ENCJ Newsletter

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COUNCIL FOR THE JUDICIARY OF ITALY

Reform of the judicial system

According to law no. 71 of 2022, the Parliament delegated the Government to reform the judicial system, defining principles and criteria for the cited reform. In particular, the delegated powers aim to review the criteria for assigning executive and semi-executive positions, to reform the criteria to access legitimacy functions and procedures for professional appraisal of magistrates, and to reorganize the regulation of collocation outside of the permanent staff.

Furthermore, the law introduces some immediately effective provisions on legal, organizational and disciplinary matters, on the ineligibility and judges' re-collocation in permanent staff, as well as the constitution and functioning of the High Council for the Judiciary.

Among these provisions, the modification of the regulations on the **transition from judging to prosecuting functions and vice versa** are particularly interesting. It can be carried out only once during the career and within 9 years from the first assignment of the functions. After this period, a change in functions is only permitted once. This can happen only in the event that the change takes place from or to civil judicial functions.

Furthermore, the provisions regarding the reorganization of the **public prosecutor's office** are compelling, envisaging an organizational plan of the said office, which must contain detailed organizational measures, adopted and aimed at guaranteeing the effective and uniform exercise of criminal prosecution, the priority criteria in the exercise of the latter and the criteria for assigning proceedings. On this last point, the CSM expressed some doubts regarding the provision of the obligation to transmit said organizational projects to the Ministry of Justice for observation. This would entail an intrusion of executive power into a matter pertaining to the core of the exercise of the prosecuting jurisdiction.

The reform contains immediate effective provisions also regarding the **constitution and functioning of the CSM**, the electoral system for the appointment of career magistrates as well as their re-collocation at the end of their mandate; provisions which have been implemented for the first time during the election of the current Council.

These rules have an impact, first of all, on the number of members of the Council, which has been increased to 30 (previously there were twenty-four members), and on the system for electing career magistrates, for which a new structure of electoral colleges is identified. Specific provisions concern the calling of elections, the establishment of electoral offices and the verification of candidatures.

Regarding the election of lay members, it is expected that they must be chosen among ordinary law professors and lawyers with at least 15 years of seniority, according to application procedures that respect gender equality.

Further modifications concern Committees of the Council. The Committee's composition changes every sixteen months - and no longer every year - in order to ensure a greater continuity of the Council's activities. Furthermore, in order to guarantee the highest degree of independence of the members of the Disciplinary section, it is expected that they cannot be assigned to any other Committee contemporarily.

Finally, the competence to adopt a general regulation for the organization and functioning of the Council itself has been included among the powers of the CSM. This choice is welcomed by the CSM which sees in this provision a strong confirmation of its autonomy.

Access to the judiciary

According to the objectives set by the PNNR (*National Recovery and Resilience Plan*), and as part of a broader reform plan, the decree of the Ministry of Justice of 15 June 2023 (implementing Legislative Decree 144/2022) modified the regulation of access to the judiciary with the aim of accelerating timing for covering the permanent staff, currently suffering from a serious shortage.

The implementation decree establishes the methods for carrying out written tests of the examination for access to the judiciary, providing that they are carried out electronically, through the use of a digital device.

This provision and the relevant measure, previously introduced with legislative decree 144/2022, revived the so-called "direct access" to the judiciary. – as already called for by the CSM in the resolution of 7 December 2021. These measures allow law graduates to participate in competitive exams (eliminating provisions that required the possession of a second degree qualification such as a research doctorate, a diploma from a specialization school, or an internship at the judicial offices), so as to reduce the time of access to the judiciary and the concrete entry into service.

Digitalization of justice

During 2022, two important criminal (150/2022) and civil (149/2022) justice reforms were adopted. Both interventions, which led to important changes in the discipline of criminal and civil trials, are aimed at making justice more efficient, reducing backlog and the so-called *disposition time*, implementing the fundamental principle that proceedings must be concluded within a reasonable time.

From this perspective, these two decrees have significantly accelerated the process of digitalization of justice. The digitalization measures envisaged by the reform are not limited to a mere dematerialization of act and paper documents, but to an implementation of several procedural provisions in electronic means with a view to a paperless process. Therefore, the digitalization measures focus also on: drafting of documents in the form of an electronic document, and their deposit in a digital file; notifications to a digital domicile; remote hearings; audio and video recording of the declaratory evidence and the questioning.

More specifically, as regards civil trials, from July 1st 2023, the filing of all documents regarding different types of civil cases, by the defenders and other individuals, takes place exclusively and compulsorily electronically.

Pursuant to the provisions of Legislative Decree 150 of 2022 (so-called *Cartabia reform*) concerning the digitalization of legal proceedings, the ministerial decree no. 155, issued on 5 July 2023 and regarding the criminal sector, defines and considerably expands the number of documents (103) that can be filed exclusively by electronic means through the Criminal Records Deposit Portal ("PDP"). This will bring significant savings in time and expenses. The effectiveness of the decree remains suspended, in the part in which it provides for the exclusivity of electronic filing and pending the adoption of implementing regulations.

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New Legislation

Amendments regarding wiretapping regulation

Law Decree No. 105 of 10 August 2023, converted into law, intervenes on the regulation of wiretapping in proceedings for organised crime offences, which, by way of derogation from the ordinary rules provided by the Procedural Code, outlines conditions less stringent for authorising wiretapping in proceedings regarding organised crime offences.

The text of the decree makes it clear that the derogatory rules apply not only to associative offences - real organised crime offences - but also to single offences, whether committed or attempted, of "*organised activities for illegal trafficking of wastes*" and "*kidnapping for the purpose of extortion*", as well as to all other offences aggravated by the mafia method or by the purpose of mafia facilitation or terrorism.

It is also provided that the transcripts of wiretaps, prepared by the judicial police, do not include conversations considered irrelevant to the investigation. The public prosecutor will also have to indicate in writing the cost of each wiretap.

Finally, a centralised archive for the storage of wiretaps is established. The measure is aimed at addressing critical issues in data management and the lack of technological equipment available to some Public Prosecutors' Offices, as well as at ensuring higher levels of security, technological update, efficiency and cost-effectiveness.

The organisation and supervision of eavesdropping activities will remain in the hands of the Chief Prosecutors. The set-up and management of the infrastructure will be ensured by the Ministry of Justice, which, in any case, will not have access to the so-called "unencrypted data".

Urgent law enforcement measures regarding youth disorder and juvenile crime

By Decree-Law 123 of 2023, pending conversion into law, the Government introduced a number of new measures to fight juvenile crime, in response to serious episodes of violence involving minors as perpetrators and victims.

Firstly, the so-called *Daspo urbano* measure (an administrative measure prohibiting access to certain areas of the city) is extended to minors under 18 years of age and over 14 years of age, while at the same time extending the cases in which the *Questore* (Provincial Chief of Police) can order accessory and preventive measures.

These forms of juvenile crime seem to be particularly encouraged by the use of IT devices. It is provided that the *Questore* (Provincial Chief of Police) may propose to judicial authorities to prohibit the possession or use of cell phones and other devices for data and voice communication when they have been used for commission of offences. The *Questore* (Provincial Chief of Police) may also propose to judicial authorities the obligation for providers of electronic communication services to ensure parental control applications as part of contracts for the provision of such services.

It is provided that pre-trial detention may be applied to a juvenile if he/she has escaped or there is a danger that he/she will escape.

With reference to the juvenile's rehabilitation process in the case of offences punished with a custody sentence of no more than five years, early termination of the proceedings is allowed. This may apply under the condition that the juvenile takes part in a civic and social reintegration and rehabilitation process, whose program must provide for the performance of socially useful work.

Legislation concerning the prevention and repression of unlawful dissemination of copyright-protected contents on electronic communication networks

Law n. 93 of July 14, 2023 has partially amended the industrial property law (Legislative decree no. 30/2005) and the intellectual property law (Law no. 633/1941), affecting the prevention and repression of unlawful conduct in breach of copyright through electronic communication networks.

This provision foresees that the Authority for Communications Guarantees (AGCOM) can adopt urgent precautionary measures aimed at disabling the access to web contents illegally disseminated, as well as to promote communication and awareness campaigns on the importance of the intellectual property. Furthermore, some offences have been broadened, in order to reinforce the protection of copyright-protected contents. The applicability of non-liability principle on the ground of particular tenuousness of the fact has been excluded for the abovementioned offences, according to Art. 131-bis of the Criminal Code.

Provisions concerning the fight to the dissemination of terrorist contents on the web

In accordance to the EU Regulation 2021/1784, new provisions fighting and preventing the online dissemination of terrorist propaganda contents were introduced by the Legislative Decree no. 107 on 24 July 2023.

The law enforcement measures include the order of removal issued by the competent Public Prosecutor, who can order, to the hosting providers, to remove contents or disable the access in all Member States. According to the Law, the hosting providers found to be exposed to the risk of dissemination of terrorist contents have to take specific measures aimed at reducing and managing this risk. Should these measures be unsatisfactory, the Ministry of Interior's division responsible for security and regular operation of Telecommunication services can order to the provider to adapt and modify these measures.

Particularly serious sanctions are foreseen for hosting providers with respect to several conducts in breach of obligations laid down in the abovementioned Legislative Decree, consisting in specific fine violations.

COUNCIL FOR THE JUDICIARY OF LATVIA

TIESLIETU PADOME

Results of the Court User Survey

In Latvia, as in several other EU countries, trust in state institutions is traditionally low. The overall critical opinion of these institutions is a characteristic of post-Soviet societies.[1] However, according to survey data,[2] respondents most frequently obtained information about the courts from the mass media (50%). 14% indicated that they received such information from close acquaintances who had interacted with the courts, and 8% obtained it through personal contact with the courts.

Given that the courts are relatively modestly evaluated by citizens who have not had direct contact with them, the question arises as to whether the work of the courts is truly mediocre, as could be inferred from the information in the mass media. One of the leading NGOs in the field of democracy analysis, the Centre for Public Policy PROVIDUS, has raised this issue and implemented several projects on the topic.[3]

The Court User Survey was conducted in each judicial district over a three-month period, covering all courts during 2022-2023. During the survey period, 991 completed questionnaires were received from the courts.[4] The majority of courts participated in the survey. The questionnaire was not conducted electronically, as an electronic version of the Court User Survey was unsuccessfully piloted in 2020. After court sessions, court users were asked to complete the provided questionnaire, which was designed to identify any problems, assess the judge's attitude and work during the court session, and determine whether communication with the court was accessible and constructive.

The quality of the Court's work was measured on eight parameters (with 5 being the highest grade):
Convenience for consulting the case file (4.3 out of 5)
Ease of finding your way around the court and obtaining information (4.5 out of 5)
Ability to call the court (4.5 out of 5)
Staff attitude (4.6 out of 5)

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[1] According to the latest survey (01.2023.) the trust in state institutions was following: Parliament (29.4%); Cabinet of Ministers (30.2%), Courts (41.5%), Police (58%), Local government (54.4%).

[2] Attieksme pret tiesām un uzskati par tiesvedības procesiem Latvijas iedzīvotāju aptauja (Attitudes towards courts and opinions about legal proceedings, a survey of the population of Latvia, 08.2021.). The Court Administration: https://www.ta.gov.lv/lv/media/1644/download

[3] Projects 'Meaningful feedback for courts' (2019, financed by the U.S. Embassy) and 'Meaningful feedback for courts II' (2020, financed by the U.S. Embassy) in cooperation with Ministry of Justice of Latvia, Court Administration of Latvia and legal experts. As a result, two court feedback forms were developed: one for court users and one for professionals (sworn advocates, prosecutors). The evaluation form for court users was piloted in several courts in late 2019 – early 2020. The court user initiative was further developed within the framework of the project "Solutions for better governance of Latvia" with the financial support of the Society Integration Fund from the funds of the Latvian state budget. Cooperation partner of the project – the Court Administration.

[4] Despite the seemingly large number of responses, the authors of the study consider it a relatively low response rate taking into account the survey period and number of courts participating.

Understandable procedure (4.6 out of 5)
Impartiality and neutrality of the judge (4.5 out of 5)
Judge's attitude (4.5 out of 5)
Exact start time of the court hearing (4.3 out of 5)
On all these parameters, the feedback from the actual court users was overall positive. They appreciated the quality of the courts and their high professional standards. The Centre for Public Policy PROVIDUS and the Court Administration presented the results of the survey to the Judicial Council on 22nd September, 2023. The results attracted media attention, with headlines such as "In the survey, court users praised the work of the courts" appearing in the press and on television news.

The results clearly show that the general population lacks knowledge and understanding of the everyday work of the courts. Therefore, criticism of the judiciary is formed based on trending news rather than reasonable and experience-based assessment.

The report on the Court User Survey 2022-2023 is available (in English): https://www.at.gov.lv/en/tieslietu-padome/petijumi-apkopojumi-prezentacijas

COUNCIL FOR THE JUDICIARY OF SLOVENIA

REPUBLIKA SLOVENIJA
SODNI SVET

On **28 December 2023** President of the Slovenian Council for the Judiciary (Sodni svet) shared the following letter, regarding the current situation of salaried of judges in Slovenia, with the ENCJ President and the ENCJ community.

European Network of Council for Judiciary (ENCJ) President

SUBJECT: Salaries of Judges in Slovenia

Dear Ms. Dalia Vasariene,

I would like to bring to your attention that issues regarding the level of remuneration of Slovenian judges raised in the 2023 Rule of Law Report have not been resolved until the end of this year.

As 2023 Rule of Law Report already pointed out the Constitutional Court declared judge's salaries in Slovenia as unconstitutional considering various aspects (June 2023). The Constitutional Court gave Parliament six months to remedy the unconstitutionality. Unfortunately neither the Government nor the Parliament have not indicated concrete actions in the direction of realisation of Constitutional Court's decision by the deadline, that is January 3rd 2024. Furthermore, the president of Slovenian Government Mr. Robert Golob stated that the judge's salaries will be regulated by the new law on wages in the public sector, the content of which has not yet been determined, nor is it clear if and when it will be submitted to the parliamentary procedure.

Sodni svet considers non-implementation of the decision of the Constitutional Court not only as a significant interference with the independence of the judiciary but also as a serious breach of the principles of the rule of law and separation of powers as the foundations of the Constitutional system of the Republic of Slovenia as well as European Law.

As a result, Slovenian Association of Judges is already preparing protests in Slovenian Courts on January 4th 2024 with expected announcement of further tightening of measures in case the decision of Constitutional Court will not be implemented.

The position of Sodni svet is that the negotiations regarding the new law on wages in public sector are not directly related to the implementation of the decision of Constitutional Court regarding judge's salaries. Consequently, after the deadline for implementing the decision of the Constitutional Court, a request for its immediate execution will be filed.

Yours sincerely,

President of Sodni svet VLADIMIR HORVAT
Supreme Court Senior Judge

GENERAL COUNCIL FOR THE JUDICIARY OF SPAIN

Declaration of Permanent Commission, 6 November 2023

MANUEL LUNA CARBONELL, Secretary General of the General Council of the Judiciary, I CERTIFY:

That the Permanent Commission of the General Council of the Judiciary, meeting in an extraordinary and urgent session on November 9, 2023, has adopted the Agreement transcribed below, with only one vote against.

"In view of the inadmissible references, which are both semantic and substantive, to lawfare and judicialization of politics contained in the Agreement signed between the PSOE and Junts with the aim of facilitating the investiture and, especially, in view of the announcement of the possible constitution of parliamentary commissions of inquiry that could determine what is ambiguously called "responsibilities" derived precisely from situations of "lawfare", in the face of the announcement of the eventual constitution of parliamentary commissions of inquiry that may determine what are ambiguously called "responsibilities" derived, precisely, from situations of "lawfare", we echo and share the total rejection of such initiatives, in line with what has already been expressed by all the judicial Associations.

Such repudiation is based, quite justifiably, on the evidence that this potentially implies submitting to parliamentary review decisions framed within the exclusive competence of our Courts, which, on the other hand, we understand were produced in full compliance with the law then being judged. Therefore, the aforementioned initiative would imply an inadmissible interference in judicial independence and a flagrant attack on the separation of powers. The continuity of such a parliamentary initiative, if it were to materialize, would determine our most frontal opposition through the legally established channels.

At the same time we must express our real and not merely nominal support to all the organs of the judiciary on the occasion of future actions that may be carried out within the framework of the law at all times in force, the ultimate guarantee of the *rights and freedoms of all our citizens*".

I also certify that the following members not belonging to the Permanent Commission have expressly adhered to this Agreement up to now: Wenceslao Olea Godoy, Enrique Lucas Murillo de la Cueva, Juan Manuel Fernández Martínez, Juan Martínez Moya, José María Macías Castaño and Nuria Diaz Abad, without prejudice to subsequent accessions that may occur.

Institutional statement of the General Council for the Judiciary, 6 November 2023

AGREEMENT ON THE INSTITUTIONAL STATEMENT OF THE GENERAL COUNCIL OF THE JUDICIARY ADOPTED ON NOVEMBER 6, 2023 WITH THE VOTE OF MEMBERS WENCESLAO OLEA GODOY, CARMEN LLOMBART PÉREZ, JOSÉ ANTONIO BALLESTERO PASCUAL, FRANCISCO GERARDO MARTÍNEZ TRISTÁN, JUAN MANUEL FERNÁNDEZ MARTÍNEZ, JUAN MARTÍNEZ MOYA, JOSÉ MARÍA MACÍAS CASTAÑO, NÚRIA DÍAZ ABAD AND MARIA ÁNGELES CARMONA VERGARA.

The General Council of the Judiciary, exercising and reaffirming its constitutional functions for the defense of the full validity of the Constitution, of the rule of law and of the integrity of jurisdictional power, has agreed to approve the following

INSTITUTIONAL STATEMENT

I

The General Council of the Judiciary has been observing with growing concern the statements made by members of some minority political parties, some of them with government responsibilities, regarding the eventual amnesty of crimes committed on the occasion of the episodes that occurred on October 1, 2017, as well as those also committed prior to their preparation, including corruption crimes, and those also committed subsequently to oppose the legitimate action of the State to bring their perpetrators to justice and restore the altered public and constitutional order.

Insofar as these declarations were not backed up by a statement from the acting President of the Government, this Council has preferred to maintain an attitude of prudent expectation. The silence of the acting President of the Government, however, was broken last Saturday, October 28, and in a personal statement of wide public diffusion he has affirmed two things: first, that he has indeed agreed an amnesty law with political parties which includes, among others, the one led by a fugitive from justice who will personally benefit from the measure; second, that the measure will be adopted in the "interest of Spain" to prevent an eventual government of right-wing parties in the event of a repetition of the elections.

II

In view of the comments made in the last few hours regarding the untimeliness of this statement under the argument that this Council should have waited until it knew the text of the bill to issue its opinion, we affirm both our legitimacy and the opportunity to do so now.

The legitimacy to pronounce in relation to legislative initiatives such as those related to an amnesty law not only results from art. 561.1.8ª LOPJ but is also part of the European standards on judicial independence. As the Consultative Committee of European Judges, an advisory body to the Council of Europe, an international organization of which Spain is a member, points out, "*40. Parliamentarians and members of the executive branch must, of course, respect the law in their*

relations with the Council of Justice and not infringe its role and its functioning by violating or circumventing legal norms. Furthermore, relations with the Council should be based on a culture of respect for the rule of law and the role of the Council of Justice in their respective member state. 41. The Councils of Justice should actively participate in dialogue with the other branches of government, especially when providing input on draft legislation. This dialogue should be conducted in an atmosphere of mutual respect" (Opinion of the Consultative Committee of European Judges of the Council of Europe No. 24-2021). It can in no way be considered alien to the functions of the Councils of Justice, and certainly not of this General Council of the Judiciary, to raise their voice when democracy, fundamental freedoms and the rule of law may be at risk (Report of the General Council of the Judiciary of June 2023 on the codes of conduct of the members of the European Councils of Justice).

In view of such a transcendental initiative, reasons of prudence and institutional loyalty justified its processing as a bill and not as a proposal to give the State's advisory bodies the opportunity to issue their technical opinion. This will not be the case. The parties that promote the legislative initiative, the same parties that support the action of the acting Government, announce that they have opted for the parliamentary procedure that allows to dispense with such reports. It is therefore absurd that we are being asked to wait to do something that could not be done because they have deliberately chosen the path that prevents it.

This statement is not intended to replace the report that is avoided by the procedure chosen for the legislative initiative, but it is issued in view of the impossibility of formulating it. And to do so, it is not necessary to know the objective and subjective aspects that will delimit the contours of the law that is announced. It is not necessary because the substance has already been announced by the different political leaders who are negotiating the future law, among them some with responsibilities pending to be elucidated before the courts and who are negotiating and determining their own exemption from responsibility. And to this we must add that, in any case, the approval of an amnesty law, whatever its basis, and whatever its objective and subjective aspects, conflicts with various constitutional principles, as will be shown below, including the principle of exclusive jurisdiction, which justifies this Council, as a constitutional body whose essential mission is to watch over judicial independence, to express its concern at the imminent passage of such a law.

III

The present institutional declaration is based on a series of considerations that constitute its foundation: on the one hand, that fundamental rights bind all powers (article 53 of the Constitution); on the other hand, that the granting of an amnesty in our current constitutional system constitutes a serious violation of fundamental rights and of the very system of division of powers on which our Constitution is inspired and on which the rule of law is based. This constitutional body cannot remain silent in the face of an initiative such as the one referred to, due to the serious consequences it has on the very configuration of the Judicial Power as set forth in the Constitution, the source of legitimacy of all the powers of the State, which conditions the exercise of its powers.

This Council does not dispute the powers of the parliamentary groups represented in the Cortes to make as many proposals for laws as they consider pertinent; but neither can it accept that an initiative be undertaken that so ostentatiously curtails the fundamental rights of citizens and the powers that the Constitution reserves to the Judiciary. And this is affirmed without prejudice to the specific content of the aforementioned proposal, because such clear constitutional breaches are produced by the mere fact of undertaking a law -which must be of an organic nature- granting an amnesty.

Without prejudice to the debate as to whether the institution of amnesty can be constitutionally

admissible -in the more than forty years that the Constitution has been in force, the most established parties have been arguing that it is not admissible, as has the most authoritative constitutionalist doctrine- it is certain that there is no Amnesty Law in our legal system, which will force the projected amnesty which is intended to be submitted to the Cortes -Spanish Parliament- to be a singular law which, always according to the words of the President of the Government in functions, would have as its purpose to solve the conflict between Catalonia and Spain and to de-judicialize the referred "political conflict in Catalonia".

The linking of the aforementioned conflict with the projected amnesty makes the Courts responsible, if not for the genesis of the conflict, at least for having sustained it. With this idea, which inspires the promise of initiative, it is forgotten that the intervention of the Courts in the events occurred in Catalonia since 2013, or even since 2006, have been, as far as the Constitutional Court is concerned, to the defense of the Constitution that is entrusted to it by constitutional mandate. As regards the Courts of Justice (Supreme Court, National High Court, High Court of Justice of Catalonia, Provincial Courts and Courts of that Community), especially, but not only, those of the criminal order, have been limited to the prosecution and punishment of the crimes committed in connection with the aforementioned events, as, moreover, was their constitutionally mandated task. These actions have been carried out with a procedural neatness that has led to the confirmation of all its decisions in the appropriate procedural channels.

An amnesty law such as the one announced by the acting President of the Government can only have the purpose of rendering null and void the decisions -generally in sentences- adopted by the Courts in relation to the aforementioned facts of the alleged Catalan conflict. That is to say, purely and simply, a law of these characteristics can only entail declaring the nullity of these decisions. In other words, the Courts would come to affect the Judiciary by declaring the nullity of the sentences passed by the courts that are part of it.

The fact that in our Law there is no Amnesty Law, as has already been said, means that an amnesty such as the one announced can only be granted through the enactment of a singular law in which such a declaration is made. In other words, by means of this (singular) law, the sentences passed by the different Courts would be declared null and void, and this (singular) law would invade the exclusive competences (Article 117-3 of the Constitution) entrusted to the Courts.

It is true that amnesty, by its very nature, entails rendering jurisdictional decisions null and void, but in the case of the proposed law it is not a law of that nature, but rather, in the absence of prior recognition of the institution, it directly grants amnesty to specific and determined persons (all those who took part in the "conflict") for specific and determined acts (all those executed in that "conflict" that constituted a crime according to the law), it directly grants amnesty to specific and determined persons (all those who took part in the "conflict") for specific and determined acts (all those executed in that "conflict" which constituted a crime according to the law) and for a specific period of time (the period in which the conflict was generated and developed), so that it is a decision of the Cortes which invades very specific competences of the Courts, the annulment of sentences, by means of an ad hoc law.

Although the jurisprudence of the Constitutional Court does not declare singular laws to be contrary to the Constitution, it does consider them to be an institution of very restrictive and exceptional use, because they distort the characteristics of the law, which is governed, among other characteristics, by the generality of its effects and, in addition, limit the fundamental rights of judicial protection and the various fundamental rights affected by such laws; hence the need for this exceptionality to require a special and specific motivation that justifies its necessity and reasonableness. This is one of the cases in which the legislative power requires a specific statement of reasons, which is not generally required for the laws passed by the Cortes, which are limited by the requirements imposed by the Constitution, the only rule that binds the Legislative Power.

In the case of the announced bill, insofar as it affects - by declaring its radical nullity or nullity by operation of law - on final judgments handed down by the Courts, it entails an inadmissible invasion of our Constitution, specifically, of the powers that, under a regime of exclusivity, the Supreme Law entrusts to the Courts. And this invasion by a law of these characteristics cannot be legitimized, not even by a motivation that could be considered reasonable, because there is no admissible reason for Parliament to arrogate to itself powers that the Constitution entrusts to the Courts by means of this type of law. The Parliament could, if our Constitution really legitimizes it to do so, approve an amnesty law with the characteristics proper to any law, which are its imperativeness, generality and abstraction; and, in application of that specific regulation, adopt the decision to apply the amnesty to specific and determined cases and with the effects already contemplated in the general law which, on the other hand, must be applied by the Courts themselves. What is not admissible is that an *ad hoc law* recognizes the institution for its application to a specific and determined case.

A law of these characteristics can have no basis or reason whatsoever, and the arguments for its motivation will be futile. The Constitution not only configures the Rule of Law that inspires it under the principle of the separation of powers, but also, in a concrete manner, tries to preserve that none of the powers invades the competences constitutionally assigned to another. In particular - as is the case with the very denomination of the Judiciary as the exclusive Power of the Judiciary - the constituent had a special concern to guarantee, in favor of the citizens, the competences of the Courts and the Judiciary, the competences of the Courts and Tribunals and took to article 117-3º the axiom ["*il n'y a point encore de liberté si la puissance de juger n'est pas separeé de la puissance législative et de l'exécutrice*" ("there is *no freedom if the power to judge is not separated from the legislative and executive power*")] that it corresponds "exclusively" to the Courts "*the exercise of the jurisdictional power*"; that is, to judge and execute what has been judged. If it is authorized that by means of singular laws a no lesser facet of that power can be altered, such as that of executing what has been judged, by means of a particular declaration that would leave without effect what has been declared in a final judgment, such as an ad hoc amnesty, a very dangerous interference of the Legislative Power in the Judicial Power would take place, altering the requirement of the separation of powers and, with it, the essential principle of the Rule of Law that our Constitution guarantees. The Parliament cannot, by a minimum constitutional logic, arrogate to itself, under the protection of temporary majorities -which are depositaries, but not holders of national sovereignty-, to influence specific sentences of the Courts declaring their nullity, whatever the motivation for such declaration may be.

IV

In view of the foregoing considerations, the General Council of the Judiciary expresses with this statement its intense concern and desolation for the degradation, if not abolition, of the rule of law in Spain, which, from the moment it is adopted, will become a mere formal proclamation that will inevitably have to produce consequences to the detriment of the real interest of Spain.

Whatever the formal or apparent justification given in the preamble of the future law, its real motivation has already been expressed, and beyond the discussion on whether singular amnesty laws are really constitutionally acceptable to circumvent the constitutional prohibition of general pardons, what in no case is acceptable is an amnesty, and not even a particular pardon of those generically admitted by the Constitution, with the real basis expressed by the President of the Government in office.

To confuse the "interest of Spain" with the interest of the acting President of the Government to avoid the hypothetical formation of governments of parties of a different ideology from his own is something manifestly incompatible with the political alternation, embedded in the basic principle of political pluralism which, according to article 1 of our Constitution, is a superior value of our legal

system. But to do so by exempting the application of the law to prevent the ongoing action of the courts or to render ineffective that which has already taken place by means of firm sentences, turning those sentences into a dead letter, is something categorically incompatible with the principle of the rule of law in which, again according to article 1 of our Constitution, Spain was intended to be constituted and indeed was constituted... at least until now. Using the enactment of a singular law to invade the competences of the Judiciary as a means of political negotiation constitutes a perversion of the constitutional regime, because nothing would prevent temporary majorities in the composition of the Courts from imposing their criteria over and above constitutional requirements, under the protection of the fact that a rule of this rank cannot be questioned by the citizens.

This is so, **firstly**, because it is not compatible with the principle of the rule of law proclaimed by article 1 of our Constitution, and not even with the principle of responsibility of the public authorities referred to in article 9.3, that political leaders are exempt from answering for their crimes before the courts, whatever the nature of their crimes, so that an aspiring President of the Government can obtain the personal and political benefit of preventing the government of other political forces or, expressed in reverse, to be able to remain in government. This means degrading and converting our rule of law into an object of marketing at the service of personal interest that pretends to present itself, from the rejection of political pluralism, as the "interest of Spain".

Second, because it means generating a political class that is legally irresponsible and unpunished for its crimes, which, without being justified by any constitutionally legitimate aim, means contravening not only the principle of responsibility of the public authorities, but even the most elementary principle of equality of citizens before the law, as proclaimed in Article 14 of the Constitution.

Third, because the independence of the courts is violated in its most basic aspect: if independence is the necessary instrument for the courts to be able to act neutrally and guarantee, through the effectiveness of their decisions, the principle of legal certainty, there can be no question of independence or legal certainty when political forces use the laws to their advantage to prevent the action of the courts. The enormity of the consequences of what has been announced by the acting President of the Government is that it turns the independence of the courts and legal certainty, justice in short, into a chimera.

And, **finally**, this General Council of the Judiciary cannot fail to point out that what is being violated with the measure announced by the acting President of the Government is not only the Constitution with which we Spaniards have provided ourselves as a framework of coexistence, but also the commitments assumed by Spain in articles 2 and 19 of the Treaty of the European Union so that at all times the principles of the rule of law and judicial independence prevail. The risk that the time will come when the European Union will decide not to be the alibi of a State that does not comply with its principles should be very present, at this critical moment, in the foresight of those who really intend to act in the "interest of Spain".

Madrid, November 6, 2023

Unanimously adopted resolution of the Plenary of Council for the Judiciary, 21 December 2023

CONSEJO GENERAL DEL PODER JUDICIAL

1. In recent weeks there have been repeated declarations and communiqués from this Council, through the Permanent Commission, its President (p.s.) and of its Members, as well as those of the Supreme Court, the High Courts of Justice, the Provincial Courts, the Dean Judges and numerous public and private institutions warning of the risks to judicial independence that the recently constituted Commissions of Inquiry in the Congress of Deputies could pose if members of the judicial career were to appear before them in order to testify on matters of which they are aware or have been aware in the exercise of their jurisdictional function.

2. In spite of this, prominent spokespersons of the parliamentary groups that have promoted the constitution of the commissions of inquiry insist that judges and magistrates be called upon to appear before them. It is therefore necessary for the Plenary of the General Council of the Judiciary to make a new pronouncement on the matter in order to express, first of all and without reservation, the absolute respect of this constitutional body for the autonomy of the Chambers that form the Cortes Generales to create as many commissions of this nature as they deem appropriate under the protection of Article 76 of the Constitution (EC) in order to clarify the facts that have occurred on the matters that are the object of the same with the purpose of demanding, if necessary, the appropriate governmental political responsibility.

3. Secondly, with the same clarity and firmness that it respects parliamentary autonomy, the General Council of the Judiciary must guarantee judicial independence at all times and under all circumstances. Therefore, and by imperative of Article 76 EC, in conjunction with Article 117 EC and Articles 396 and 399 of the Organic Law of the Judiciary (LOPJ), it must be noted that these parliamentary committees lack the power to call to testify before them and investigate judges and magistrates on matters that they know or have known in their work of judging and enforcing what has been judged.

4. Judges and magistrates are fully subject to the Constitution and the laws and are subject to disciplinary and criminal liability when they incur in the cases typified as infractions or crimes, respectively. Now, the requirement of the first corresponds exclusively to this Council by mandate of Article 122 EC and, the second, to the judicial bodies served by "Judges and Magistrates who are members of the judiciary, independent, irremovable, responsible and subject only to the rule of law". Conditions that, obviously, are not met by the members of the parliamentary committees of inquiry, since, after all, their representative function is strictly political and is oriented and limited, as far as it matters here, to the demand for responsibilities of that nature.

5. Consequently, in the event that, notwithstanding the foregoing, judges and magistrates are called upon to testify before repeated commissions of inquiry on matters in which they have intervened or are intervening in their capacity as such, even under the warning that they may incur criminal liability if they do not appear, they shall not be obliged to comply with the

request sent to them for this purpose, they shall not appear before them and the General Council of the Judiciary shall not authorize service commissions for this reason.

6. Finally, the reminder that each power must confine its actions to its respective sphere must be complemented by a call for the Council to be renewed as soon as possible and to put an end to the constitutional anomaly in which we find ourselves, the duration of which has far exceeded the limits of what is tolerable.

By virtue thereof, the Plenary of the General Council of the Judiciary

AGREES

First: To urge the Congress of Deputies and the Senate, in accordance with articles 76 and 117 CE, 396 and 399 LOPJ, to refrain from summoning judges and magistrates to testify before the investigation commissions constituted therein on facts that have come to their knowledge in the proceedings subject to their jurisdictional activity.

Likewise, judges and magistrates may not disclose in writing, or in any other way, facts or circumstances of which they have become aware by reason of their professional practice.

Second: Judges and magistrates who, notwithstanding the above, are summoned to a commission of inquiry shall immediately inform the Standing Committee of the General Council of the Judiciary, sending it a copy of the summons received.

Third: The Permanent Commission shall deny the authorization of service commissions to judges and magistrates to appear to testify before the aforementioned commissions of inquiry on facts of which they have or have had knowledge on the occasion of their jurisdictional activity.

Fourth: To communicate this Agreement to the presidencies of the Congress of Deputies and the Senate and to the European Network of Councils for the Judiciary.

Madrid, December 21th, 2023

NATIONAL COURTS ADMINISTRATION OF SWEDEN

COUNTRY SITUATION UPDATE

Collaboration to provide safe and secure participation in court hearings via videoconference

The Swedish National Courts Administration has been collaborating with the Swedish National Service Center to provide safe and secure participation in court hearings via videoconference. The collaborative project has been ongoing since 2021 and finally, in mid October, the project was up and running. The aim is to offer parties, experts and witnesses a safe environment with secure technology when participating digitally in a hearing. Using the service offices is an alternative to borrowing video rooms at another court or allowing the participant to participate from home. In addition, it means shorter journeys, lower costs and a better service to the public.

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The Committee of Inquiry on strengthening the protection of democracy and the independence of the judiciary has completed its work

The committee delivered a report based on the broad political consensus underpinning its composition. The task of the committee was to examine the modalities of amending the constitution and the need to further strengthen the long-term protection of the independence of courts and judges.

The committee recommended the setting up of a new courts administration agency that would be more independent from the Government compared to the current Swedish National Courts Administration (the "SNCA"). The new agency would be led by a board, a majority of which are or have been judges, nominated by the courts, that would appoint the agency's director. The report comprises proposals on several other aspects, such as the procedure for amending the constitution, adjustments in the system of appointment of judges, procedures for accountability of judges, a statutory retirement age for judges of the Supreme Courts and other judges, and a special joint composition with judges of both Supreme Courts.

The Swedish model includes a so called formal consultation round after a report is delivered and that took place between April and August 2023. In the consultation round government agencies and other interested parties are asked to give its opinion on the proposed changes. The SNCA is over all positive to the proposed changes. However, in the part relating to proposals for the establishment of a new courts administration agency, the SNCA thinks that the committee has not sufficiently considered the SNCA's extensive and complex assignments vis-à-vis the courts and in relation to other authorities. In that area the SNCA has recommended further work and consideration during the coming task of the workings of establishing a new courts administration agency. It is foreseen that the proposed changes would enter into force in 2027.

THE VENICE COMMISSION

Overview of recent opinions of the Venice Commission regarding relevant legislative initiatives in the ENCJ Members and Observers.

Prepared by the ENCJ Office team

The European Commission for Democracy through Law (Venice Commission) has recently published opinions on among others, Bulgaria (CDL-AD(2023)039), the Republic of Moldova (CDL-AD(2023)032) and Ukraine, which were adopted at the plenary session on 6-7 October 2023.

Bulgaria

The opinion on draft amendments to the Constitution was requested by the Bulgarian Justice Minister Atanas Slavov. Draft amendments concern among other things the system of governance of the judiciary and the prosecution service.

Chapter on the Bulgarian judiciary, relating to the Supreme Judicial Council (SJC), contains important amendments that may be of interest to the ENCJ community.

First of all, the VC regrets that prior to the launching of the constitutional debate, no appropriate public debate was organised. The Venice Commission recommends the Bulgarian authorities to explain in detail the reasons behind each proposal so that the public is aware of the impact of new legislation (para. 23). The Venice Commission has expressed its support for the proposed amendment aiming at dividing the SJC and eliminating the Plenum so that the Minister of Justice would no longer chair the Plenary SJC and the Plenary SJC nominates candidates for the position of the two chief justices and the Prosecutor General (para. 45).

The abolition of the plenary SJC, already recommended in the previous VC opinion, would also address the concern that the prosecutors, and the Prosecutor General in particular, are excessively involved in the governance of judges. Venice Commission recommends looking into possible modalities for adequate contact between the two councils aimed at exchanging information and best practices.

In the draft amendments, the provisions provide for the SJC to be composed of 15 members, including the presidents of the Supreme Court of Cassation and the Supreme Administrative Court,

8 of the remaining 13 members to be elected directly by the judges, and only five to be elected by the National Assembly (non-judicial members) (para. 46). The composition of SJC would therefore be in line with the recommendation of the Venice Commission as the majority of the members would be judges (ten out of fifteen), and eight judicial members would be elected from various levels of courts.

However, the Venice Commission regrets that no dead-lock mechanisms for situations where the National Assembly cannot reach the 2/3 of votes for electing the members of the SJC, the Prosecutorial Council and the Inspectorate are foreseen (para. 50).

Additionally, the Venice Commission stressed that probationary periods for judges should be removed or conditions for not confirming the tenure should be narrowly defined in the law (para.59).

The two councils should be able to nominate candidates for the respective inspectorates, and they should have exclusive authority to remove them. According to the Venice Commission, it is important for the law to clearly define the powers of the inspectors, ensuring that they do not interfere with the constitutional role of the two councils in regard to the career and discipline of judges and prosecutors (para. 100).

The draft amendments also attempt to transform the State Prosecution Service.

For more information, please read the following Opinion CDL-AD(2023)039.

Moldova

The opinion on the draft "Law on the anti-corruption judicial system and on amending some normative acts" was requested by the President of the Republic of Moldova. The draft law has two major aims: firstly, to create a system of specialised courts offering "an increased degree of independence to judges" and secondly, to accelerate corruption-related proceedings.

In overall terms, the Commission recommends that the authorities enhance their efforts aiming at the finalisation of the judges' vetting process, who may then be allocated corruption-related cases, and at reinforcing the efficiency of anticorruption bodies and mechanisms, as well as of the courts dealing with corruption cases. The Venice Commission underlines that in light of the aim of establishing a "system of specialised courts", consideration should be given to the creation, by decision of the SCM, of a specialised anticorruption chamber also in the Supreme Court of Justice (para. 39).

In addition, the Commission recommends that once the Selection and Evaluation Board of the SCM is operational, the SCM should be responsible for the selection procedure without the need for an additional body to carry out a preselection procedure (para. 53). According to the Venice Commission, the regulations to be established by the SCM should include provisions for a minimum number of members required to participate and vote in the selection process, as well as the necessary quorum. Additionally, general and intermediate deadlines should be defined in the pre- and selection procedures to ensure legal clarity and efficiency. It is also recommended that the draft law refers to the relevant legislation (Administrative Code) which provides for judicial review (para. 59).

Finally, the Commission considers the monitoring of "the lifestyle of judges" by the SCM unnecessary and recommends its removal from the draft law. The verification of assets and personal interests already provides an adequate mechanism for monitoring judges' integrity (para. 71).

For more information, please read the following Opinion (CDL-AD(2023)032).

Ukraine

Opinion on the Draft law On amending the Law of Ukraine On the Judiciary and the Status of Judges (hereinafter – the draft law) was requested by the Chairman of the High Council of Justice (HJC). The draft law aims at introducing additional procedures directed to enhancing public trust in the judiciary, mainly through (i) broadening the grounds for checking the integrity and discipline of judges by introducing a new type of "court monitoring" the HICJ; and (ii) introducing the use of lie-detector (polygraph) in various contexts of judicial career (recruitment, competitive transfers, the court monitoring, and the disciplinary proceedings) (para 11).

The VC has assessed the amendments proposed by the draft law in the broader context of their previous opinions produced on the Law of Judiciary and the Status of Judges in Ukraine and the reforms envisaged by these amendments. The VC recalled its 2020 Opinion, which underlined the importance of the stability of the judicial system and the necessity to refrain from frequent fragmentary judicial reforms, ensure the appropriate sequencing of changes in the judicial reform and prioritize the effective enforcement of the existing legal framework (para. 7, 24).

Following the abovementioned position the VC remarked that the new HJC composition has only recently begun to operate and has not yet even started to exercise its disciplinary function, thus it suggested that it might be more appropriate to allow some time for the HJC to fully resume its work and to continuously monitor which shortcomings in the existing procedures hamper the effectiveness of the work of the HCJ, and only then consider introducing further measures, such as those contained in the draft law (para. 29).

Furthermore, the VC stressed the need of proper implementation of the adopted laws concerning the judicial reforms in Ukraine (para.30) and the necessity of accountable, yet independent judiciary. It was noted that judicial independence may not be an argument to block means of accountability, howeverthe means of accountability may not infringe independence, especially by creating threats and undue pressure (para. 32). The Commission proceeded to review specific provisions regarding "court monitoring", including the clarity of the powers and procedures before the HJC (para. 37-54) and the proposed use of lie-detector in ample of procedures related to the judiciary (para. 54-67).

The VC concluded that the draft law raises concerns and the Commission is not convinced that the newly proposed measures are appropriate.The Commission and DGI recalled their general recommendations contained in the abovementioned 2020 Opinion: when making such substantial changes to the framework governing the judiciary, the authorities must take a comprehensive and coherent approach with due regard to the considerations of stability of the judicial system; it is essential to respect the sequence of changes in the judicial reforms and give priority to the effective enforcement of the existing ordinary tools of judicial accountability (para. 70).

For more information, please read the following Opinion (CDL-AD(2023)027).