elements in the exercise of fundamental rights.

As already stated in the section on substantive issues, during the interrogations the legitimate exercise of fundamental rights was questioned, as in the case of the interrogation of Mr. Sànchez (Session 6, 21st February), in which he was asked by the State Prosecutor's Office and the State Attorney -in a criminalizing tone- about their role in the convening of demonstrations or gatherings (it's worth recalling that the Constitution, in its article 21, guarantees the right of assembly and to demonstrate without prior authorization). It is also important to highlight that, on various occasions, such as during the interrogations of Mr. Turull (Session 6, 25th February) or those of Mr. Cuixart (Session 7, 26th February), these defendants had to request the protection from the Court due to the constant interruptions of the representatives of the State Prosecutor's Office while answering the questions. The defendants stated that they felt their right to defence was being violated.

Finally it is worth noting, without prejudice to what will be said later, that during the interrogation of Mr. Sànchez (Session 6, 25th February), in response to a request by

[21] Translator's Note: Òmnium Cultural is a cultural non-governmental organisation, with more than 125,000 members and 57 years of history. Founded in 1961, Òmnium Cultural was launched to combat the censorship and persecution of Catalan culture and to fill the gap left by the political and civil institutions of Catalonia that were forbidden by the dictatorship. Since 2010 Òmnium has organised the largest peaceful demonstrations in Europe, along with the National Assembly of Catalonia (ANC), in support of Catalonia´s right to democratically decide its own political future by means of a self-determination referendum.

the Mr. Cuixart's lawyer to show a series of videos, the president of the Court introduced what he called a "methodological guideline", key to the conduction of the rest of the oral phase of the trial. The President announced that the viewing of video-graphic evidence during interrogations of the defendants, could only take place when it was essential for the defendant to be able to answer a specific question. Otherwise, it would have to wait until the phase of documentary evidence (vid. Infra).

b) Witness evidence

i) The unequal treatment of the witnesses of the parties

Article 6.3.d ECHR establishes that every defendant has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. In the case Delcourt vs Belgium (Judgment of 17th January 1970), the European Court of Human Rights already indicated that a restrictive interpretation of Art. 6 would be contrary to the aim and purpose of the said provision, given the pre-eminence of the right to an equitable process in a democratic society. Likewise, the Court warned that such an interpretation is obligatory for both the European Court and national jurisdictions, which must take it into account in the interpretation and application of that provision. In Spain, it is Art. 24.2 SC that provides the right to use the relevant means of evidence for one's defence. The conduction of the witness evidence phase in this criminal process, however, has been severely hampered as a result of numerous incidents that are indicated below.

Such hampering of the evidence was all the greater as a result of the prohibition to immediately challenge the statement of a witnesses with the recorded images (videos) of the facts. This "methodology" imposed by the Court prevented the identification of possible contradictions, as it has already been mentioned, and caused a direct impact on the Court's assessment of the evidence. Moreover, as it has also been said, this hindered the work of the defence teams to demonstrate or challenge the credibility of witnesses – a cornerstone element of the witness evidence phase. In response to the protests of the lawyers, the President of the Court insisted, again and again, that the videos would be seen at a later time. However, the delayed visualization of the videos - separated and decontextualized from the moment in which the witnesses placed them in time and space- made them lose the effective probative value which had caused them to be proposed as evidence (See, among many others, ITW's Report on week 9).

In addition to having refused the admission of numerous witnesses requested by the defence teams, many of the statements of the defence witnesses were clearly interrupted and hindered by the President of the Court. A multitude of examples throughout the sessions could be highlighted but perhaps and for the sake of brevity, it should be cited here one of its greatest exponents: the statement of the witness Ms. Marina Garcés on 14th May. That statement exemplifies the difference in the treatment with regard to the witnesses of the accusation, the members of the State security forces or the court's official in charge of the search at the Ministry of Economy of 20th September 2017. The constant interruption of this lady showed the unequal treatment received by the parties. Even more serious was the attitude shown by the President of the Court in front of the defence lawyer Mr. Benet Salellas, to whom, as explained

above, the president snapped a (textually) "*much better*", thus ending the witness interrogation and causing an incident that calls into question the impartiality of the judge.

This contrasts with the statements of the testimonies offered, for instance, by Mr. Zoido, Mr. Rajoy or Mrs. Saénz de Santamaría[22]. In Session 8 (27th February), during the interrogation by the lawyer Mr. Melero, the witness Ms. Saénz de Santamaría evaded almost all the questions asked, to the point where the lawyer, addressing the President, stated that the witness' attitude fitted the behaviour of the reluctant witness, prohibited by Art. 460 Criminal Code. In the same vein, the lawyer Mrs. Arderiu asked the witness if she was aware that the declaration of independence was not published, and not even voted. Yet again, Ms. Sáenz evaded the question. After the intervention of the President of the Court compelling her to respond, the witness replied that she did not know if it was published. During the interrogation of Mr. Zoido (Session 9, 28th February), he failed to answer many of the questions posed by the defence teams – particularly from Ms Borràs' lawyer- claiming a lack of knowledge or not to remember whether the events had occurred or not. In the face of these witnesses, the attitude of the President of the Court was extremely forgiving, and this may again be indicative of an unequal treatment of the parties. Even more so if one takes into account that in one of the depositions by a defence witness, answers such as "*I don't know*" or "*I don't remember*" made the President to point out to the witness that this type of responses could mean prosecution for false testimony.

ii) The problem of witness communication

The problem referred to here is whether there is a loss of reliability of the statements of witnesses as a result of the possible –prior- viewing of the trial on television, and if such problem becomes more serious when the statements of the accusation witnesses – Government, Ministry of the Interior, National Police and Civil Guard authorities – take place consecutively, in successive days, in a descending hierarchical order, which may have allowed the inferior ranks to view their superiors' preceding statements.

This is important because they were prosecution witnesses extremely relevant in order to prove very serious crimes. It is worth beginning by recalling that Art. 704 LECrim indicates that the witnesses who have to testify in the oral phase of a trial will remain in a venue, until they are called to give their statements, without communication with those who had already declared or with any another person. Also, Art. 435 LECrim prohibits communication between witnesses.

However, in Session 8 (27th February), for instance, the lawyer Mr. Pina asked Mr. Rajoy if he had contacted any witness or if he had followed the previous development of the trial, because, during the interrogation of the prosecutor, he had made reference to a statement by Mrs. Sáenz in the courtroom. Mr. Rajoy, in an obvious state of discomfort, replied that he might have "read it in the digital newspapers." Likewise,

[22] Translator's Note: Mr Rajoy, Ms Saénz de Santamaría and Mr Zoido were, respectively, the Prime Minister, the Deputy Prime Minister (and overseer of the Spanish secret services), and the Minister of the Interior at the time of the events.

some witnesses have alluded to statements from previous ones with phrases like "*that's how it has been said here [at this trial],"* thus showing that they knew its content, therefore, against the guarantee of solitary confinement of witnesses during the practice of the evidence phase (particularly, at week 8). Many more examples, as next section will show, took place in successive weeks, when police officers repeated words -whether they were relevant or not- such as "tumult", "human wall", "violence" or "hate" that their superiors had introduced in the interrogation. The problem, then, points directly to the possible direction and contamination of prosecution witnesses.

The jurisprudence on this particular procedural problem states that "a witness can never hear the statement of the preceding witness." And, that is why measures of solitary confinement of witnesses in the oral phase of trial are foreseen, which -regulated in Article 366 LEC[23]- stipulates a series of particularities that open the debate about whether their infraction can be considered as a reason for nullity of the declaration or loss of credibility.

Consequently, the correct way of proceeding is the one indicated by the law, that is, that witnesses remain in solitary confinement and declare one by one, avoiding unnecessary risks that, if materialized, could undermine the value of available evidence. Certainly, this could be understood as an outdated regulation regarding the current communicational (televised) moment but, first, it is still a valid law and, second, although it could be accepted that the communication between witnesses is not a condition for their testimony's validity, it can seriously affect its credibility (see, among others, JSC 153/2005), as follows.

iii) Lack of spontaneity and use of language

The concern regarding the communication between witnesses who obtain information prior to their statement, by watching what other witnesses have said before them, became all the more serious as it was observed that police commanders, in a decreasing hierarchical order, were giving their statements after having been able to previously hear what their superiors had declared, thus being able to build, as previously noted, incriminatory accounts of doubtful spontaneity, hence contravening the jurisprudence that emanates from the LECrim (See, particularly, ITW's Reports from week 4).

Indeed, the statements of police witnesses have insistently repeated concepts and descriptions of events. Thus, having examined Sessions 8 to 34, in which fundamentally declared the highest political, ministerial and security forces ranks (Messrs. Rajoy, Nieto, Millo, Pérez de los Cobos, Gozalo, Trapote and Baena, and Ms. Sáez de Santamaría), as well as seventy-six civil guards and ninety-four national police officers, the analysis of the language used by these nearly two hundred key prosecution witnesses yields some interesting results:

- A striking coincidence in the sort of descriptions made, which calls into question the spontaneity of the vocabulary used.

[23] Translator's Note: Civil Procedure Law.

- An approximate count - and without prejudice to a more detailed view of the mentioned sessions- reveals the number of times, of repetitions, of keywords of the alleged demonstration of the defining elements of the criminal charges. Thus, the word "insurrection" is used nine times; "hate" fourteen times; the expression "barriers and/or human walls" fifteen times; the term "tumult" sixteen times; the term "active resistance" in thirty-nine occasions; the expressions "hostile, harass, harassment and hostility" in fifty-two instances; the word "mass" on ninety-one occasions; and the term "violence" one hundred and nine times (broken down into violent events and acts, and violent attitude).

- Although many of these cases are subjective assessments that in no way link the defendants to the imputed facts, they have sounded insistently in the courtroom (close to four hundred expressions) that have been creating a particular climate that, despite to numerous protests by the defences because of the stereotyped or trained nature of that language, has been allowed by the President of the Court. In fact, the use of such similar expressions, so repeatedly, could denote, either that such statements would be orchestrated and prepared or, simply, that their previous visualization, as explained above, caused that result. Be that as it may, for one reason or another whose intent is not valued here, there is at least evidence of a serious impact on the credibility of these key witnesses to sustain the serious accusations.

- On the other hand, the way in which witness evidence has been allowed to the prosecution denotes, as examined, a very restrictive conception of the constitutional exercise of the right of assembly shared by prosecutions and the police witnesses. They have both been exchanging their own expressions. And, along these lines, it is also worth highlighting the refusal of the President of the Court to accept questions about whether the citizens gathered before the voting centres legitimately exercised their fundamental rights. From all this it could be deduced that the Court tended to listen more favourably to the account of the violence alleged by the prosecution and supported by the statements of the agents of the State's security forces (See ITW's Report on week 9).

c) The so-called prospective investigations and the value of police statements

As is known, the investigations so called, are prohibited in our legal system (see, among others, the 2017 Annual Report of the State Prosecutor's Office). These are *ad prevendam* investigations. That note of generality that defines such prospective investigations, and that operates without a specific *notitia criminis*, has been observed in the present case, possibly constituting a procedure of malpractice that is at the origin of these proceedings. And it cannot be allowed that the zeal of some prosecutors causes situations of defencelessness by prospective police investigations without any jurisdictional control.

When a *notitia criminis* appears, the prosecutor must communicate it with the utmost celerity to the natural judge in order to avoid "pre-processal" investigations that escape jurisdictional control. And, if such investigations could lead to a limitation of fundamental rights, they should be adopted by the competent judge in the framework of

judicial proceedings. It is a basic element of the rule of law - as has been proclaimed by the Supreme Court, the Constitutional Court and the European Court of Human Rights, by prohibiting merely prospective investigations or the so-called general causes, aimed at the generic search for criminal offenses.

The existence in this case of more than signs pointing to the fact that the initial investigations of 2015 under the orders of the Prosecutor's Office[24] and which continued in the Court of Instruction no. 13 of Barcelona, are prospective investigations, would be affecting the right of defence of the defendants (cf. week 7). Particularly concerning is the few questions that the defences were able to ask in this regard and that revealed that the object of the investigation, initiated in 2015, were not concrete facts but a political movement. Few questions indeed, as the President vetoed the contrast between the police investigation and the testimony of the witness Mr. Baena[25].

It was thus a "prospective investigation", which would highlight two issues: on the one hand that this could be a political process, which the framework of the Spanish criminal process does not allow. On the other, the lack of credibility of the witness Mr. Baena (week 7), should it be demonstrated that the operational director of the investigations under the orders of prosecutor Zaragoza did not act with the absolute neutrality and impartiality required by law (which has not yet been demonstrated because the Court prevented the hearing of the recording in which Mr. Baena himself claimed that he was "Tácito"[26] on the social networks).

These kinds of actions, on the other hand, relate to the value of police reports in the oral phase of the trial. Certainly, the probative value of the reports is only full if they are verified in the oral trial. However, in this process the President refused to contrast the statements of some witnesses with the evidence of the criminal process, which would have been key to the adversarial principle in this phase of the trial, particularly in this case, in which the investigation (and the decree of pre-trial detention) have been largely based on such police statements.

If, in addition, as already indicated, numerous police statements are both part and result of a “prospective investigation” carried out without impartiality, without the knowledge of the parties and hence prohibited by our system, the contamination of the

[24] The 2015 Investigation of the then Chief Prosecutor of the National Court, Mr. Zaragoza, targeted acts that generically “*may be committed in the course of this illegal pro-independence process*”, such as forcibly invading the legislative assembly, altering its operation and preventing its members from attending its sessions. Similar cases, according to the prosecutor, would occur if institutions such as the Government of the Autonomous Community, the Constitutional Court, the Supreme Court or the General Council of the Judiciary, or the State’s Security Corps and Forces were insulted or forcibly assaulted.

[25] Translator’s Note: Lieutenant Colonel Baena has been the Civil Guard official in charge of the police investigations on the pro-independence movement since 2015.

[26] Translator’s Note: Spanish media have published a number of articles revealing that Mr. Baena, the official in charge of the police investigations used twitter to attack “*politicians whom he investigates in the three open lawsuits in relation to the 1st October* [referendum] (…) *pouring his political ideas into investigations that ought to be objective*.”

criminal case by such investigations is of extreme concern in so far as it may impact the right to evidence and defence.

d) Expert evidence

The expert evidence proposed by the State Prosecutor's Office and the State Attorney's Office in case 20907/2017 was intended to determine whether public funds had been allocated to the organization, preparation, logistics, financing and execution of the referendum of 1st October 2017. The purpose of this expert evidence was to put to test the report issued by the General State Intervention at the request of the Court of Instruction No. 13 of Barcelona, dated 28th October 2018.

The experts proposed by the prosecution were all public officials attached to the Ministry of Finance. During the examination of the evidence it became clear that, contrary to the provisions of Arts. 337.1 and 378.2 LEC and 346 LECrim, there was no written record of the report that was going to be challenged.

This entailed both a limitation in the conduction of the expert evidence itself, and the exclusion of the possibility of presenting a counter-expert. Likewise, during the questions addressed to one of the experts, it came to light that she had collaborated with the Civil Guard in the drafting of a report on the expenses of the referendum. Such circumstance can determine that her statement can only be treated procedurally as one from a witness-expert. Consequently, the report of these experts, who resembled more witnesses of one of the parties than genuine neutral or impartial experts, has not been able to be effectively challenged by the defences and it is highly questionable that it truly constitutes expert evidence and not a mere accusation report.

e) Documentary evidence

The undermined phase of documentary evidence -in the indicated sense that the exhibition of videos during witness depositions was not allowed- may be indicative of a violation of the right to the use of evidence and to the possibility of challenging it.

It should also be noted that, at the beginning of the documentary evidence phase, the defences claimed that the State Prosecutor's withdrawal of numerous documents not expressly enumerated was not clear and could jeopardize the defence strategy. They also complained that a request to incorporate further evidence (from the State Attorney, for instance) was submitted after the Order for the admission of evidence had been issued and that this did not trigger the preliminary proceedings to discuss the matter.

In short, several defences stated that they could not prepare a specific strategy against documents that only appeared at the end of the sessions, during the phase of documentary evidence. The Court's non-acceptance of such allegations provoked again the protest of the defences and new allegations of defencelessness to be added to the previously mentioned.

As for the exhibition of the videos, the President recalled that he would not admit comments on them and that he would only allow the place and date of each one to be

indicated, without contextualization by the parties. In the analysis of evidence, too, some defences warned of the danger of a lack of technical reliability of the validation of several videos. Particularly negative was the fact that, in several instances, the prosecutor was not able to specify the location of recordings that were nonetheless exhibited and that referred, in addition to the police violence of 1st October 2017, to other events that occurred between September and November 2017. In some cases, the Prosecutor even had to be expressly corrected by some defence lawyers, when his information on location and dates was wrong. All this illustrates the Prosecutor's contempt towards the analysis of such relevant evidence – and requested by him-, in addition to undermining the probative value of the videos he presented.

f) The procedure of final conclusions

On the evening of 29th May, a few minutes after the phase of documentary evidence had come to an end, the prosecutions raised their provisional conclusions to final and presented their respective writings. Basically, they maintained almost all of the statements expressed in their writs of provisional qualification with some changes regarding one charge (of the defendant Santiago Vila).

In the first place, it is noteworthy that the hundreds of pages of the writs of the three accusing parties were presented, as has been said, a few minutes after the end of the viewing of the videos, that is, of the completion of the phase of documentary evidence. They did not wait, therefore, to see the development of the probative phase: the accusatory material had already been previously prepared with obvious contempt for the elements of assessment that could emerge from the indicated evidence. It could be argued that it is a common practice. However, it is worth making three observations:

i) This is not an ordinary trial (let's not forget that it is called a "Special" Cause);

ii) The evidence in the videos was precisely aimed at determining the existence of the defining elements of the criminal charges (violence, uprising ...);

iii) The fact that a bad praxis takes place persistently does not make it a good practice.

Secondly, it is disconcerting that, without having assessed the evidence just presented, the accusation persisted in its charges of rebellion. In its oral argumentation, the State Prosecutor's Office indicated that there had been violence, an uprising and a coup d'état in Catalonia.

Third, the only substantial change of the State Prosecutor's Office was the express request for the application of the provisions of Art. 36.2 of the Criminal Code in order to prevent that, during the execution of the sentence, the defendants were granted an open regime until at least half of the sentences has been served. It is not a minor request, and adds yet another point of retribution to the State Prosecutor's Office accusation.

Beyond that, the presentation of the conclusions before the Court exhibited -on the part of the four prosecutors who took the floor- an extremely harsh tone, full of political inferences (while paradoxically denying the political nature of the trial) and, as a matter of fact, of some important errors such as when the prosecutor pointed out that the Working Group on Arbitrary Detention, which recently issued a statement requesting the release of three of the defendants, belonged to the Council of Europe, when it belongs to the United Nations.

Subsequently, the final writ of the defence teams was presented on 11th and 12th June, and it was the turn for the twelve defendants to exercise their right to be given the last word. In general, the exercise of fundamental rights was vindicated, and the harshness of such long-term pre-trial detention and its effects on both the prisoners and their families were highlighted. It is worth noting that there has been a manifest disproportion between the seven hours granted to the three accusations and the twelve hours granted to the twelve defences - one hour per defendant, despite the seriousness of the crimes and the penalties requested and the long duration of trial. This represents an imbalance between the parties as regards the use of time and means necessary for the defence.

7. Pre-trial detention and the right to freedom (Art. 17 SC)

On 8th August 2018, the Working Group on Arbitrary Detention notified the Government of Spain the complaint concerning Messrs. Cuixart, Sànchez and Junqueras[27]. The Government of Spain had accepted the request, even asked for an extension of the response period (which was granted), and responded to the allegations on 8th November 2018, without questioning the role or the international competence of the Human Rights Council.

Having heard the parties (the representative of the aforementioned prisoners and the representative of the Kingdom of Spain), the Working Group's resolution declares:

i) the arbitrary nature of the pre-trial detentions held until today;
ii) the "immediate" release of the three complainants;
iii) the right to "obtain compensation";
iv) the "adoption of the relevant measures against those responsible for the violation of their rights"

[27] It should be remembered, first of all, that the said Working Group on Arbitrary Detention was created pursuant to the resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. In accordance with the provisions of General Assembly resolution 60/251 and decision 1/102 of the Human Rights Council, the Council assumed the mandate of the Commission. The last time the Council extended the mandate of the Working Group for three years was in its resolution 33/30. It is, therefore, a body of international human rights law, of the so-called universal system of protection, with fundamental basis in the UN International Covenant on Civil and Political Rights of 1966, which entered into force in 1976 and which, a year later, was expressly ratified by Spain.

v) the establishment of a procedure for monitoring the compliance with the resolution.

The pre-trial detentions of the defendants have been deemed arbitrary because:

- stem from the exercise of fundamental rights and freedoms (category II);
- were decreed in violation of the right to have adequate time and facilities for the exercise of defence (category III);
- were adopted in violation of the right to presumption of innocence, judicial independence and impartiality of the courts and the right to a fair trial (category III);
- were decided by a judge and court lacking jurisdiction (category III).

Also, on 18th June, Amnesty International requested, once again, the release of the defendants in jail.

The forcefulness of these arguments and requests contrasts with the weakness of the arguments that both the prosecutions and the Court put forward for maintaining these lengthy exceptional measures, which in some cases already exceed six hundred days in prison. The maintenance of such an exceptional measure in this special cause produces an accumulation of very serious effects regarding both the situation of the individuals deprived of their liberty, and that of their families.

On 21st June the Court dismissed the requests for release, while severely smearing the aforementioned Working Group. The Court argued that the Working Group has no jurisdiction, that its opinion is merely “informative”, and defined it in a way implying a strong disregard for international human rights law, and the so-called "universal system" under the umbrella of the United Nations. The defiance that the Court exhibits with regards to this last resolution constitutes a dangerous precedent. The law (also international) must always be obeyed.

III. CONCLUSIONS

Substantive aspects:

1. There is a Criminal Code in force and that is obviously the law that the Judging Court must apply. The definition of a crime cannot be extended analogically in *malam partem* at the prosecution’s or the judge’s will. Given the construction of the accusation and the underlying factual basis, a conviction for the crimes of rebellion or sedition would not be possible in this case unless such criminal offenses were recreated outside the Code in force in order to adapt them to the facts that have indeed been proven during the trial.

2. The accusations have been unable to determine when and where the uprising took place - action required in the crimes of rebellion and sedition- took place. And without uprising there is no criminal conduct, given the defining verb in both criminal offenses is missing.

3. Without specifying when the uprising took place, the notions of "violence", "environmental violence", "normative violence" or "tumult" are devoid of any validity by themselves to assess the existence of the criminal offenses of rebellion or sedition. Moreover, neither "violence" nor "tumultuary" actions have been demonstrated (which, in any case, also require violence). At the most, it has only been possible to demonstrate that, in the hundreds of concentrations that took place in Catalonia between September-October 2017, "faces of hatred" were seen, agents were insulted, sputters or kicks and, sporadically, some objects were thrown, and three cars were damaged. However, criminal law is governed by the principle of subjective responsibility for one's acts, and the alleged sporadic acts of violence cannot be attributed to the defendants.

4. Besides the fact that the definitory elements of these criminal offenses are missing, it has not been demonstrated the *ex-ante* suitability of the prosecuted conducts in order to achieve the purposes of each criminal offense. The citizens, allegedly summoned to take the streets by the defendants, demonstrated either to protest various police and judicial actions that were taking place at that time in Catalonia (e.g. arrests and searches without a court order), or to express their opinion (on 1st October) on the political future of Catalonia, in an act devoid of legal validity and incapable of generating a transformation of the constitutional order or preventing the legitimate authority from exercising its functions. Citizens, therefore, manifested their opinion and ideology through their right of assembly and demonstration that the Spanish Constitution recognizes.

5. Now that the trial is over, the assessment of evidence shows that, among the proven facts, there is no trace of the defining elements of these criminal offenses (the violent or tumultuary uprising), that in none of the demonstrations weapons were carried, and that none of such demonstrations had a chance to achieve these offenses' aims -as proven by the fact that at no time was the state of siege (Art. 116 SC) activated. Against this backdrop, the prosecution's stubbornness in maintaining such an accusation goes against the principle of criminal legality (Art. 25.1 of the Constitution) and corroborates that this criminal trial -without foundation in the current law- has been rather a trial against the political ideas of the defendants. They have been judged for who they are, not for the illegality of their behaviour.

6. The criminal behaviour attributed to three of the defendants (Messrs. Cuixart and Sànchez, and Ms. Forcadell), in addition, was protected by the exercise of fundamental rights. Mr. Cuixart and Sànchez, who have been prosecuted for convening meetings and demonstrations, acted protected by freedom of ideology, the right of assembly and freedom of expression. Leaving aside the fact that many of the demonstrations and concentrations of protest referred to during the trial were not convened by them (or not only), what is clear is that all the calls they made, as it has been seen, called for a responsible exercise of free assembly in the sense provided in Art. 21 SC ("peaceful and unarmed assembly"). In accordance with this constitutional precept, the call to protest against the arrests of government and administration officials in peaceful concentrations or the call to participate on 1st October in the mass expression of the citizen's position about the future of Catalonia as a political community, are only calls to freely express ideology, with no relation with a hypothetical uprising. Being pro-

independence and seeking the achievement of a State of its own is protected by the Spanish Constitution, as the Constitutional Court has held in countless judgments on the concept of "militant democracy", and it is still so when claimed jointly in public, peaceful and non-violent meetings.

7. Ms. Forcadell, in her role as President of the Parliament, was protected by the prerogative of parliamentary inviolability and by the fundamental right recognized in Art. 23 SC to the free exercise of public office. Thus, in the first place, by virtue of the prerogative of inviolability, according to the jurisprudence of the Constitutional Court, it was not possible to set in motion any proceedings against her for voicing her opinions or casting her votes in the exercise of her parliamentary activity, as it has been the case. Second, as a member of the Bureau and guarantor, in turn, of the inviolability of Parliament against the interference of other powers of the State, she scrupulously fulfilled her parliamentary function and duty by not allowing -based on constant jurisprudence of the Constitutional Court about the scope of the supervisory power of the bureau with respect to parliamentary initiatives- any power to interfere in that inviolability. To interpret it differently would have meant an express recognition of a system of government by the judges. And, thirdly, her positive vote on the processing of parliamentary initiatives for which she is accused involved a legitimate exercise of her fundamental right to the performance of her public office (Art. 23.2 SC) free from interference.

8. It is not possible to commit a crime while exercising fundamental rights, as the Constitutional Court recalls and is the case of these three defendants. And when all the investigated actions are alien to the Criminal Code and it must be overstretched in order to keep sustaining the accusation so that these actions are punished, an unequivocal sign appears that behind such charges there is a prosecution not of criminal conducts but of political ideas.

Procedural aspects:

9. Throughout the present special case, including the investigation and oral phases, there have been numerous violations affecting the guarantees of due criminal proceedings, with a very special impact on fundamental rights, the right to the impartial judge predetermined by the law, the right of defence, to right to use the appropriate evidence, to right to equality of arms, and to the right to freedom.

10. With regard to the right to be judged by the ordinary judge predetermined by law (Art. 24.2 SC and Art. 6 ECHR), the manifest lack of competence of the National Court has vitiated the procedure as null. The transfer of the case to the Supreme Court cannot amend the previous irregularities. Neither of them is the constitutionally recognised "natural judge." Instead, and according to the legal system in force, the Superior Court of Justice of Catalonia is. Furthermore, there is no knowledge how the courtroom was appointed, what norms were followed and why its members are these and no other judges.

11. The fragmentation of the judicial investigations has led to the disintegration of this criminal process in four different cases (before the Supreme Court, the National Court, the Superior Court of Justice of Catalonia, and the Court of Instruction no. 13 of

Barcelona). This has cause very serious problems that affect fundamental rights and procedural guarantees, generating defencelessness. This disintegration has prevented the defences in this process before the Supreme Court, from knowing the actions previously carried out by the Court of Instruction no. 13 of Barcelona, which the prosecutions have been able to use to gather a large volume of documentary evidence, which the defence teams have not been able to access nor challenge.

12. The impartiality of the Court in relation to the right to a process with all guarantees (Arts. 24.2 SC and 6.1 ECHR) has also been seriously affected. The fact that members of the Supreme Court have taken various decisions in the course of the procedures -mainly by ruling on appeals against the decisions of the investigating judge- meant that they took a previous position on the case. Likewise, the fact that two of the magistrates of the Court are, in turn, members of the Central Electoral Board, is a fact that in no way helps the image of impartiality. Also, the objective impartiality of the Court has been undermined by the interruptions of the President of the Court to the defences and, among others, to the interrogation of lawyer Benet Salellas snapping him a (textual) "*much better*", when Mr Salellas decided not to ask more questions given the permanent obstructions of the President.

13. The right to equality of arms (Arts. 24.2 SC and 6.1 and 6.3 ECHR) was violated on numerous occasions due to the different treatment accorded to the prosecution witnesses (very protected by the Court), compared to the defence witnesses, thus unbalancing the right to the use and review of evidence in an equitable manner.

14. The right of defence and the adversarial principle (Art. 24.2 SC and 6.3 ECHR), as a result of what has been highlighted, was seriously compromised for a number of reasons: due to the impossibility of having the time and facilities for the defence, especially at the time the pre-trial detentions were ordered (as the UN has just declared); given the strenuous sessions due to their lengthy duration, which particularly affected the defendants in pre-trial detention and their ability to follow the sessions throughout four months of trial; given the lack of publicity regarding the complete calendar and the order of summoning of witnesses; given the disorder in the assessment of evidence altering the rules of the LECrim; or because of the limits to interrogations, where undue protections were granted to some (prosecution) witnesses by the President of the Court.

15. The right to use the appropriate evidence to one's defence (Art. 24.2 SC) was seriously violated as a result of situations of a diverse nature. Regarding the documentary evidence, it is worth highlighting its undermining as the showing of videos -particularly on the events of 20th September and 1st October 2017- to challenge statements of very doubtful credibility by prosecution witnesses was not allowed. Also the witness phase has suffered from important obstacles for its proper realization. In addition to the unequal treatment of the witnesses of the parties and the protection of many prosecution witnesses, the problem of the (previous) communication of witnesses who were able to watch the statements of their hierarchical superiors (National Police and Civil Guard) meant a flagrant violation of the LECrim. This caused a total lack of spontaneity and the use of stereotyped or prearranged language, as some two hundred officers of the Ministry of the Interior, National Police and the Civil

Guard, saw the statements of their hierarchical superiors. This situation raises questions on the nullity or on the loss of credibility of such fundamental evidence of the prosecution.

16. The use of “prospective investigations” constitutes another element that violates the right to the impartial judge and the right to defence and must be addressed separately. It has been revealed that the Instruction of 5th November 2015, which was put in motion by Mr. J. Zaragoza, then Chief Prosecutor of the National Court, and was led by Lieutenant Colonel Mr. Baena, sought to investigate in a generic way the Catalan pro-independence political movement. This proves that a general cause -proscribed in our legal system- was opened and that turned (later on) in beginning of the proceedings of the Court of Instruction No. 13 of Barcelona with a whole "pre-process procedure" in which the defendants did not have the possibility of knowing or challenging the materials already gathered.

17. In the process of conclusions of the oral phase of the trial, in which the accusations have maintained almost identical their initial narratives, they presented hundreds of pages of conclusions just a few minutes after the last video was shown. The conclusions of all the prosecutions were presented without waiting for the assessment of this video-graphic evidence, with an absolute contempt for the assessment of such decisive evidence.

18. The right to freedom (Art. 17 SC and 5 ECHR) has been violated since the beginning of the criminal proceedings. As the Working Group on Arbitrary Detention of the UN Human Rights Council has stated, Mr. Sànchez, Mr. Cuixart and Mr. Junqueras suffer from arbitrary pre-trial detention as their imprisonment is the result of the exercise of fundamental rights and freedoms; because it was decreed in violation of the right to have the time and adequate means to exercise the defence; because it was adopted in violation of the right to presumption of innocence, to judicial independence, to an impartial court, and the right to a fair trial; and because [their imprisonment] was decided by a judge and court lacking the jurisdiction to do so. For this reason, [the WGAD’s report] insists in the immediate release of the three complainants, to the adoption of the necessary measures against the culprits of the violation of their rights, and the launch of a proceeding to monitor the compliance with the resolution.

19. On 21st June the Court dismissed the requests for release, while severely smearing the aforementioned Working Group. The Court argued that the Working Group has no jurisdiction, that its opinion is merely “informative”, and defined it in a way implying a strong disregard for international human rights law, and the so-called "universal system" under the umbrella of the United Nations. It is striking that, during the three months that the Spanish State had to respond to the UN (which even granted it one extra month at its request), Spain did not put forward any of the complaints it now voices. The disobedience that the Court exhibits with this last resolution constitutes a dangerous antecedent. The law (also international) must always be followed.

The defiance that the Court exhibits with regards to this last resolution constitutes a dangerous precedent. The law (also international) must always be obeyed.

20. In view of all of the above, it can be concluded that this trial constitutes a general cause of political nature, which -presented under an alleged jurisdictional and procedural cover- has resulted in a clear manifestation of repression of the exercise of fundamental rights and political ideas