Carta sobre situación en España y Cataluña

RESPONSE TO THE OPEN LETTER "UPHOLDING THE RULE OF LAW IN THE EUROPEAN UNION", of 31 October 2017

Dear President Juncker, dear President Tusk,

The open letter published on 31 October, addressed to you and signed by a number of scholars, intellectuals and Members of the European Parliament, denounced the alleged actions of the Spanish authorities before and after the illegal referendum that took place on 1 October. The signatories included certain figures who, for different reasons, are very well known, such as Gustavo Zagrebelsky, Judith Butler, Philip Pettit, Nancy Fraser, Toni Negri, Étienne Balibar, Arjun Appadurai, Boaventura de Sousa Santos and Yanis Varoufakis. This letter reveals an appalling lack of knowledge regarding the issues it addresses, including a serious ignorance of Spain's Constitution and Spanish law. Additionally, it contains numerous factual errors and, as a result, inevitably arrives at conclusions that are far removed from what is really happening in Catalonia and in Spain. Due to the high standing of the signatories, and due to the falseness—in certain cases, unquestionably, unintended—of their accusations, we consider it appropriate to provide you with the following clarifications.

I The very first paragraph contains an affirmation that is inadmissible from any minimally reasonable perspective: "…we are deeply concerned that the EU's governing bodies are condoning the systematic violation of the rule of law in Spain, in particular regarding the Spanish central authorities' approach to the 1 October referendum on Catalan independence". On this point, what would concern the signatories, if they were fully informed of the matters on which they are commenting, would be, at least, the following four key issues.

Firstly, this so-called referendum was not covered by the most basic democratic guarantees according to European standards of the Venice Commission of the Council of Europe: the electoral roll was not known until an hour before the voting commenced, the staffing of the polling stations was not made public in advance, and there was no electoral administration or court scrutiny. All of the above are absolutely essential to ensure that a referendum is worthy of such a name and that its results can be trusted.

Secondly, the Act that regulated this most unorthodox vote had been approved three weeks earlier, on 6 September, in a less than a day sitting of the Catalan Parliament. In said session, opposition parties had only two hours to amend the bill presented and stripped parliamentary minorities of the most basic rights of participation recognized in Spain's Constitution. It must also be added that the Bureau of the Catalan Parliament, by majority decision, ignored not only the rulings of the Constitutional Court but also those of the Council for Statutory Guarantees (an internal body of the Catalan regional government—the Generalitat—which issues legal opinions) and the reports of the Catalan Parliament's own legal counsel.

Thirdly, the purpose of the Referendum Act was to regulate "Catalonia's right to self-determination" —a right, formulated as such, whose very existence is not supported, either by Spanish or international law. Moreover, in its first few articles, the Referendum Act affirmed the sovereignty of the Catalan people and the hierarchical superiority of this Act to the Spanish Constitution, to Catalonia's Statue of Autonomy and to Spain's entire legal system.

Fourthly, the Parliament of Catalonia, the legislative chamber of the Autonomous Community, does not have the power to regulate, and the regional premier of Catalonia does not have the power to call, a referendum whose results necessarily and directly affect the Spanish people as a whole. To achieve the intended purpose of this referendum, what would be required, given that Spain is a democratic State governed by the rule of law, would be a constitutional reform. As indicated in a recent ruling by the Constitutional Court, such a reform is always possible given that the Spanish Constitution, unlike those of other European States, does not include any clauses prohibiting its total reform and, as a pluralistic democracy, parties and ideologies that are against the Constitution are legal and with representatives in Parliament. That said, given that Spain is also a constitutional democracy, such a reform would need to follow the specific procedures detailed in Title X of the Constitution.

Therefore, if the "the Spanish central authorities' approach to the 1 October referendum on Catalan independence", as the letter claims, is supposedly a very important fact demonstrating that there is a "a systematic violation of the rule of law in Spain", it is clear that this statement is entirely unfounded. In contrast, the Act passed in Catalonia—which was immediately suspended by the Constitutional Court, pursuant to Article 161.2 of the Constitution —does in fact conspicuously violate not only Spain's Constitution, but also the fundamental principles of democracy and rule of law. We are disappointed that the signatories of the letter did not familiarize themselves with the form and content of this irregular legislative process, before deciding to sign.

II The signatories of the open letter are also mistaken when they allege that the Spanish authorities, including judges and courts, as well as the Constitutional Court, have violated the fundamental rights set down in international treaties.

Sound supporting arguments should be given for an accusation of this severity. However, surprisingly, the letter does not provide any specific facts, merely mentioning general considerations without going into detail, to allege that Spanish legislation has violated fundamental rights. As regards the application of this legislation over the past few conflictive weeks, to assert that the Spanish authorities—both the government and the judiciary—have violated freedom of peaceful assembly, the right to peaceful public manifestation, freedom of expression and the right to political participation, as the letter states, is to flout the truth.

Firstly, the demonstration of 20 September that the letter mentions, due to which Mr Sánchez and Mr Cuixart have been remanded in custody, as a precautionary measure, was in no way peaceful: three Civil Guard patrol cars were attacked, while the officers were executing a court order to search a building used by the Catalan Public Administration; the court clerk who observed the search on the judge's behalf to ensure that it was performed lawfully was prevented from leaving the building for several hours; furthermore, the officers from the Civil Guard were prevented from leaving the building by the protesters—led by Mr Sánchez and Mr Cuixart—until 7am the following morning, 23 hours after they entered. Therefore, the demonstration, which lasted almost a whole day, was not peaceful in any way, and in fact violated the rights of those who, in fulfilment of a court order, were performing their duties as judicial police.

Secondly, to state, as the open letter does, that in the days running up to the referendum [sic] of 1 October, the Spanish authorities "undertook a series of repressive actions against civil servants, MPs, mayors, media, companies and citizens" is entirely incorrect. The actions were not "repressive" in any way; they were adopted with all of the constitutional guarantees offered by the High Court of Justice of Catalonia, applying the ruling of the Constitutional Court, which suspended all provisions and actions whose purpose was to hold a referendum—regulated by a law that had already been suspended and therefore did not apply, and which was unanimously ruled unconstitutional a few days later. An allegation that a measure adopted by a judge is "repressive" can only be upheld if it is proved that the decision is arbitrary, unlawful or, naturally, a violation of the fundamental rights recognized in international law. None of this has been demonstrated, or even argued, in the open letter.

Thirdly, as regards the events of 1 October, a decisive factor is not mentioned in the letter: pursuant to the powers set down in Catalonia's Statute of Autonomy, the police force that was responsible for preventing the illegal referendum was the regional Catalan police (*Mossos d'Esquadra*), to whom instructions were accordingly issued by the presiding judge. But this regional police force did not comply with the court order—their chief officers are now under investigation—making it necessary to urgently replace them with the National Police, a nationwide force. Consequently, the National Police were subjected to a veritable ambush, causing difficult situations in which it proved necessary to use some physical force, as it often does during demonstrations.

Nonetheless, contrary to what the figure of 900 persons injured provided by the Catalan Generalitat might suggest, the truth is that the use of physical force was very limited. The proof of this is that only four people went to hospital: two were discharged immediately, a third suffered a non-fatal heart attack—a condition for which the police cannot be held responsible—and the fourth person had an eye injury from a rubber ball fired by the police, and was attended at a medical centre. Of the images that circulated on social networks over the following days, many proved to be from previous police operations or other situations (as media outlets such as the *The Guardian, Le Monde*and *El País* discovered), and did not depict 1 October. This is a telling reflection of the dishonesty of the news items, which formed part of the propaganda campaign orchestrated by Catalan pro-independence organizations, in collusion with the Catalan Generalitat.

Therefore, it cannot be stated, as it is in the open letter, that "the Spanish police engaged in excessive force and violence against peaceful voters and demonstrators", nor that the use of force was disproportionate and abusive. If that had been the case, there would be no explanation whatsoever for the claim that approximately two and a half million Catalans were able to vote (a 42% of the Catalan citizens), according to figures provided by the organizers, the truth of which is impossible to verify due to the lack of electoral guarantees.

III However, what is most surprising about the open letter—which purports to be concerned about the rule of law in Spain—is the fact that at no time does it refer to the Catalan Parliament's and Catalan Government's repeated and fragrant non-compliance of Spain's Constitution, of Catalonia's Statute of Autonomy, and of all other provisions in Spain's legal system, not to mention of court rulings. Specifically, it can be affirmed that during the months of September and October, the authorities of the Autonomous Community of Catalonia acted in open contempt of the Constitution, of prevailing legislation, and of court decisions: on numerous occasions they defiantly announced that they did not intend to abide by the laws or comply with court rulings. It is also striking that the letter does not express any concern whatsoever for the well-grounded suspicions that

the Catalan authorities have engaged in corrupt activity by using the Generalitat's public funds to finance all of these partisan pro-independence activities against a ruling of the Constitutional Court. For this reason, some of the prosecuted politicians are being accused, among other offences, of misappropriation of public funds.

For all the above, it is ludicrous for the letter to accuse the central government and the courts of acting outside the legal standards in the European Union as guaranteed in the Treaties of the European Union and in the European Convention on Human Rights, when, in fact, the ones acting outside the law—including Catalonia's Statute of Autonomy and the Catalan Generalitat's own laws—have been the Catalan authorities.

Indeed, since January 2013 the Catalan authorities have been defying Spain's rule of law on a great many significant occasions, which are impossible to summarize here, but which are very well known. It all led, in September 2017, to the approval of the Referendum Act and of the Legal Transition Act both by a majority of the Catalan Parliament (72 from 135 members), which replaced the constitutional order in Catalonia with a new and different order, which had no democratic legitimacy whatsoever. Faced with this, the Spanish Government, with the support of the political parties Popular Party, PSOE (Spanish Socialist Workers' Party) and Ciudadanos—i.e. an overwhelming majority in Spain's Congress of Deputies—not only filed court appeals, especially before the Constitutional Court, but also gave the Catalan Parliament and Government several opportunities to rectify their actions. Since they did not do so and, on 27 October, they declared—evidently with no legal effects—Catalonia's independence, Spain's Senate approved the central government's proposal to adopt extraordinary measures, pursuant to Article 155 of the Constitution, dissolving the Catalan Parliament and calling elections for 21 December. Obviously, both this decision, together with any others that may be adopted pursuant to said Article 155 of the Spanish Constitution, is subject to the corresponding judicial scrutiny.

In conclusion, notwithstanding any ideological affinities that may be aroused by the secessionists' aspiration to fracture Spain's territorial integrity, we consider that by restoring constitutional order in Catalonia through application of Article 155 of the Spanish Constitution, the Spanish authorities are also guaranteeing the rule of law in the EU. Naturally, should illegal or disproportionate acts that violate fundamental rights and democratic principles be committed in the future, we will not hesitate to denounce such arbitrary actions by the public authorities that constitute a threat to citizens' freedom and equality. But this has not occurred. For all these reasons, we consider the arguments set forth in the open letter to be unfounded and biased. Therefore, we are responding, both with an account of the facts and with their legal grounding, based on Spanish, European and international law. As Public Law scholars, we feel it is our public duty to respond, to provide you with a clarification of the situation.

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