

SUMMARY REPORT
OF ACTIONS TAKEN
BY THE CATALAN
OMBUDSMAN
REGARDING THE DAY
OF OCTOBER 1, 2017
NOVEMBER 2017

SÍNDIC

EL DEFENSOR
DE LES
PERSONES

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Síndic de Greuges de Catalunya

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INTRODUCTION

In the month of April, 2017, the Catalan Ombudsman filed in the Parliament of Catalonia the report on the subject matter of human rights: "Human Rights Regression in Spain: Elected Officials' Freedom of Expression and the Separation of Powers".¹ This report detailed a number of laws and practices at the State level that had a significant impact on Catalonia, and were eroding the standards of internationally-recognized civil and political rights. Among other affairs, the report sought to draw attention to the partisan use of the justice system, which was accompanied by a growing judicialization of the political debate on Catalonia, to the undermining of the separation of powers and limitations to the freedom of expression, especially of elected officials. The report was debated in a committee meeting on July 10 of this year.

As of the ratification of Law 19/2017, of September 6, on the self-determination referendum (appealed by the Spanish Government on September 7, and suspended by the Constitutional Court the same day), an escalating spiral of events have transpired, leading this institution to

take a number of positions, always with the purpose of protecting respect for human rights and fundamental freedoms and making repeated appeals for a start to political dialog to resolve the conflict. Aside from the competent Catalan and Spanish authorities, these statements and reports have been addressed to the European Commissioner for Human Rights, the European Ombudsman, the UN High Commissioner for Human Rights, the Spanish and Autonomous Community Ombudsmen, and also the members of International Ombudsman Institute.

The report now being presented summarizes and systematizes the statements, letters and reports published by the Catalan Ombudsman from 15 September to 2 November of this year² placing special emphasis on the Ombudsman's role in the defense of the fundamental rights and the public freedoms of the citizens of Catalonia before any public authority. Furthermore, this report details the actions taken by the institution in this period following the complaints and queries received from citizens, and updates the statistics and analyses of the events that have been the subject of investigation.

¹ http://www.sindic.cat/site/unitFiles/4402/Report%20Human_rights_regression.pdf.

² The original texts referred to by these statements, letters and reports are as follows:

- Letter from the Catalan Ombudsman, <http://www.sindic.cat/site/unitFiles/4701/Carta%20SG%20v%203-ENG.pdf> (15 September 2017)
- Statement of the Catalan Ombudsman <http://www.sindic.cat/en/page.asp?id=53&ui=4711&prevNode=408&month=8> (20 September 2017)
- Report by the Catalan Ombudsman http://www.sindic.cat/site/unitFiles/4713/Report%20%2022%20september%202017_eng.pdf (22 September 2017)
- Statement of the Catalan Ombudsman <http://www.sindic.cat/en/page.asp?id=53&ui=4716> (26 September 2017)
- Participation of children and adolescents, pluralism in schools <http://www.sindic.cat/site/unitFiles/4727/La%20participaci%20dels%20infants%20i%20adolescents%20i%20pluralisme.pdf> (29 September 2017)
- Actions of the Spanish state's law enforcement agencies on October 1st <http://www.sindic.cat/site/unitFiles/4730/Comunicat%201-O-EN-FINAL.pdf> (2 October 2017)
- Proposal for dialog and mediation before the current context <http://www.sindic.cat/en/page.asp?id=53&ui=4743&prevNode=408&month=9> (4 October 2017)
- The European Commissioner for Human Rights notifies the Catalan Ombudsman that he has requested that the police baton charges of October 1 be investigated, <http://www.sindic.cat/en/page.asp?id=53&ui=4753&prevNode=408&month=9> (9 October 2017)
- The Catalan Ombudsman states that the independence movement cannot be criminalized, makes appeal for political dialog <http://www.sindic.cat/en/page.asp?id=53&ui=4773&prevNode=408&month=9> (18 October 2017)

1. EVENTS PRIOR TO OCTOBER 1st

1.1. Freedom of assembly and expression

The first action taken by this institution, a letter dated 15 September sent to the aforementioned institutions, was triggered by possible violations of the freedom of expression and assembly, as well as possible abuse of authority by the Spanish Prosecutor's Office in judiciary duties, which will be referred to in the following section.

First, the Judicial Review Court no. 3 of Madrid suspended a permit to use publicly-owned premises to hold an event entitled, "Madrid, For the Right to Decide" through a court order dated September 12. It was an event planned for September 17 by an association with the endorsement of the local administration, which allowed the use of a publicly-owned facility in which to hold it. These prohibitions spread to thwart similar events planned in Vitoria Gasteiz (by a court) and Gijón (by the municipal government).

At the same time, on September 12, the High Court of Justice of Catalonia notified several individuals, including the management of the Catalan Audiovisual Media Corporation (CCMA-TV3 and Catalunya Ràdio) of the ruling by the plenary session of the Constitutional Court suspending Law 19/2017, which also prohibited "informing on any agreement or action that would allow the preparation and/or celebration of the self-determination referendum of Catalonia". The court also warned of possible criminal punishments in case of disobedience.

At this point, it is important to note the irregularities that took place in the approval of Law 19/2017 in the Parliament of Catalonia, both as regards the Regulations of Parliament as well as the Council of Statutory Guarantees Act. These irregularities are likely attributable to, among other reasons, the constitutional case law that immediately blocks and

suspends any parliamentary procedure derived from pro-sovereignty political rulings, as the Catalan Ombudsman stated in his report of April 2017.

In any case, the ideological freedoms of expression, demonstration and information are pillars of democracy and therefore, the prohibition of the Madrid event and the ruling that appears to prohibit public communication media from broadcasting certain information could be violating fundamental rights recognized in the constitution and statute, as well as international treaties ratified by Spain, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The Catalan Ombudsman also quoted a recent report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, which states that in our societies, it must be possible to address and resolve matters relative to self-determination or secession "through peaceful and democratic dialogue that respects the rule of law and human rights (including the rights of national minorities) between the region concerned and the government of the State of which it forms part".³

Thus, the Catalan Ombudsman conveyed to all recipient institutions an alert regarding these acts, and made a solemn appeal for all involved institutions to immediately engage in political dialog to resolve such a transcendental matter.

1.2. Lack of proportionality in actions of the Prosecutor's Office

State Public Prosecutor. Upon the approval of the Referendum Act and its suspension by the Constitutional Court, the state public prosecutor issued on 15 September instructions addressed to the four provincial prosecutors' offices of Catalonia to open investigative proceedings on over 700 mayors, with the instruction to subpoena them as persons under judicial investigation with the explicit warning

³ Report by the Committee of Judiciary Affairs and Human Rights of the Council of Europe, 4 September 2017 (Doc. 14390).

that failure to appear would result in their arrest and being brought before the court.

In his letter of 15 September, the Catalan Ombudsman cast doubt on the Prosecutor's ability to autonomously undertake these actions when prior judicial proceedings were already underway. The Catalan Ombudsman's concern was corroborated several days later in an order handed down by the High Court of Justice of Catalonia (27 September) to which reference will be made in the following section. Additionally, it was stated that the judicial action and prosecution of alleged criminal activity with relation to the Order of the Prosecutor's Office had to be inspired by the principle of proportionality (Article 5 of the Organic Statute of the Prosecutor's Office).

Days later (20 September), the Catalan Ombudsman insisted once again on the disproportion of the measure, given that the subpoenas of over 700 mayors were motivated by laws that had been suspended, but not yet declared unconstitutional (the ruling of the Constitutional Court is from 17 October), and were of a preventive nature, considering that no activities to prepare the consultation had yet been materialized. All of this was being done against the aiding of an act—the referendum—which does not constitute a crime.

High Prosecutor's Office of Catalonia. On September 12, the High Prosecutor's Office of Catalonia issued Instruction 4/17, in which it ordered the judiciary police to take actions "to block the illegal referendum called for October 1 in Catalonia." It also ordered that the command of the Civil Guard coordinate the operations of the three police forces involved in the operations: Police of the Generalitat-Mossos d'Esquadra, National Police and Civil Guard (PG-ME, CNP and GC).

With respect to the order to block the "illegal referendum", the Catalan Ombudsman issued a statement (September 26) featuring the reminder that the calling of a referendum ceased to be a crime following Organic Law 2/2005, which abolished the articles of the Criminal Code that punished the calling "of general, autonomous or local elections, or popular

consultations by means of referendum." In other words, articles 506 bis and related provisions introduced by Organic Law 20/2003, due to insufficient entity to constitute a crime. In fact, the opening statement of the abolishing reform of that precept stated that the calling of a referendum by one who does not have the capacity to do so "does not have sufficient entity to warrant criminal punishment, even less so if the punishment established is imprisonment." Further it added, "in our legal framework there are means for control of legality other than criminal law." Therefore, considering that criminal law is governed by the principles of minimal intervention and proportionality, the Catalan Ombudsman believes that the use of criminal law for the legal control of the right to call or promote consultations by those who do not hold the legal competency to do so, is inappropriate.

The Instruction should have been limited to the possible disobedience of the Constitutional Court's September 7 mandate, which was addressed to certain public authorities through personal notifications specified by name. The extension of disobedience to anyone not nominally included in the Constitutional Court notice could result in an overreach not supported by the regulations in force. Additionally, Instruction 4/17 did not mention the crimes to be investigated and prosecuted.

As regards coordination of **law enforcement agencies**, the Catalan Ombudsman calls attention to the fact that the legislation in force establishes police coordination channels, which are none other than the Catalonia Security Council. In fact, Article 46.2 of the Organic Law on Law Enforcement Agencies and Corps facilitates "concurrency of corps in certain services or the performance of a specific action." Additionally, pursuant to the Statute of Autonomy, the Mossos d'Esquadra have the two-fold role of maintaining public safety and order (Article 164.5 a) and judiciary police (164.5 c). In keeping with this second competency, they could be ordered by judges or prosecutors to prevent the celebration of a referendum, but it would not be justified that the first role, of ensuring public safety and order, be put in

hands of the Spanish Ministry of Home Affairs by decision of a prosecutor.

In the view of this institution, the Prosecutor's Office overreached its competencies, which could justify demands for accountability. This abuse of authority meant control over the PG-ME that is not established in the legislation. It made for a de facto intervention that, in any event, the government of Spain (not the Prosecutor's Office) should have enacted via Article 155 of the Spanish Constitution.

Last, as had been stated on September 15, and pursuant to Article 773 of the Criminal Procedure Act, the prosecutor must "cease their proceedings as soon as they become aware of the existence of court proceedings regarding the same events." Therefore, this article defines the priority of judicial authority and prohibits the duality of pre-trial initiatives.

Following the Catalan Ombudsman's statement, the Civil and Criminal Chamber of the High Court of Justice of Catalonia (TSJC) categorically ordered the prosecutor to cease their "proceedings, actions and instructions carried out up to then with regard to these facts" (the October 1 referendum), which makes clear how exorbitant the activity of the Prosecutor's Office had been up until that time. Unfortunately, the order did not specify whether the actions ordered by the Prosecutor up until that time were null and void, or if the aim was, to the contrary, to justify them.

Juvenile Affairs Prosecutor's Office. On September 27, the Juvenile Affairs Coordination Unit of the State Prosecutor's Office sent the provincial prosecutors of Catalonia an instruction requesting they launch individualized cases after having received information that suggested that minors still of compulsory education ages had requested authorization from their schools to be excused from attending classes and thus be able to attend rallies and demonstrations. The instruction specified that, regardless of whether the parents have given their authorization, the schools are not exempt from their obligations of custody of the children and minors during teaching hours.

In light of this instruction, and also the appearance in the media of news that suggested that in Catalonia there was a process of indoctrination or that in Catalonia there was no respect for students' freedom of thought and conscience, the Catalan Ombudsman calls attention to Article 13 of the Convention on the Rights of the Child, which recognizes children's and adolescents' right to freedom of expression and establishes that this includes the right to receive and disseminate any kind of information and ideas. Further, Article 14 of the CRC states that member states must respect children's rights to freedom of thought, conscience and religion.

Additionally, among the guiding principles of the educational system, Law 12/2009, of 10 July, on education (LEC), establishes: personal freedom, responsibility, solidarity, respect and equality (Art. 2.1.b), pluralism (Art. 2.1.e), school inclusion and social cohesion (Art. 2.1.f) and exclusion of any sort of proselytism and indoctrination (Art. 2.1.q). In fact, in the exercise of their teaching duties, teachers and educators "have the specific duty to contribute to the development of the school's activities in an atmosphere of respect, tolerance, participation and freedom that promotes among students the values inherent to a democratic society" (Art. 29.2.b).

Additionally, Article 21 acknowledges students' right to assembly, and if necessary, form associations in the framework of the legislation in force. Last, Organic Law 9/1985, which regulates the right to education, expressly establishes in Article 8 that as of the third year of mandatory secondary school, students can collectively decide on class attendance, which is not punishable if the result is the exercise of the right to assembly, and is previously communicated to the school administration.

This notwithstanding, and although it is true that schools cannot remain isolated from their social environment, the Catalan Ombudsman draws attention to the fact that the political or ideological position of the administration, faculty, or certain members of a school's educational community regarding the socio-political

situation of the country, or a given political juncture, must not involve the student body. Schools, therefore, must refrain from promoting or encouraging participation of the student body in an ideological, political or religious position. Nor should they promote students' demonstrating in favor of a given political position in or outside the school.

1.3. Arrests of elected officials and various searches

On September 20, the first subpoenas were served to mayors for them to appear before the Prosecutor's Office. Additionally, 14 individuals were arrested that day, most of them senior officials of the Catalan government. The arrests were ordered by the Examining Court no. 13, within the proceedings begun against former senator Santiago Vidal for his remarks on the presumably illegal use of Catalan citizens' personal data. With respect to those remarks, the Catalan Ombudsman's April 2017 report already stated that the institution had opened an ex officio action and regretted that the Ministry of the Vice-Presidency had not appeared in the case.

The Civil Guard operation also involved 22 searches of a number of sites, including several autonomous Catalan ministries, such as the Ministry of Economy, the Directorate General of Heritage, or the Ministries of Governance and Social Affairs. Searches were also conducted at printing presses, companies allegedly storing electoral materials and private residences.

The arrests and searches of September 20 sparked street protests, with an especially noteworthy one taking place in front of the Autonomous Ministry of Economy, deemed by the Spanish High Court as presumably constituting the crime of sedition, which will be discussed in greater detail in later sections of this report.

The Catalan Ombudsman highlighted certain possible excesses and irregularities in these arrests and searches, drawing attention once again to the fact that

neither the referendum nor collaboration in an illegal referendum—at that time, merely suspended—are crimes.

a) The arrests of individuals, who did not oppose the search or the police's activity, that took place within the framework of these searches were especially egregious. For the most part, they were public officials and servants who cooperated with the procedural action.

b) Searches of various printing presses were conducted around the Catalan territory, in which employees and management were made to wait for hours while the court order was procured. Thus, questions must be asked regarding the proportionality in the use of the means, if the hours that were taken to produce the court orders are taken into account.

c) Two law firms were entered and searched. This sort of search warrants must be accompanied by the special procedural guarantees pursuant to the terms of European Court of Human Rights case law. Additionally, the Ombudsman reminds readers of the importance of preserving professional secrecy, contained in Article 542.3 of the Organic Law on the Judiciary Branch.

Of the persons detained, two were attorneys, and there is no record of the Barcelona Bar Association (ICAB) being notified of their arrest, neither as detainees nor as attorneys. Apparently, the ICAB found out about the arrest through the attorneys who took over the defense of these individuals.

d) There was also an attempted search without a warrant in the headquarters of a political party (CUP) in Barcelona by a number of agents of the Police Intervention Unit (UIP), and material was confiscated at the entrance to these offices. It is important to remember that these persons represent their electorate, and therefore, an attempted search of the headquarters of a political party with a warrant, that is, without the proper procedural guarantees, stands for a frontal attack on the entire society, especially if it is supposedly democratic and plural.

1.4. Intervention of the Autonomous Catalan Government

On September 20, the Spanish government announced the freeze of the Autonomous Catalan Government's accounts, which was made effective on September 22. In this matter, the Catalan Ombudsman believes that the Spanish government has taken action ignoring the control mechanisms of autonomous community bodies. Specifically, the ordinary supervisory mechanism established in Article 153 of the Spanish Constitution as well as the exceptional mechanism in Article 155 SC, which to be applied requires a warning letter to be sent to the president and approval by an absolute majority of the Senate.

The intervention of the Autonomous Catalan Government was equivalent to the suspension of the right to self-rule through a procedure of dubious legality, and that was likely unconstitutional, which has taken place without respecting Organic Law 2/2012 on budgetary stability, and that is a covert application of Article 155 without following the established procedure. The aforementioned Organic Law 2/2012 calls for monthly reporting of information to the Spanish Treasury via a certificate detailing the amount of authorized and committed loans, obligations recognized in the budget, expenses pending payment accounted for in non-budgetary accounts, other expenses and total payments made. Through Order PRA/686/2017, 21 July, it was established that the monthly reporting of information by the Autonomous Catalan Government would become weekly to scrutinize any possible expenses devoted to electoral processes, a result of various statements by Catalan representatives who had expressed the intention to hold a referendum. According to this order, these two events placed the financial stability and normal operation of the Administration and autonomous institutions in jeopardy.

The government of the Generalitat announced, by a letter dated September 13, 2017, that it would not comply with the weekly reporting requirement.

Through Order HFP/878/2017, 15 September, the Spanish Government Delegate

Committee for Economic Affairs took "measures in defense of the general interest and to guarantee public services in the Autonomous Community of Catalonia." According to this decision, the Autonomous Catalan Government had to report to the Spanish state all payments for budgetary credits relative to fundamental public services or high priority services or items. Additionally, the state would not make any new transfers of resources to the Autonomous Catalan Government, but rather would directly make the payments for public services or high priority budget items, such as suppliers' invoices or the payroll of public employees.

This is another example of the Autonomous Catalan Government being intervened by budgetary means, although in this case the possible actions derived from the budgetary plans are not limited or blocked, but rather are completely submitted to the decisions of the State.

It is worth noting that the measures adopted through Order HFP/878/2017 contravene Articles 25 and 26 of Organic Law 2/2012, of budgetary stability, as they do not respect the period of 15 days between non-compliance and adoption of the agreement for budgetary non-availability, as the Autonomous Catalan Government was only given 48 hours. Additionally, the material scope of the agreement seems not to respect the legally-required proportionality, considering that it has a very general dimension, and is not limited to certain credits directly linked to compliance with a specific objective of budgetary stability. There were plans for the creation of a committee of experts to evaluate the situation and propose measures. Last, the direct adoption by the Spanish Treasury of the Budgetary Non-availability Agreement, in the hypothesis that the Autonomous Catalan Government does not do so, is a covert application of Article 155.

To conclude, this decision does not fit within Organic Law 2/2012. From a material standpoint, it is not proportional to invoke the principle of budgetary stability, associated with resources from the FLA (Autonomous Liquidity Fund) to justify budgetary non-availability of a very broad scope when resources eventually devoted to

referendum-related expenses would be very limited. From a procedural point of view, the Spanish government did not adopt the mentioned agreement, as would be required (Art. 26.1 of Organic Law 2/2012), following the procedure established in Article 155 of the Constitution (vote by an absolute majority of the Senate) and therefore, it stands for a covert application of this constitutional provision.

These intervention measures, which by definition should have been temporary and were meant to block the celebration of the ballot, continue in force today, which completely lacks justification.

1.5. Constitutional Court fines levied against members of the Electoral Commission of Catalonia

As regards the levying of several fines by the Constitutional Court (CC) against a number elected officials for alleged disobedience of the rulings meant to prevent celebration of the referendum, the Catalan Ombudsman believes that these fines may contravene Article 6 of the ECHR. This is because, if they are considered to have a punitive character, the guarantees of the aforementioned Article 6 ECHR should be applied (this character is confirmed in the dissenting votes of the ruling), especially as regards the principle of contradiction. This punitive character does not depend on the legal denomination, or the class of process that drives them, but their materially afflictive nature. The proof is found in the fact that the amount of the fine is grounded in the severity of the alleged violation and the level of authority of the sanctioned officials (see ATC-P court order of 21-9-2017).

It is true, however, that Ruling 185/2016 rejected the punitive character. But even in this case the levy of this kind of fines must be accompanied by legal guarantees. This is what occurs, for example, in the case of the coercive fines levied by the Administration, which, as administrative

acts, must follow the established procedure and can be reviewed in a jurisdictional setting, or the courts themselves, and they can also be reviewed in the jurisdictional setting. On the other hand, the coercive fines levied by the CC stipulate:

- *Inaudita altera parte*: they can be levied ex-officio by the government, without even listening to the sanctioned parties. The report to be requested from them is to inform on compliance with the CC ruling by which they are being sanctioned (Art. 92.4 OLCC) and therefore does not meet the minimum conditions of a prior hearing. But, furthermore, fines can be levied in some cases without even having to produce this report (Art. 92.5 OLCC). The latter case is what has happened to some of the individuals who have been fined by the aforementioned court orders.

- Without any possibility of later judicial review, as the rulings of the CC cannot be appealed. Even in the case that a reversal appeal were allowed (which is not expressly provided for either), this could not be considered an appeal that would allow judicial review of the challenged act, given the contamination of the entire body if the fine has been levied by the court in plenary session (as is the case).

The fact that the fines do not have a sanctioning or punitive nature does not mean they are exempt from judicial review. This is even more relevant if the fines have been levied without following any procedure in which the sanctioned parties have been able to exercise their right to defense, or even be heard.

- Additionally, the request for a report on compliance with the decisions of the CC could, in itself, contravene the right to defense if criminal proceedings have been begun in parallel, as is the case at hand, because then the individual would be obliged to testify against themselves, which would mean a direct violation of the rights recognized in Article 24 SC (not testifying against oneself).

2. THE DAY OF OCTOBER 1ST

On the weekend of October 1st, on an exceptional basis, the Catalan Ombudsman's Office remained open, and the availability of the team was bolstered over the following days. In fact, to fulfill the competencies and responsibilities granted by Article 78 of the Statute of Autonomy and the Catalan Ombudsman Act, the service was expanded so that all persons who considered that their rights had been violated could contact the institution through the usual channels.

In light of the events of October 1st, and following the twenty complaints received by the institution that same day and on later days, the Catalan Ombudsman made it known that it would investigate the actions of the Spanish state law enforcement agencies and corps. Therefore, an ex-officio action has been launched to determine if excessive and disproportionate actions have been taken in the instructions issued by the High Court of Justice of Catalonia in its September 27 2017 court order. This court order dictated a number of measures meant to block the celebration of the referendum, but "without affecting normal civic order". The Police of the Generalitat-Mossos d'Esquadra, the Spanish National Police and the Civil Guard were ordered to work together.

Additionally, there were numerous complaints by citizens, and many pictures and videos of aggressions at polling stations by national police and the Civil Guard toward individuals offering passive, pacific resistance to try to express themselves by voting. There were baton charges and a significant number of injuries, some of them severe. When faced with certain news items that sought to minimize the official statistics on the number of victims (which have surpassed one thousand), the Catalan Health Care Service published a report in which it informed on the number of persons

treated by health care region and diagnostic classification.⁴ Furthermore, the Council of Doctors' Associations of Catalonia published a statement in which it reminded the public that "there can be no doubt as to the professionalism and independence of the doctors when certifying the injuries suffered on the day of the referendum, as doctors work under a code of ethics when treating and diagnosing patients."

The Catalan Ombudsman is aware that Examining Court no. 7 of Barcelona is already handling over 200 complaints on injuries caused by these law enforcement agencies on October 1. It is also aware of the Catalan Government's intent to create an investigation committee regarding the police violence suffered that day, although this body has been suspended following application of Article 155. Other organizations, such as the group #somdefensores, have also provided public information on reports of alleged police brutality on October 1st.⁵

In this investigation, the objective of the Catalan Ombudsman is to find out who ordered the baton charges and the specific order the policemen had. Additionally, the use of rubber bullets by the Spanish National Police is also being investigated. Rubber bullets have been prohibited since April 2014 by the Mossos d'Esquadra police force. Clearly, that does not make them illegal for other law enforcement agencies. But their usage reveals an alarming lack of sensitivity toward the social rejection felt in Catalonia toward this instrument for the keeping of public order.

This institution is also studying whether the Spanish National Police and Civil Guard accredited, by certifiable means in all cases, the court order to enter and search the schools and public premises, and also whether the damages caused were the minimum indispensable, as well as the extent of legality in cases of confiscation of private property in the course of these entries and searches.

⁴ http://premsa.gencat.cat/pres_fsvp/docs/2017/10/20/11/15/232799c8-755f-4810-ba56-0a5bbb78609c.pdf.

⁵ http://iridia.cat/wp-content/uploads/Informe-DDHH_1OCT.pdf

3. COMPLAINTS AND QUERIES RECEIVED IN THIS PERIOD

Since the month of September, the Catalan Ombudsman has handled near 200 actions in which citizens have sought his intervention regarding situations related with the celebration of the ballot announced for October 1.

With regard to the calling of the referendum, 15 actions have been processed on behalf of citizens who expressed their disagreement with the way in which the parliamentary process for the manner in which the Referendum Act and the Legal Transition Act had been ratified, as well as for others who considered the vote as well as its possible results illegal. Along these lines, especially noteworthy is the complaint filed by all MP's of the Socialists of Catalonia Party, in which they sought the Catalan Ombudsman's intervention in the violation of their rights to participate, and the consequent contravention of the fundamental right described in Article 23 SC by the Presiding Board of the Parliament due to the actions that took place in Parliament on September 6 and 7 and that culminated in the approval of the two aforementioned laws.

The Catalan Ombudsman reminded them that the office's mission is the defense of fundamental rights and public freedoms. With this aim, the Catalan Ombudsman supervises the activity of the Catalan administrations. But the workings of the Parliament as a political body, and the consequent debate, are outside the Ombudsman's competencies. That said, the Catalan Ombudsman did offer certain considerations with relation to the approval of the two laws by an ad hoc procedure, with violations of the Regulations of Parliament and the Council of Statutory Guarantees Act, and also with the suspension of these laws, at that time, by the Constitutional Court.

An important number of the actions leading up to October 1 were motivated by citizens' concern toward configuration of an electoral census. Some forty individuals addressed the Catalan Ombudsman in defense of their right to vote, especially in the cases in which they wanted to vote but had not been able to ascertain the polling station where they were to do so, or in which the information was

erroneous, and therefore the assigned school did not match their address. In these cases, the Catalan Ombudsman conveyed the citizens' requests to the Autonomous Ministry of the Vice-Presidency, Economy and Finance, which holds the competency for this subject matter.

Also regarding the electoral census, some 20 actions were begun at the behest of citizens who deemed illegal the treatment of their personal data for the preparation of the electoral census, and who requested that the Catalan Ombudsman protect their fundamental right to data protection. Within this block, especially noteworthy is the complaint filed by the leader of the opposition in the Parliament of Catalonia. The Catalan Ombudsman, in addition to conveying these matters to the Autonomous Ministry of the Vice-Presidency, Economy and Finance, has also sent some of them to the Catalan Data Protection Authority (APDCAT).

As for the events leading up the celebration of the vote, especially as of September 15, the Catalan Ombudsman processed nearly 30 complaints and queries regarding the different actions carried out by the Prosecutor's Office and law enforcement agencies, described above. These include the confiscation of electoral material and correspondence, searches, website shut-downs, arrests and subpoenas, as parties to be investigated, of over 700 mayors. With regard to specific cases, the Catalan Ombudsman reminded citizens that, pursuant to the competency framework established by the Regulating Law of the institution, the Office cannot supervise actions of the justice administration. Notwithstanding this, in his letter of September 15, to which reference has been made, the Catalan Ombudsman questioned the legal validity of the actions taken by the General State Prosecutor's Office in these cases. The complaints on the actions taken by the postal administration, for example, have been conveyed to the Spanish Ombudsman.

Other actions opened in this period and in the days following October 1 referred to the actions of some media outlets. On one hand, some individuals who came to Catalan Ombudsman have accused some news media (public Catalans outlets and other privately-owned newspapers that circulate throughout the Spanish State) of lack of impartiality in the

information they offered. This is the case of an action opened regarding a children's-format news program broadcast by the CCMA, in which it was attempted to explain the events of October 1 to children. The Catalan Ombudsman has conveyed this complaint to the Audiovisual Council of Catalonia, reminding them that the communication media have a clearly educational role and that, along those lines, and more so in the case of children and adolescents, they must guarantee pluralism and exclusion of any proselytism or indoctrination. The Catalan Ombudsman also reminded them that the legislation attributes to public authorities the duty to ensure that the information received by children and adolescents be true, plural and respectful of constitutional principles.

On another note, cases have been begun on the references by some private newspapers to the supposed usage and manipulation of children in Catalan "political causes", and the publication of photos of children associated with news on the current political juncture. Statements by certain politicians on an alleged manipulation and usage of children in this context, broadcast in some news programs, have also been the object of claims filed by citizens. As regards statewide private media, the Catalan Ombudsman has conveyed the cases to the Spanish Ombudsman and, for Catalan media outlets, they have been sent to the CCMA.

The Catalan Ombudsman also has been notified of the usage of children's photos on the websites of private organizations in which these photos are linked to a narrative on the manipulation of children to carry out actions related with the "secessionist cause" or with the October 1 referendum. Considering the special protection that our legislative framework offers on the right to privacy and protection of personal data when the parties involved are children, the Catalan Ombudsman has opened ex-officio actions with the aim of conveying these cases to the Prosecutor's Office and the APDCAT.

The publication of children's photos linked to newsworthy events that had to do with the October 1 voting process by some news media also gave rise to complaints by fathers and mothers who saw perfectly identifiable images of their sons and daughters published without having given their prior consent. In these

cases, the Catalan Ombudsman called attention to the fact that the Law on Rights and Opportunities of Children and Adolescents recognizes as a severe breach the dissemination of children's or adolescents' personal data by news media, and establishes a punishment regimen for which the Directorate General for Childhood and Adolescence Services (DGAIA) is competent. The Catalan Ombudsman also reminded these organizations that the use of images or the name of minors in the news media that could imply illegitimate interference in their privacy, honor or reputation, or that is contrary to their interests, would determine the intervention of the Prosecutor's Office.

As for October 1 itself, the Catalan Ombudsman opened over 30 actions. Some citizens expressed to the Catalan Ombudsman their considerations on the illegality of the notification they had received to be election judges, and sought the Ombudsman's intervention to defend their rights, while others expressed the difficulties faced on October 1 to exercise their duties as an election judge, because of the technical problems that arose with the electronic platform prepared for the ballot and the difficulties of contacting the relevant technical service. In other cases, citizens expressed their disagreement due to the lack of legal guarantees for the voting process, which they considered a violation of their right to vote with guarantees.

Yet the majority of actions related with October 1 refer to the interventions of the Spanish National Police and the Civil Guard toward citizens who were waiting in front of polling stations to be able to vote, the violent acts the police committed when entering polling stations and confiscating electoral materials, and the consequent destruction caused to the facilities, as explained in the preceding paragraph.

In these cases, each of the individual complaints received has been followed up. At the same time, ex-officio actions have been opened to study the possible lack of proportionality and the consequent violation of individual rights and public freedoms due to the actions of the Spanish law enforcement agencies and corps that acted that day. In these cases, the Catalan Ombudsman is waiting to receive the reports requested from the various competent administrations.

4. EVENTS FOLLOWING OCTOBER 1ST

Among the acts that took place after October 1, especially noteworthy is the ex officio action opened to study the situation that came about in a secondary school of the Barcelona metropolitan area on October 2, in which, as the news media reported, a teacher reproached a student, who is the son of a Civil Guard officer, for the actions of that corps the day before. At this time, the Catalan Ombudsman is waiting for the report requested on the matter from the Autonomous Ministry of Education.

Furthermore, the Catalan Ombudsman has received several requests from individuals, organizations and social groups that claimed on their behalf a more direct intervention to help resolve the lack of understanding that the current political crisis has brought about, by offering his mediation between the state and autonomous governments, proposing channels for dialog or any other possible strategy to reach an agreement. The Catalan Ombudsman has also given his opinion on the pretrial imprisonment of the presidents of the National Catalan Assembly and Òmnium Cultural for alleged crimes of sedition.

Last, the Catalan Ombudsman has also given his opinion on the application of Article 155 of the Constitution and the criminal charges filed against the ousted government of Catalonia and Presiding Board of Parliament.

4.1. Proposal for dialog and investigation

On October 4, the Catalan Ombudsman announced that he was offering to all public authorities the institution of the Síndic de Greuges de Catalunya (Catalan Ombudsman), in its mediation role, pursuant to Article 4 of Law 24/2009, of 23 December on the Catalan Ombudsman, to organize, in the realms of Catalonia, Spain and the international community, a table for understanding and agreement for all involved parties, such as

the President of the Spanish Government and the President of the Autonomous Government of Catalonia, the Spanish Parliament and the Parliament of Catalonia, and all other authorities of the State, while also making an appeal to the Spanish Ombudsman.

The Catalan Ombudsman proposed they reach a consensus, as a starting point among all those called to the mediation, to establish a “zero hour” for understanding and agreement. Along these lines, he made yet another appeal for political dialog to resolve the situation.

Following the sending of information to the European Commissioner for Human Rights on the social and political context in Spain and Catalonia and especially, on the actions of Spanish law enforcement agencies on October 1, the Commissioner had addressed the Spanish Minister of Home Affairs, urging him to ensure, “in co-operation with other authorities in charge of law enforcement that swift, independent and effective investigations are carried out into all allegation of police misconduct and disproportionate use of force during the events of 1 October 2017 in Catalonia.” (October 4).

Despite the categorical tone employed by Nils Muiznieks, the Spanish minister dismissed the recommendation in a letter in which he stated “the state security forces and corps, following instructions from the judiciary, acted with caution and proportionality” (6 October).

The international appeals for an impartial investigation into the events of October 1 have been repeated by the UN High Commissioner for Human Rights⁶, Amnesty International⁷ and Human Rights Watch⁸, among others. This was also the tone of the debate held on October 12⁹ by the Parliamentary Assembly of the Council of Europe and the commitment made by the Spanish Minister of Foreign Affairs before the secretary general of this international organization.¹⁰

⁶ <http://www.un.org/apps/news/story.asp?NewsID=57785#.WeB4AVu0Pbg> (2 October)

⁷ <https://www.amnesty.org/es/latest/news/2017/10/spain-excessive-use-of-force-by-national-police-and-civil-guard-in-catalonia/> (3 October)

⁸ <https://www.hrw.org/es/news/2017/10/12/espana-la-policia-utilizo-la-fuerza-de-manera-excesiva-en-cataluna> (12 October)

⁹ Alicia Sans: “Debat al Consell d’Europa contra la violència i pel diàleg” (Council of Europe Debates Violence, Supports Dialog), Ara, October 13, 2017.

¹⁰ <https://www.coe.int/en/web/secretary-general/-/spokesperson-of-the-secretary-general-meeting-between-secretary-general-jagland-and-the-foreign-minister-of-spain-alfonso-dastis-quecedo> (9 October)

4.2. Order for pretrial imprisonment of Catalan National Assembly and Òmnium Cultural presidents

On October 16, the judge of the Central Examining Court No. 3 of the Spanish High Court ordered communicated pretrial prison with visitation rights and without bail for the presidents of the Catalan National Assembly (ANC) and Òmnium Cultural for an alleged crime of sedition.

The Catalan Ombudsman in the framework of his statutory mandate for the defense of individual rights and public freedoms, and without prejudice to his respect for the independence of the Judiciary, has stated that imprisonment of the former Deputy Catalan Ombudsman and current president of the ANC, as well as of the president of Òmnium Cultural, constitutes a decision contrary to the rights and freedoms comprised in international treaties ratified by the Kingdom of Spain, especially the freedom of expression, the freedom of assembly and demonstration, and right to freedom and security.

The Catalan Ombudsman reminds the public that the organizations led by Mrrs. Jordi Sànchez and Jordi Cuixart have tens of thousands of members who defend an idea—the independence of Catalonia—that is neither punishable nor illegal, as is plainly concluded from Ruling 42/2014 of the Constitutional Court. In that ruling, the Constitutional Court confirmed that all ideas fit within the constitutional framework, even those that sought to alter the very foundations of the constitutional order, and that they could conduct preparatory activities to fulfill this objective.

The pro-sovereignty organizations and their presidents have participated in the organization of demonstrations that have mobilized hundreds of thousands of people on several occasions over recent years, especially those for the National Day of Catalonia (“la Diada”), always in a peaceful, festive manner. The pacifistic backgrounds of Mrrs. Sànchez and Cuixart are more than well-known.

The court order handed down by Central Examining Court no. 3 contains elements that could be interpreted as the criminalization of certain organizations and a social

movement, exclusively for their ideas, in a manner that clearly contravenes freedoms recognized internationally and in the Constitution, especially the freedom of expression. In fact, in the criminal code there are other less severe cautionary measures to prevent the presumption of future criminal recurrence, insufficiently grounded in the judge’s decision. The non-application of these measures, as has occurred with other individuals under judicial investigation, can lead to the belief that there is an attempt to criminalize organizations and currents of opinion in Catalonia and remove their leadership.

Furthermore, the Catalan Ombudsman calls attention to the fact that, pursuant to Article 6 of the European Convention of Human Rights, everyone shall have the right to a fair trial, and specifically, to be presumed innocent of a crime until legitimately proven guilty.

As a result, the Catalan Ombudsman expresses the urgent need to place fundamental rights as a keystone of the democratic and legal state.

The Catalan Ombudsman points out that the conflict between Catalonia and Spain could have as a solution the political dialogue between both parties. This path of dialogue, which until now has not been possible, will undoubtedly be difficult for decisions that can lead to the violation of fundamental rights of people.

Meanwhile, the Catalan Ombudsman continues its investigations on possible violations of rights and freedoms regarding October 1st.

4.3. Application of Article 155

Last October 27, following the approval of two resolutions in the Parliament of Catalonia, which were clearly outside the constitutional framework, with the intended declaration of independence, at the behest of the Council of Ministers, the Senate in plenary session authorized a broad range of measures to be taken toward the Autonomous Government of Catalonia in application of Article 155 of the Spanish Constitution (SC). From then on, the president of the Spanish government has

signed numerous royal decrees that include the firing of the President, Vice-President and Ministers of the Autonomous Catalan Government, as well as other senior Government officials and the dissolution of the Parliament of Catalonia. This dissolution brings about the call for autonomous elections on December 21 of this year.

Constitutional Court acts that suspend or declare unconstitutional laws approved by the Parliament or later declarations proves that within the legislation in force there are legal measures to guarantee respect for the constitutional order that are more appropriate than the use made of Article 155 SC. Aside from not explicitly setting a time limit for exceptional measures, the measures taken by the Spanish government could violate the fundamental right to political participation of all citizens of Catalonia, recognized in Articles 23 of the Constitution and 3 of the Additional Protocol to the European Convention on Human Rights. These precepts establish:

“Citizens have the right to participate in public affairs, directly or through representatives freely elected in regular elections by universal suffrage” (Art. 23 SC).

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.” (Art. 3, Additional Protocol).

The exercise of parliamentary mandates by elected officials is protected by the case law of the European Court of Human Rights in application of the latter precept, and from this point of view, the firing of the whole Catalan government violates the right to political participation of all citizens of Catalonia, regardless of the options they voted for in the elections of September 2015. This is also true in that the removal has taken place with a possible violation of the Spanish legal framework, as no precept of the Spanish Constitution, not even Article 155 SC, establishes the ability to adopt a measure of this nature.

This decision can be judicially challenged by citizens, even as a complaint of unconstitutionality, by those who consider

damaged their right of participation. On the other front, when facing irregularities committed in parliament that damage their rights, members of parliaments have, as the Catalan Ombudsman has indicated, channels for specific appeals outlined in the Constitutional Court Law.

In addition to this, the Senate and Government’s interpretation of Article 155 appears contrary to other constitutional precepts. The decisions taken on the competency to dissolve Parliament and call elections, and to remove the president and Government, could violate the right to autonomy recognized in Article 2 of the SC and the system developed under Title VIII. Nonetheless, the elections called for December 21 must be conducted with all democratic guarantees, and without any threat or warning with regard to the results. In any event, the Spanish government must publicly commit to lifting the exceptional measures adopted once the new Autonomous Catalan Government is formed, freely and according to the statutory provisions.

Additionally, regardless of whether the suspension of Catalan self-rule could be considered an intrinsic violation of rights, the fact that from Monday the Administration of the Generalitat was being governed from a distance, by bodies alien to the popular will expressed by the citizens of Catalonia and that are not accountable to their legitimate representatives, can generate a risk of maladministration and potential rights violations.

4.4. Criminal indictment of the dismissed government and Presiding Board of Parliament

All legal and institutional channels must prevail over the criminal course to resolve matters such as those at hand. Along these lines, in the opening statement of the Organic Law that modified the Criminal Code to decriminalize holding illegal referendums, after stating that this conduct did not have sufficient entity to constitute a crime, expressly states that “in our legal framework there are means for control of legality other than criminal law. Therefore, the exercise of competencies to call or

promote consultations by those who do not hold the legal competency to do so, is perfectly controllable by means other than criminal law.”

That is why, with full respect for independence of the Judiciary, and emphasizing the need to cooperate with it at all times, it is important to indicate that the court orders of the Supreme Court and the Spanish High Court may contravene the fundamental rights recognized in the international treaties and in the SC, by allowing the criminal charges filed by the General State Prosecutor.

In the first place, they may represent a violation of the rights of the judge predetermined by Law, which should be the ordinary jurisdiction of Catalonia, and in the first place the High Court of Justice of Catalonia (TSJC).

Still and all, the disparity of criteria between the two instances, Supreme Court and High Court of Spain, in terms of exercising the right to defense and the application of cautionary measures, is surprising.

In second place, in the case of the members of the Presiding Board, it appears that there has been an omission, as was stated in the April 2017 report, of the immunity members of parliament enjoy in their parliamentary duties, as is, without a doubt, the allowing, by vote, of proposals for resolution.

Last, the labeling as rebellion proposed by the Prosecutor’s Office, and accepted by the highest jurisdictional bodies, appears completely disproportionate to describe the events known to all, as was the order for pretrial imprisonment without bail brought against Jordi Sànchez and Jordi Cuixart, still in force today, despite the substantial modification of the circumstances in which that judicial ruling was handed down. The cautionary measures of pretrial imprisonment now applied to dismissed ministers are another example of the disproportion of the justice system.

The case law of the Constitutional Court makes clear that Article 25.2 and 9.3 of the Constitution require the guarantee of the principle of proportionality of punishments that are apparently not being respected in

this case. Furthermore, a retroactive reference made in the charges, deeming “threatening” the large demonstrations that have been exemplary for their civic behavior may make for a violation of Article 21 SC, that recognizes the right to assembly and demonstration.

These encumbrances of fundamental rights and public freedoms recognized in the Constitution and in the European Convention for Fundamental Rights and Public Freedoms and in their additional protocols, could end up before the European Court of Human Rights. Unfortunately, the more than foreseeable rulings by Strasbourg will arrive once a long period has transpired, when the violations of rights are irreversible and the only possible reparation would be moral, or in some cases, economic. The Catalan Ombudsman urges the various authorities that have competencies to do so to reverse *ab initio* these numerous situations of violation of rights and freedoms to prevent, as has happened on a reiterated basis, the highest European jurisdictional body in human rights from finding the Spanish state guilty of violations of internal and international human rights rules.

In his report of April 2017, the Catalan Ombudsman already warned about regressions in rights and freedoms, following the cautions received from European bodies, on the dangers to rights brought about by the use of the criminal law solutions for institutional and political conflicts, and the partisan tendencies in judiciary bodies.

Consequently, the Catalan Ombudsman expresses the urgent need to return fundamental rights as the cornerstone of the democratic state and rule of law, the rigorous respect for which is indispensable in any situation.

Last, the Catalan Ombudsman states that the conflict between Catalonia and Spain should be solved through political dialog between both parties. The pathway of dialog, impossible until now, will indubitably be hindered by decisions that could lead to the damage of individuals’ fundamental rights.

In the meantime, the Catalan Ombudsman will continue with his investigations on possible rights violations related to the October 1 ballot, and will continue to follow up on rights violations that could take

place during the validity of the measures applied through Art. 155 SC, exercising his duties of investigation, supervision, study and reporting to all bodies, and to the fullest extent.

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