AMNISTIA I LLIBERTAT

CONCLUSIONS I LAW CONFERENCE FOR THE DEFENSE OF CIVIL AND POLITICAL RIGHTS

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PART. 1 THE CONSTITUTIONALITY OF AMNESTY

Amnesty from an international viewpoint

Amnesty is a figure which is not compulsory under international law; it is a prerogative of each state.

However, the different branches of international public law (such as the humanitarian and human rights systems) do recommend it, insofar as what this humane regulatory body of international law does is to prevent abuse by a state.

On the one hand, humanitarian law (i.e. that applied to conflicts) obliges the victorious party, by way of Protocol 2 of the Geneva Convention (relating to armed conflicts) to grant amnesty at the end of hostilities. With regard to the jurisprudence of international tribunals, they also indicate that the only exception to amnesty are war crimes, crimes against humanity, genocide and crimes of aggression, which are part of international criminal law and fall under the jurisdiction of international tribunals.

On the other hand, the human rights system imposes limitations on the conduct of states, and obliges them to investigate those responsible for non-compliance with ratified conventions.

It may be **concluded** that:

1. Although the instrument of amnesty, according to the international legal corpus, is not mandatory, it is recommended.

2. The above is true above all when it also forms part of the so-called "transitional justice" as an instrument of conciliation.

3. Therefore, international law allows states to apply an amnesty according to its will, with only one limitation, i.e. regarding the commission of international crimes which fallunder the jurisdiction of international courts.

Amnesty from the Spanish viewpoint

Amnesty is to be found in different **historical periods** of Spanish politics.
In the first place, the Constitution of 1869 provided for it (Article 74) and the Republican Constitution of 1931, Article 102. Secondly, Law 46/1977 on amnesty, of 15 October, an instrument that contributed to the political transition, and was applied even after the approval of the Constitution in 1978.

The **Constitution** does not mention the figure of amnesty, but it does consider a "right to pardon" (“Derecho de gracia”) in Article 62.1). This would be completed by two further articles: Article 87.3 (which prohibits the popular legislative initiative regarding the “Derecho de gracia”), and Article 102.3 (which prevents the application of a royal “Derecho de gracia” to cases of criminal responsibility by the President and other members of the Government). On the other hand, pardon (“indulto”) may be applied by the Government, unlike amnesty, which requires the intervention of the legislator, and where popular sovereignty also resides.

In **comparative law,** in France it has been attributed in relation to the Algerian war of independence (1962, 1968 and 1982), but similar figures have also existed in Germany and Italy.

With regard to the **current situation**, a proposal for an Amnesty Law was presented but was not approved. The main argument against amnesty was the prohibition of a general pardon. But in reality, the Constitution is silent on the concept of amnesty.

In conclusion, it can be stated that:

1. At the political level, the amnesty is seen as a necessary measure to face a new stage in the political conflict with Spain.

2. At the legal level, amnesty would be a perfectly constitutional instrument in the Spanish legal system, notwithstanding the silence in this regard. This would imply the retroactivity of the most favourable criminal law and the repeal of (unfavourable) criminal legislation with retroactive effects.

3. It has been applied undertaken on several occasions in the past. In short, history shows that if there is a political will, legislation would not be an obstacle".

4. In relation to the conflict with Spain, there are historical precedents, the possibility of establishing time limits on its application, and the group of people to whom it would apply.

PART 2. CRIMINAL LAW FOR THE ENEMY

Types of repression: the right to protest and 1 October 2017

The right to protest is a fundamental right, through which others can be exercised and demanded. The aim of repression is precisely to demobilise by means of fear.

Several different **mechanisms** have been used to break up demonstrations, which at the same time constitute different types of repression. From the **excessive use of force by the police** (e.g. on 1 October 2017, or in Plaça Catalunya in 2011); to arbitrary arrests of demonstrators (e.g. general strikes, demonstrations in October 2019, among others); through **legal restrictions**, such as, for example, the reform of the Public Safety Act of 2015 or the reform of the Criminal Code. Other examples would be harassment of people observing protests, restrictions on journalists reporting on protests, persecution of civil society groups.

The attempt to do away with the right to demonstrate has come to a head in recent years with the persecution of the independence movement and the persecution of political dissidents. To this end, a national propaganda system has been set up to construct the figure of the enemy: a distinction is made between the "good citizen", the one who obeys without question, and the "bad citizen" (the enemy), who disobeys. The aim is none other but to dehumanise and create the image that “these people" are not subject to rights and that the same guarantees do not apply to them as they would to a "good citizen". Here language is key. For example, during the economic and social crisis of 2008 and the 15-M demonstrations of 2011, the political language at the time was that the demonstrators were "terrorists", "kale borrokas". Another would be the repeated use of the word "coup perpetrators", which would make the popular outcry devoid of meaning and dehumanise the protesters.

In short: Ruling (459/2019) of 14 October (aka Sentència del Procés), is a type of repression that has succeeded in criminalising and limiting the right to protest. The basis of the conviction has been, precisely, mass mobilisation as a criminal element. Civil and peaceful disobedience, praised by the European Court of Human Rights, has become a crime of sedition in the ruling on el "Procés".

Criminalisation of protest through the jurisprudence of the Spanish Supreme and Constitutional Courts

STS 161/2015, 17/2 2015 and STC 133/2021 on the "Aturem el Parlament no deixarem que aprovin retallades" demonstration on 15 june 2011, has condemned some demonstrators further to article 498 of the Criminal Code (crime against representatives of institutions of the State). These rulings do not analyse the typical element required for the crime of sedition and whether or not the conduct exceeds the exercise of the right to protest.

STS 459/2019 of 14 October is condemned for the crime of sedition under article 544 of the Criminal Code. In this case, the exercise of the right (for example in the case of the demonstration of 20 September 2017) did not paralyse the fulfilment of the law or the exercise of the officials' functions, so that in this case neither the substantial nor the subjective elements of the criminal offence were fulfilled.

The sentences SSTC 121/2021 and 122/2021, which dismiss the appeal against the STS (459/2019) brought by Jordi Cuixart and Jordi Sànchez, based on the disproportionality of the sentences for sedition (for the massive demonstration on 20 September 2017), show that they are in fact intended to punish what is known as "disloyalty to the Constitution". Notwithstanding the above, even if such had indeed been the intention of the demonstration, this would violate the principle of legality, given that today there is no provision that sanctions the peaceful breaking or endangerment of the constitution.

It can be concluded, therefore, that what really makes the demonstrations a crime of sedition is exclusively their pro-independence purpose, that is, the idea they promote. With the danger that in the future any other demonstrations and citizen mobilisations will all end up as criminal offences if it is considered that the "message" jeopardises the constitutional order.

PART. 3 ROAD TO THE EUROPEAN COURT OF HUMAN RIGHTS

The presentation will address the commentary of recent decisions of the ECtHR that have rejected applications from the Spanish judicial system (Olga Álvarez case and the Banyoles church protest case) as well as some decisions adopted on the substance (Carme Forcadell case and others, 2019) in order to show some of the difficulties in obtaining protection from the ECtHR. On the other hand, an attempt will be made to raise some aspects on which it would be necessary to try to develop the jurisprudence of the ECtHR from the opportunities afforded by the Catalan conflict.

PART 4. ECONOMIC REPRESSION AND STRATEGIC LITIGATION ON HUMAN RIGHTS

ECONOMIC REPRESSION: Court of Audits (Tribunal de Cuentas), accounting jurisdiction and its necessary reform

INDEFENSION. Firstly, it should be stressed that the jurisdictional competence of a public administration audit body is not an exception.

From a purely procedural point of view, we believe that the procedures provided for in the case of the Court of Audit do not offer the necessary guarantees. In this regard, it is very questionable that the persons being audited are not able to appear before it and proceed with equality of arms in the preliminary stage of the proceedings, all the more considering that it at this stage that interim measures are decreed and may entail freezing of assets.

The appeal options also lead to a situation of defencelessness. Both because the possibility of lodging an appeal at the procedural stage is excessively limited (to the point that appeals are rejected in 99% of cases) and it is made to the Court itself, and because the sentence can only be appealed before the third chamber of the Supreme Court. We understand, therefore, that the general principles of law and the guarantee of the right to defence must be protected in all cases, even when it is not a criminal proceeding and, above all, when the amount claimed is particularly high and the impact on those under investigation and the members of their families is severe.

ULTRA VIRES. With regard to the audit of the Generalitat's foreign action in the period 2011-2017, it is our understanding that the Court of Audit arrogated to itself an interpretative power of Chapter III of the Statute of Catalonia which is in no way within the powers of an administrative body dedicated to supervising public accounts. What is more, the Generalitat's foreign action activities are not linked to any judicial proceeding, nor were they the object of a warning at the time, but were initiated a posteriori, based on political criteria that are excessively restrictive in terms of the right to freedom of expression of elected officials, which is fundamental in democracy. This is a worrying precedent that would enable this Court to hold accountable any public or political official who, not committing any crime or unlawful enrichment of any kind, acted, in a full and broad sense, in political representation and participation. Thus, for example, any mayor or mayoress who makes statements, takes action in areas that are not strictly within his or her competence (in the field of, for example, anti-racism or development cooperation, but which are of interest to the citizens they represent) could find themselves subjected to a proceeding by said Court of Audits. It is worth remembering that this broad vision of political participation, which goes beyond the explicit obligations of each elected official or political leader, is not only perfectly legal, but also enriches and reinforces the democratic quality of a society.

POLITICISATION. The lack of clear criteria and the undue interpretative framework facilitates politicised bias in the application of the law. Moreso, if we bear in mind that both the system for electing the members of the TC and its jurisdictional function detached from the ordinary justice system make it almost unique in Europe.

RECOMMENDATIONS

1. Modify the system for electing members of the Court of Audits in order to guarantee political independence and increase professional and curricular requirements, thus avoiding possible politicisation in its decisions.

2. Limiting the jurisdictional function of the Court of Audits to amounts equivalent to the maximum contemplated for minor contracts (not cumulative) and transferring cases of larger amounts to the ordinary courts.

3. Amend Act 7/1988 on functioning of the Constitutional Tribunal, specifically Article 47.1e, so as to ensure the fundamental right to defence as provided in the Spanish Constitution.

4. Once the Examiner has been appointed, further to Organic Law 2/1982, they will proceed to carry out the following actions: e) Interim measures, having heard the alleged responsible parties, to the Prosecutor, the State attorney, or, as the case may be, the counsel of the damaged party, expressly stating which public securities and assets may have been misappropriated.

5. Adapt legal practice by the Court of Audits in order to safeguard the rights of the persons concerned, and to prevent any situation of defencelessness from arising, thereby ensuring effective respect for the guarantees derived from the principle of effective judicial protection.

6. Limit any action by the Constitutional Tribunal to cases of irregular accounting that do not entail political interpretations of the legal framework within which the events to be investigated took place.

7. In order to avoid duplicating payments, it is necessary to refrain from claiming amounts for concepts already affected and claimed in court rulings.

8. Close the case against the foreign action of the Generalitat in the period 2011-2017 on the understanding that it is not a case of irregular accounting, but of political interpretation of the competence framework provided for in the Statute of Catalonia and of the rights to freedom of expression and political participation.

9. Create a complementary risk fund of the Generalitat de Catalunya to meet the legal obligations that may be claimed from public sector workers in judicial or administrative proceedings, for actions they have carried out in the exercise of their post or functions, which are not covered by a guarantee mechanism.

PROPOSALS OF LAW

Draft proposal to incorporate the jurisdiction of the Court of Audit to the Judicial Authority

Inform the Parliamentary Party presenting the initiative that it may not be admitted in as far as a preliminary analysis shows that said initiative clearly contradicts the provisions of Article 136 of the Constitution and an amendment of this matter is not possible by way of a Draft Proposal.

Draft proposal to amend Organic Law 2/1982, of 12 May, on the Court of Audits and Act 7/1988, of 5 d'abril, on the functioning of the Court of Audits.

1. An appeal may be lodged against the decisions of the bodies of the accounting jurisdiction of the Court of Audits before the appropriate body of the administrative jurisdiction.

STRATEGIC LITIGATION IN HUMAN RIGHTS

Successful human rights advocacy requires a range of tools. One of the most powerful of these is strategic human rights litigation (SHRL).

Today, in the face of the regression taking place in human rights all over the world, at many levels, and also in Spain, we must be capable of using all the tactics to promote social progress **jointly.** This is one of the key premises of the LEDH.

While human rights litigation is growing and consolidating, as a discipline it still has some way to go and is both valued and criticised (mainly because of the time and dedication it requires). International organisations and NGOs (e.g. Open Society Foundations, Amnesty International, International Federation for Human Rights) are incorporating it as a practice and as a response to the multiple challenges of human rights advocacy, especially in contexts of repression and/or state violence.

The LEDH starts from the humble assumption that the courts (national or international, and other human rights mechanisms), operating in full, are sufficient to ensure the victory of our client and/or the human rights settlement we desire. Court intervention, although a key element, is only one of the motors of social action, so that, in an overall view, other mechanisms and actors can (and must) intervene in synergy in this strategy. Street demonstrations, the work of legislators, debates in the public media, etc. are extremely important to generate the changes in the opinion and context that we want.

With regard to **definitions** of LEDH we find, for example, that "in human rights, litigation is strategic when it is consciously designed to advance the protection of rights. The idea is to change laws, policies, practices and to achieve remedies or reparations for human rights violations". It has also been defined as the "selection of a specific case that manages to demonstrate the core of a problem".

The main elements that could differentiate the LEDH from criminal litigation would be the **type of client** (it is not only the person who is defended but the interests they represent), the **impact**, which is on a large scale (cases that highlight systemic or structural defects of the state and do not vindicate only the specific violation of the client's rights); the **vulnerability** of the client (type of repression suffered). In short, the client, who in LEDH and in international contexts is referred to (whether or not it be the case) as a **"victim", becomes the focus** of the struggle and the design of the strategy. They must be involved, to the extent that they wish, in the whole process and not act in a paternalistic manner.

The LEDH is determined by the **context**. Here we are before contexts of repression (meaning a systemic violation of human rights), which forces us to think under maximum pressure - because violated rights can affect the essence and physical and emotional well-being of the client. It is especially designed, therefore, to respond to contexts of coercion and abuse of structures by the state.

Finally, those of us defending clients who defend human rights are also considered **defenders of human rights.** This means that the role of the lawyer is protected by international standards, and this must be taken into account. On the other hand, very little is talked about the "care" needed by lawyers working in these contexts, and it is essential to point it out. In highly sensitive cases, with media exposure and possible risks, the advocate is involved in long-lasting processes, where resilience and care are key.

These are some of the elements that will be taken into account when drawing up a litigation strategy and establishing priorities.

Conclusions: The LEDH uncovers structural and systemic flaws of a state, it gives an instrumental approach to the defence of a case. Courts have always been seen as catalysts and promoters of change, spaces where the abuse of power can be questioned, but the rule of law itself can play against us. The LEDH analyses all the mechanisms available, it tells us that the orientation and response against repression must be collegiate, it forces us to think about objectives (and redefine them) even changing the perspective of success. Finally, it vindicates the lack of education in human rights, both in theory and in practice.

STRATEGIC LITIGATION IN HUMAN RIGHTS : advice and best practice

From a more practical point of view, the strategy is nothing more than an "action plan to obtain what we want". It is important that it be elaborated and thought through. Through experience in criminal and strategic litigation, the method and/or the essential elements for an effective strategy are established:

1. Identification of the case - localising controversies of a certain magnitude, which have a broad impact, with the capacity to create a legal or political change, etc.

2. The human factor of the case - when designing the strategy, especially in criminal and/or human rights cases, the client (who in these cases will be the victim of the violation) must be at the centre of the strategy, they must be able to decide the objectives and the extent to which they are willing to be exposed.

3. Development of the strategy - thinking about the future, breaking down all possible actions through hypotheses and impact. In short, take the time to develop it.

4. Information management - only when it maximises impact. The media, in litigation strategy, are important. Notwithstanding the above, it is not always necessary to explain (to the media or others) all the steps that the lawyer intends to take, only those that are necessary. It is understood that we are working for the common good, and recognition is of secondary importance.

5. The team and the study - large-scale cases require multidisciplinary teams and dedication to the study. We will often encounter issues with few precedents that are difficult to resolve. It is important to have contacts with expertise in different fields. Collaboration and cooperation will be essential. To "study" also means to get to know the political and social context, the different actors, to know the vocabulary used by an organisation, etc.

6. Other elements :

A. Losing. In cases of great magnitude it is important to know how to manage the negatives, the disengagements, the loss.

B. It is important to take care of the lawyer - an essential part of maintaining resilience and representing the client at the highest level. Rest, disconnection will be a fundamental pillar to get through the long road of litigation.

6. The fighting attitude - once we decide to represent a case, we know that the road will be long and difficult. You always have to be ready to go all the way.

FINAL CONCLUSIONS

1. Although **amnesty** has been used more extensively in situations of armed conflict or post-conflict, it can also be used as a tool for resolving political conflicts at the national level. As the experts concluded in this Congress, Spain has the legal and constitutional mechanisms to apply it, the historical and political precedents which support it, so that its application would eventually be at the mercy of political will.

2. The **right to protest** in Spain is in crisis and has been for more than two decades. In recent years, in order to silence and discourage "awkward" movements from all social spheres (and generally from the left) - from the right to housing, critical during the economic crisis, to anti-racist demands and movements in support of political standpoints, etc.), the state has used different repressive techniques, already used before in other countries where there have been episodes of extreme violence. Non-violent acts to make proposals for the improvement of rights or awareness-raising campaigns, are considered by the State to be "the enemy within", so that it uses the criminalisation of civic acts of protest and image sullying campaigns to discredit the substance and the people (human rights defenders) who are the protagonists of the defence. Both citizens and human rights professionals need to be aware of the different forms of criminalisation in order to combat it.

3. In recent years, there has been increasing talk of the **European Court of Human Rights** as the ultimate guarantor of the European human rights system. As well as the difficulty that legal professionals have in reaching it, by exhausting the petitions, and overcoming the strict admissibility criteria, whereby only approximately 90% of the petitions that are presented are admitted. At a time when the claims of Catalan political leaders have reached Strasbourg, their lawyers analyse the recent jurisprudence of the ECtHR on freedom of expression for political opinion in similar cases of imprisoned political leaders (such as Demirtas v. Turkey) and assess the possibilities and angles that the ECtHR can take when it deliberates.

4. The **Court of Audits** is being used as a necessary instrument of what is known as "economic repression". From the election of its members to its non-judicial composition, to other procedural flaws that would equate it to a criminal jurisdiction without its own guarantees, the multiplicity of cases against the independence movement has uncovered a systemic flaw in the entire institution. In this Congress, different legislative proposals have been presented in order to ensure the maximum guarantees for those under investigation, and prevent defencelessness in any case.

5. Human rights lawyers (including in contexts of repression) are only one of the actors, albeit an essential one, that can guarantee the protection of the universal and European human rights system. Through the defence of specific cases, core problems are uncovered, "systemic defects" that require working tools that can provide an effective response. Good prior and strategic organisation, coordination with the different social actors capable of promoting changes in rights, the emotional management of representing victims and cases of great impact, or the multiplicity of human rights defence organisations (both nationally and internationally) are elements that **Strategic Human Rights Litigation** aim to strengthen; This is a discipline that is being consolidated, undertaken by NGOs and international organisations of great renown and that, now also in Spain, we are beginning to implement due to the deterioration of rights, at different levels, that we are experiencing and that require additional training.