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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

SPAIN

OPINION

ON

THE RULE OF LAW REQUIREMENTS OF AMNESTIES

WITH PARTICULAR REFERENCE TO THE PARLIAMENTARY BILL "ON THE ORGANIC LAW ON AMNESTY FOR THE INSTITUTIONAL, POLITICAL AND SOCIAL NORMALISATION OF CATALONIA"

Adopted by the Venice Commission
at its 138th Plenary Session
(Venice, 15-16 March 2024)

on the basis of comments by

Ms Marta CARTABIA (Member, Italy)
Mr Philip DIMITROV (Member, Bulgaria)
Ms Regina KIENER (Member, Switzerland)
Mr Martin KUIJER (Member, the Netherlands)
Mr José Luis VARGAS (Member, Mexico)

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I. Introduction

1. By letter of 8 December 2023, the then President of the Parliamentary Assembly of the Council of Europe (PACE), against the background of an exchange of views on the Rule of Law in Spain, requested a study on the Rule of Law requirements that an amnesty should fulfil. On 13 December 2023, Mr Pedro Rollán Ojeda, the President of the Senate (*Senado*) of Spain, on behalf of the Bureau of the Senate, requested an urgent opinion of the Venice Commission on the parliamentary bill on "Organic law for amnesty for the institutional, political and social normalisation of Catalonia", which was pending before the Congress of Deputies of Spain (CDL-REF(2024)002, hereinafter "the amnesty bill").

2. The urgency of the request was explained in a letter of 22 December 2023, following which the Bureau of the Venice Commission, acting on the basis of Article 14a of the Rules of Procedure, authorised the rapporteurs to prepare an urgent opinion.

3. Ms Marta Cartabia, Mr Philip Dimitrov, Ms Regina Kiener, Mr Martin Kuijer and Mr José Luis Vargas acted as rapporteurs.

4. From 7 to 9 February 2024, a delegation of the Commission composed of all the rapporteurs, Ms Simona Granata-Menghini, Secretary of the Commission, and Mr Pierre Garrone from the Secretariat, travelled to Madrid and held meetings with the President of the General Council of Lawyers, with the Minister of the Presidency, Justice and Relations with the Cortes, with the Justice Committee of the Congress of Deputies, with the President and representatives of the General Council of the Judicial Power, with the President of the Senate and representatives of the political groups in the Senate, with the State Public Prosecutor, with the President of the Constitutional Tribunal, with representatives of the academia and with a representative of the Government of Catalonia. They also received written material from various interlocutors, including the Ministry of the Presidency, Justice and Relations with the Cortes; representatives of political parties or movements - ERC (the Republican Left of Catalonia), Junts per Catalunya, Sumar, VOX, as well as representatives of the academia. The delegation could not meet with the Secretary General of the Congress of Deputies. The Commission is grateful to the Ministry of Foreign Affairs and the Presidency of the Senate for the excellent organisation of this visit.

5. As on 30 January 2024, the amnesty bill failed to reach the necessary votes for approval by the Congress of Deputies and was returned to the Justice Committee, thus delaying the referral to the Senate, the Venice Commission's Bureau decided to revert to the ordinary procedure of adoption of the opinion at the 138th Plenary Session (15-16 March 2024).

6. This opinion was prepared in reliance on the English translation of the amnesty bill. The translation may not accurately reflect the original version on all points.

7. This opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings from 7 to 9 February 2024. The draft opinion was examined at the joint meeting of the Sub-Commissions on Rule of Law and on Constitutional Justice on 14 March 2024. Following an exchange of views with Mr Pedro Rollán Ojeda, President of the Spanish Senate, and Ms Isaura Leal Fernández, Second Secretary of the Bureau of the Congress of Deputies of Spain, it was adopted by the Venice Commission at its 138th Plenary Session (Venice, 15-16 March 2024).

II. Scope of the opinion

8. The President of PACE asked the Venice Commission to identify the Rule of Law requirements applicable to amnesty. The Senate's request was presented in the form of six questions, which may be summarised as follow: 1) what are the general criteria that the Venice Commission considers necessary for a measure like the amnesty to adhere to the standards of the Rule of Law; 2) is the complete elimination of criminal responsibility for the acts committed in

relation to the territorial integrity of Spain with the intention of promoting or procuring the secession and the independence of Catalonia compatible with the Rule of Law; 3) is the possibility of granting amnesty for crimes of terrorism if a final sentence has not been handed down compatible with the criteria of the Venice Commission; 4) is the possibility of granting amnesty for offences of embezzlement and corruption in accordance with the Rule of Law; 5) do the measures contained in the amnesty bill which condition, restrict or even impede the actions of the Spanish criminal judges comply with the Rule of Law; 6) would summoning judges to appear before the committees of inquiry set up by the Congress of Deputies in relation to judicial actions in the independence process jeopardise the independence of the judiciary and the separation of powers. This opinion will respond both to the request made by the President of PACE and to the request of the President of the Spanish Senate, whose first question equally relates to the general Rule of Law requirements of amnesties. The Venice Commission will respond to the questions put to it taking into account the relevant provisions of the amnesty bill, including, if necessary, those not explicitly mentioned by the Senate.

9. The Venice Commission will carry out its legal analysis in the light of European and international standards, as well as comparative material. It will not intervene in the political discussion. In particular, it will not comment on the desirability of the amnesty, nor on its suitability to achieve its stated aim, as these are political decisions for the Spanish Government and Parliament to take.

10. Furthermore, the Venice Commission is not competent to comment on the constitutionality of the amnesty bill, which is a matter for the Spanish Constitutional Tribunal ultimately to decide, and for the Spanish constitutional experts to debate. In addition, in line with its established practice, the Venice Commission will not assess the compatibility of the amnesty bill with European Union law, which could be the subject of a judgment by the European Court of Justice.

11. The Venice Commission has examined the amnesty bill in its version of 13 November 2023. It has taken into account the amendments adopted by the Congress of Deputies on 14 March 2024. However, the Commission has not been provided with the full text of the adopted amendments, and therefore the analysis thereof cannot be exhaustively reflected in the present opinion, also given the limited time available.

III. Background

12. On 15 October 1977 an amnesty was approved with a vast majority of the Spanish parliament with the objective of facilitating the reconciliation amongst Spaniards after the end of the Franco Regime.

13. The new Constitution, approved on 31 October 1978, does not contain a specific provision on amnesty.

14. The Autonomous Community of Catalonia was established by the Statute of Autonomy of 18 December 1979 (see also Articles 143 et seq. in conjunction with Article 2 of the Spanish Constitution of December 1978).

15. A reform of the Statute of Autonomy was adopted in a referendum in Catalonia on 18 June 2006, and the Statute was subsequently amended by Organic Law 6/2006 of 19 July 2006. By judgment of 28 June 2010 (No. 31/2010), the Constitutional Tribunal declared a number of provisions of this revised statute unconstitutional.

16. On 27 September 2012, the Catalan Parliament adopted a resolution asking to hold as a priority a self-determination referendum during the next term of the regional Parliament, that is after the elections of 25 November 2012. After the Congress of Deputies refused to transfer to Catalonia the competence of holding referendums, the Catalan Parliament adopted a law on

non-referendum popular consultations and other forms of citizen participation on 26 September 2014. On 29 September 2014, the Spanish Government lodged an appeal against this law to the Constitutional Tribunal, which suspended it by way of provisional measures. Despite this measure, the consultation took place on 9 November 2014. On 25 February 2015, the Spanish Constitutional Tribunal (by Ruling 31/2015) declared the provisions of the law allowing for general consultations unconstitutional.

17. In September 2017 the Catalan Government and the Catalan regional Parliament unilaterally decided to secede from Spain. On 6 and 7 September 2017, the Catalan Parliament passed two laws, the first calling for a referendum on the independence of Catalonia and the second a "transitional" law for the future "Republic of Catalonia". At the request of the Spanish Government, these laws were suspended, and later declared unconstitutional by the Spanish Constitutional Tribunal, both for serious procedural breaches and for being in direct contradiction with the Spanish Constitution and the Statute of Catalonia (Ruling 114/2017). Notwithstanding the suspension of the law, on 1 October 2017 the referendum was held. Despite its lack of authority, the Catalan Government proclaimed that the vote on the secession proposal had been successful. On 27 October 2017, the Catalan regional President formally declared the independence of Catalonia but suspended its effects with a view to "negotiating with the Spanish Government".

18. Following this declaration of independence, the Spanish Government launched the process leading to the application of Article 155 of the Spanish Constitution, which was approved, after a debate, by a vast majority of the Senate on 27 October 2017.[1] As a consequence, the autonomous government of Catalonia was dismissed and replaced by bodies set up by the central government and new general elections in Catalonia were called. These were held on 21 December 2017. Further regional elections were held on 14 February 2021. Pro-independence parties obtained the majority of seats in both elections.

19. On 30 October 2017 the Spanish Attorney General filed a complaint for acts constituting the crime of rebellion or, subsidiarily, the crime of sedition, and the crime of embezzlement against all those who were members of the Governing Council of the Generalitat of Catalonia as well as several social leaders. Several members of the Catalan regional Government, a civil society leader elected to parliament in the new elections on 21 December 2017, and the leader of a Catalan cultural association, Ómnium Cultural, were arrested and remanded in custody. Criminal proceedings were brought before the Supreme Court. On 14 October 2019, the Supreme Court convicted the nine defendants on counts of sedition and embezzlement of public funds and sentenced them to terms of imprisonment and disqualification from holding public office.

20. On 21 June 2021, the Parliamentary Assembly of the Council of Europe adopted Resolution 2381(2021) on "Should politicians be prosecuted for statements made in the exercise of their mandate?", in which PACE invited the Spanish authorities, amongst others, to reform the criminal provisions on rebellion and sedition; to consider pardoning or otherwise releasing from prison the Catalan politicians convicted for their role in the 2017 unconstitutional referendum and peaceful mass demonstrations; to ensure that the criminal provision on misappropriation of public funds is applied in such a way that liability arises only when actual, quantified losses to the State budget or assets can be established.[2]

21. On 23 June 2021, the nine convicted leaders were partially pardoned by the Government and released from prison. The pardon, however, did not extend to the disqualification from office.[3]

[1] See for example Noticias Jurídicas (juridicas.com)
[2] Res. 2381 - Resolution - Adopted text (coe.int)
[3] Cf. Catalan separatists walk free from prison after receiving pardon from Spanish government - ABC News.

22. By Organic Law 14/2022 of 22 December 2022,[4] the Spanish legislator abolished the offence of sedition, and amended the offence of embezzlement (introducing the need for personal enrichment in Article 432 of the criminal code). As a consequence, the Supreme Court, *ex officio*, reviewed the sentences of disqualification from holding public office, which were the only reviewable sentences after the (individual) pardons granted by the Government. In a decision of 13 February 2023, the Supreme Court quashed the disqualification of those who had been convicted only of sedition, while it upheld the disqualification of those who had been convicted of both sedition and embezzlement. Proceedings for offences other than sedition are still pending, *inter alia* against politicians who have fled from Spain such as the former President of the autonomous government of Catalonia.

23. In particular, terrorism charges are pending in relation to the actions of "Democratic Tsunami", a pro-independence movement which had organised massive protests at Barcelona airport on 14 October 2019, as well of the "committees of defence of the Republic" (CDR).[5]

24. Two applications concerning the Catalan process were declared inadmissible by the European Court of Human Rights.[6] A number of cases are still pending, concerning among others: the applicants' remand on custody pending trial (three applications); the criminal convictions (nine applications); the activity of the Catalan parliament during the period above (four applications). One further application concerns the organisation in 2014 of a consultation on the independence of Catalonia.

IV. The parliamentary procedure relating to the amnesty bill

25. The amnesty bill is part of the coalition agreements signed by the President of the Government with two Catalan pro-independence parties, following the 23 July 2023 national elections. On 13 November 2023, the Socialist Parliamentary Group of the Congress submitted to Parliament a legislative proposal (*proposición de ley*) for an organic law with a request to deal with it under the urgent procedure. This bill is entitled "Legislative Proposal for Organic Law on the amnesty for institutional, political and social normalisation in Catalonia". The Minister of Justice, who is a member of the Congress of Deputies, participated in the preparation of the bill.

26. Unlike a draft law (*proyecto de ley*) prepared by the Government, a legislative proposal introduced by MPs is dispensed, amongst others, from a public consultation through the website of the relevant department, from the preparation of a regulatory impact assessment and from seeking reports and opinions, including from the State Council, the General Council of the Judiciary, the Fiscal Council, or the Ministry of Finance. For legislative proposals, only a technical report by the legal advisers of the Cortes Generales attached to the Justice Committee is prepared.

27. On 14 November 2023, the Spanish Senate amended its standing orders to allow it to decide on the application of the urgent procedure to legislative proposals, irrespective of a decision to apply the urgent procedure by the Congress of Deputies.[7] This amendment was appealed to the Constitutional Tribunal by a group of MPs from PSOE with reference to Article 90 of the Spanish Constitution.

28. On 21 November 2023, the bill was approved for processing by the Chamber's Bureau, which did not consider it to be in flagrant contradiction with the Spanish Constitution, thus opening the way for a parliamentary debate; this does not exclude the possibility of an examination of the bill by the Congress of Deputies from the technical-legal perspective, including the examination

[4] To be found at BOE-A-2022-21800.
[5] See for example here: catalannews.com.
[6] ECtHR 11 September 2018, *Aumatell i Arnau v. Spain* (dec.), appl. no. 70219/17; ECtHR 7 May 2019, *Forcadell I Lluis and Others v. Spain* (dec.), appl. no. 75147/17.
[7] https://www.senado.es/legis15/publicaciones/pdf/senado/bocg/BOCG_D_15_32_741.PDF

of its possible unconstitutionality. In their technical comments on the legislative proposal, the legal advisers of the Congress of Deputies expressed doubts as to whether the bill "can have a place in the Constitution", and considered that "it should be articulated through a constitutional reform procedure".[8] On 12 December 2023, by 178 votes from a composition of 350, the Congress accepted to start debating on the bill. On 23 January 2024, the Justice Committee of the Congress approved it (with amendments). However, on 30 January 2024, after the amendments proposed by the Catalan independentist party Junts per Catalunya were not retained, the Congress rejected the bill by 179 votes – including those of Junts – against 171. The bill was thus sent back to the Justice Committee of the Congress.

29. On 7 March 2024, the amnesty bill was approved with amendments by the Justice Committee.

30. On 14 March 2024, the amended amnesty bill was approved by the Congress of Deputies.

31. Since the Bill proposes a new organic law, after its examination by the Senate it will be adopted if it is approved by an absolute majority of the members of Congress in a final vote on the bill as a whole.[9]

32. The bill has provoked fierce criticism in Spain and beyond. Numerous institutions have rejected the Bill, mainly on the grounds that it is an attack on the independence of the judiciary and on equality before the law, including the General Council of the Judiciary (which warned, albeit before the actual bill was presented, that the proposed amnesty "implies the degradation, if not abolition, of the Rule of Law in Spain"[10]), the Supreme Court, the Prosecutors' Associations, the General Council of Spanish Lawyers and the Spanish Diplomats' Association.[11] Massive demonstrations were held against it. [12] According to a poll by Metroscopia before the draft law was unveiled, 70 per cent of those questioned said they were against a law on amnesty, compared with 26 per cent who said they were in favour of the amnesty.

33. A lively debate on the constitutionality of the amnesty bill has also developed among the Spanish constitutional experts.

34. At EU level, the Spanish government agreement – including the amnesty bill – was the focus of a debate in the European Parliament with representatives of the Spanish Presidency and the Commission. Justice Commissioner Didier Reynders, who had already written to the Spanish government before the bill was tabled, asking for details of the planned legislation, confirmed that the Commission was analysing the bill.[13]

35. The number of people who could benefit from the amnesty is difficult to estimate. For example, according to the Minister of Justice, 372 cases are concerned; according to the Spanish daily newspaper EL PAIS (international edition of 14 November 2023), the Bill would benefit nearly 400 people, including politicians and public officials, citizens who were prosecuted for the riots after the 2019 conviction of secessionist leaders, and an estimated number of 73 police officers. The stakeholders met in Madrid mentioned figures varying from around

[8] Legal Officers of the Cortes Generales, technical comments, at I.
[9] Article 81.2 of the Constitution.
[10] https://www.poderjudicial.es/cgpj/en/Judiciary/Panorama/Declaracion-institucional-del-Pleno-del-CGPJ--6-noviembre-de-2023-
[11] See https://www.outono.net/elentir/2023/11/11/spain-the-list-of-the-institutions-that-reject-the-socialist-attack-against-the-rule-of-law/; https://www.elnacional.cat/es/politica/asociacion-mayoritaria-fiscales-espanoles-pide-comision-europea-frene-amnistia_1101414_102.html
[12] https://www.reuters.com/world/europe/biggest-protest-spain-against-catalan-amnesty-law-draws-170000-2023-11-18/
[13] European Parliament Briefing of 16 November 2023 (https://www.europarl.europa.eu/news/en/agenda/briefing/2023-11-20/10/rule-of-law-in-spain-meps-to-assess-the-governmental-agreement)

100-150 beneficiaries to 4000. This figure will depend on the exact final content of the law and on its interpretation by the judiciary.

36. On 5 December 2023, the Bureau of the Senate decided to request the Consejo Fiscal (a body of the State Public prosecutor's office) to prepare a report on the amnesty bill. On 25 January 2024, the Fiscal General del Estado (State Public Prosecutor) declined the request on account of the lack of mandate of his institution.

37. The Senate has also requested an opinion of the General Council of the Judiciary, which is currently being prepared.

38. On 12 December 2023, the Plenary Session of the Congress of Deputies of Spain approved, by 178 votes, with 171 against and 1 abstention, a motion by the Junts per Catalunya and Basque Parliamentary Groups (EAJ-PNV) "for the creation of a committee of Inquiry into the so-called "Operation Catalonia" and the actions of the Ministry of the Interior during the governments of the Popular Party in relation to the alleged irregularities linking high-ranking officials and police commanders to the existence of a vigilante plot."[14] Two other committees of inquiry were set up, "on the right to know the truth and the implications of the attacks in Barcelona and Cambrils on 17 August 2017" and "on espionage and intrusion into privacy and intimacy, through the Pegasus and Candiru malware, of political leaders, activists, lawyers, journalists, institutions and their families and friends".[15] The term "lawfare" has been used by Junts per Catalunya with reference to the strategic use of the law as an instrument to target political opponents.

V. Comparative analysis of the existing constitutional and legislative provisions on amnesty in Venice Commission member states (CDL-PI(2024)002)

39. The Venice Commission has collected information on constitutional and legislative provisions on amnesty in 54 of its member states (CDL-PI(2024)002).

40. All legal systems envisage instruments for condoning penalties, especially criminal penalties, either general or individual in nature, conditional or unconditional. Traditionally this power of mercy was considered a prerogative of the sovereign. In modern times general amnesties have been approved after changes of regime, or after periods of conflicts for the purpose of restoring social peace. Today, the power not to punish or to relieve from punishment is more articulated and it is shared between the legislative and the executive branches of government. In recent times new forms of transitional or restorative justice are developing aiming at social and political reconciliation after a period of harsh conflict.

41. While some other forms exist in a number of countries,[16] the two principal forms of measures of mercy within the Council of Europe member States are "amnesty" and "pardon". On the basis of the analysis which the Commission carried out in its Opinion on the draft Amnesty Law of Georgia,[17] for the purposes of this opinion, the Commission will use the following definitions:

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[14] https://www.congreso.es/en/busqueda-de-iniciativas?p_p_id=iniciativas&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&_iniciativas_mode=mostrarDetalle&_iniciativas_legislatura=XV&_iniciativas_id=156/000001

[15] https://www.congreso.es/en/busqueda-de-publicaciones?p_p_id=publicaciones&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&_publicaciones_mode=mostrarTextoIntegro&_publicaciones_legislatura=XV&_publicaciones_id_texto=(DSCD-15-PL-12.CODI.)#(P%C3%A1gina59)

[16] Some countries make a difference not only between amnesty and pardon, but between general and special amnesty: in Italy, the general amnesty ("amnistia") is a collective act of forgiveness applied to entire categories of offences, with legal consequences completely wiped out; while "indulto" (commutation) is a more limited act of clemency, reducing or remitting (part of) the punishment for a specific group of offences. A similar distinction exists for example in the Republic of Korea, Chile, and Portugal.

[17] Venice Commission, Opinion on the Provisions relating to Political Prisoners in the Amnesty Law of Georgia, CDL-AD(2013)009, paras 18-20.

amnesty is a measure which is impersonal and applies to all persons or to a class of persons, while a pardon concerns a specific individual or a specific group of individuals. While a pardon typically serves to remit a sentence, an amnesty may be granted before criminal proceedings have commenced or at any stage thereafter.[18] While amnesty is usually considered to fall within the realm of the legislature, the power to grant a pardon is seen as one of the prerogatives of the Head of State.

42. In other words, pardon[19] involves a reduction or revocation of the sentence of one or more convicted person(s). The criminal nature of the act committed remains. Prosecution of other perpetrators of that act remains possible because they too committed a punishable offence.

43. Amnesty entails an exemption from the application of the criminal law provisions in force on the basis of abstract substantive criteria. It removes (totally or partially) the criminal responsibility of the perpetrators. Certain acts are considered – in retrospect – not punishable. What happened has no criminal consequences. Prosecutions instituted are dropped, new ones are not instituted. Sentences are cancelled, and penalties are not executed, or their execution is interrupted.[20] The amnesty applies in principle to every known and unknown perpetrator of the offence eligible for amnesty.

44. Amnesty is provided for explicitly in the Constitutions of the majority of the countries under consideration: Armenia, Austria, Azerbaijan, Bulgaria, Chile, Czechia, France, Greece, Hungary, Iceland, Italy, Republic of Korea, Kosovo, Kyrgyzstan, Mexico, Republic of Moldova, Monaco, Morocco, the Netherlands, North Macedonia, Portugal, Slovakia, Sweden, Switzerland, Tunisia, Türkiye, Ukraine, United States. In Canada and the United Kingdom, amnesty is considered as permitted by constitutional conventional practice.

45. Several constitutions provide for pardon but not for amnesty: Cyprus, Estonia, Finland, Israel, Liechtenstein, Malta, Norway, Slovenia, Spain. In Spain, general pardons (*indultos generales*) are prohibited by the Constitution.

46. In the absence of constitutional provisions on amnesty, a number of countries consider it as acceptable and have provided for amnesty on specific occasions, and/or recognised the admissibility of amnesty in their legislation: Belgium, Brazil, Canada, Costa Rica, Croatia, Denmark, Germany, Ireland – for tax offences -, Norway, Poland. In Estonia and Finland, it is generally accepted that amnesty is possible.

47. General legislation relating to amnesty – in general, provisions in the penal code or the code of criminal procedure – is in force in the following countries: among those which have a constitutional provision on amnesty: Armenia, Bulgaria, Costa Rica, Hungary, Italy, Republic of Moldova, Switzerland, San Marino, Ukraine; among those which do not have a specific constitutional provision: Canada.

48. The competence to grant amnesty generally belongs to the legislative branch of power. This is the case in Armenia, Austria, Belgium, Bulgaria, Chile, Costa Rica, Croatia, Estonia (according to the leading commentary of the Constitution), Finland, France, Greece, Hungary, Ireland (fiscal amnesty), Italy, Kosovo, Latvia, Lithuania, Mexico, the Republic of Moldova, Morocco, the Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, San Marino, Serbia, Switzerland, Tunisia, Türkiye, Ukraine and the United Kingdom.

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[18] ECtHR, 23 September 2008, *Lexa v. Slovakia.* Application no. 54334/00, para. 89.
[19] The term *pardon* is first found in early French law and derives from the late Latin *perdonare* ("to grant freely"), suggesting a gift bestowed by the sovereign. It has thus come to be associated with a somewhat personal concession (by a head of state) to the perpetrator of an offence, in mitigation or remission of the full punishment of the perpetrator. The term *pardon* subsequently fell into disuse in French law, to be replaced by the term *grâce*.
[20] ECJ, Judgment of 29 April 2021, Case C-665/20 PPU - *X (Mandat d'arrêt européen – ne bis in idem)*, para. 93.

49. Special majorities are necessary: in Italy (an amnesty law requires a majority of 2/3 of each Chamber), in Greece (180 out of 300 MPs (3/5)), in Türkiye (a majority of 3/5 of the Assembly) and in Chile (a 2/3 majority in case of terrorism). In Romania, amnesty laws are organic laws which need approval by the majority of members of each Chamber.

50. In Belgium, Bosnia and Herzegovina, Germany and Switzerland, the sub-national entities can adopt amnesty laws concerning offences falling under their competence.

51. In a minority of countries, the power to grant amnesty is vested in the executive branch of government, with or without parliamentary involvement. In the Republic of Korea, the President may grant amnesty with the consent of the National Assembly. In Canada, the amnesty orders are made by the executive branch (the Governor in Council) but are authorised by Parliament. In Slovakia, the President may grant amnesties without legislative approval, with the consent of the National Assembly in case of a general amnesty. In Czechia, the President may grant amnesty but needs the co-signature by the Prime Minister or the competent member of the government. In Denmark, amnesty is a prerogative of the King requiring the consent of the relevant Minister. In the United States, the Constitution establishes the President's authority to grant clemency, encompassing not only pardons of individuals but several other forms of relief from criminal punishment as well; the power has been recognised by the Supreme Court as quite broad, but there are two limits: it does not apply to criminal offences under state law nor to cases of impeachment. In Iceland too, the President grants amnesty, but may not exempt a Minister from a punishment imposed by the Court of Impeachment. In Monaco, the Prince exercises the right of amnesty after consultation of the Crown Council.

52. A number of constitutions limit the material scope of the amnesty. The Greek Constitution admits it only for political crimes. So does the Constitution of Costa Rica. Other countries exclude some serious crimes. For example, Bosnia and Herzegovina excludes war crimes and genocide; Bulgaria crimes against peace and humanity, Croatia the most serious violations of humanitarian law characterised as war crimes. Armenia excludes from amnesty genocide, crimes against humanity, war crimes and related crimes like justification and denial of these crimes, but also ecocide, terrorism, abuse of official or service powers and torture. In Brazil, exceptions to the benefits of amnesty include those convicted of terrorism, assault, kidnapping and personal attacks. In Belgium, according to legal doctrine, amnesties must not go against international law, so should be excluded for serious breaches of human rights. This is also true in Costa Rica: the exclusion of crimes against humanity from amnesty under the case-law of the Inter-American Court of Human Rights has to be taken into consideration; moreover, electoral offences cannot be amnestied. In Chile, crimes that are not amnestied in accordance with international human rights treaties ratified by Chile cannot be amnestied. In Kosovo, the exclusion applies to acts against international actors and international security forces in Kosovo, acts that constitute serious violations of international humanitarian law, criminal offences that resulted in grievous bodily injury or death. In Serbia, the exclusion concerns crimes against humanity and other goods protected by international law, but also crimes against sexual freedom; as well as persons who have been convicted to a prison sentence of 30 to 40 years. In Kyrgyzstan, amnesties do not apply to crimes such as torture, rape committed against a child, and acts of terrorism. The Republic of Moldova provides for an exception for a number of serious or exceptionally serious crimes, *inter alia* criminal acts that constitute serious violations of fundamental human rights; Portugal excludes the crimes of homicide and harm to physical integrity; San Marino habitual, professional offenders or criminals by tendency; Ukraine high treason, sabotage, criminal offences related to corruption, violation of traffic safety rules or operation of transport by persons who drove under the influence of alcohol, drugs or other intoxicants or were under the influence of medicines that affect concentration; and Türkiye offences against forests.

53. In Austria, an amnesty can only be applied to criminal offences that fall under the jurisdiction of ordinary courts and that are to be pursued *ex officio*.

54. The practice of amnesty strongly varies according to countries. It is interesting that a number of amnesties were related to political events in the broad sense. In Belgium, historically amnesties were linked to revolution, war and strike; in Brazil, amnesty was applied to all those who, in the period between 2 September 1961 and 15 August 1979, had committed political or related crimes, electoral crimes, those who had their political rights suspended, and civil servants of the Direct and Indirect Administration, of foundations linked to the government, civil servants of the Legislative and Judicial Powers, the Military and union leaders and representatives, punished based on Institutional and Complementary Acts. In Bosnia and Herzegovina, the General Framework Agreement for Peace provided for the amnesty of any returning refugee or displaced person charged with a crime, other than a serious violation of international humanitarian law. In Croatia, the 1996 amnesty covered acts committed between 17 August 1990 and 23 August 1996. In France, amnesties took place, *inter alia*, after: the independence war in Algeria; political crises in oversea territories linked to separatist claims (New Caledonia, Guadeloupe); events of a political and social nature linked to the establishment of the status of Corsica (1982); social crisis (1968); social disorders (1972). In Italy, in 1946, a presidential decree amnestied some of the crimes of the previous regime. In Morocco in 1994, political prisoners were amnestied, and political exiles were recognised the right to free movement.

55. In other countries, amnesties were not related to political events and were limited to specific offences, such as recent amnesties in Canada concerning the possession of firearms. The 2020 amnesty in Mexico applied to five federal offences: a) abortion; b) homicide based on kinship; c) simple non-violent theft; d) specific drug-related crimes and e) sedition; as well as to individuals belonging to indigenous communities who, during their legal process, did not have full access to the jurisdiction of the State, due to the lack of interpreters or defenders knowledgeable about their language and culture. Repeat offenders were excluded.

56. In Latvia, the amnesties adopted since the country recovered its independence concerned specific groups: apart from authors of unintentional crimes, minors (under the age of 18), pregnant women, those caring for underage children, and those over the age of 55 (women), over the age of 60 (men), and persons with disabilities.

57. Two general conclusions may be drawn from the above analysis of the constitutional and legislative provisions on amnesty:

a) Some form of (strong) involvement of parliament is usually required;

b) Generally, amnesties have a limited scope and are often related to political events in the broad sense. Some substantive exclusions of the application of the amnesty – either with reference to specific crimes (for example: homicide) or with reference to a type of crime (for example: criminal offences that resulted in grievous bodily injury or death) – are provided for by a number of Constitutions.

VI. Analysis

A. The Rule of Law requirements of amnesties (Question of the President of the Parliamentary Assembly and Senate's question 1)

58. The request of the President of the Parliamentary Assembly of the Council of Europe and the first question put to the Commission by the President of the Senate both aim at identifying the Rule of Law requirements which apply to amnesties.

59. The Venice Commission is of the view that the following benchmarks of its Rule of Law Checklist are pertinent in respect of amnesty:

- **Legality, Supremacy of the law**[21]

[21] Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, II.A.4.i.

60. Amnesties have the effect of retrospectively nullifying the criminality of certain acts and can therefore deprive criminal provisions as laid down in acts of parliament of any practical effect. The Commission considers that amnesties should ideally require parliamentary approval. This is indeed the case in most states addressed in the comparative analysis.[22] In a minority of states, however, amnesties are adopted by the executive, with or without parliamentary involvement.

61. Amnesties, whether adopted through statutory law, other decisions or acts of parliament or executive decisions with or without parliamentary involvement, must comply with the Constitution. Constitutionality is to be controlled through the bodies and procedures provided for in the Constitution.

62. The majority required for approval by parliament falls, like all procedural rules, in the domain of the national constitutional law. The constitutional rules vary significantly on this point. While a majority of countries require simple majority,[23] the Venice Commission considers that insofar as amnesty may have very divisive effects in the society, the parliament should strive to adopt it by an appropriately large qualified majority.

63. Executive decisions granting amnesties, like any action of the executive branch, must also conform with the Constitution and other laws.

- **Respect for international law, in particular, human rights law, including binding decisions of international courts**[24]

64. On the basis of the case-law of international tribunals, the reports of international bodies and academic literature,[25] the following categories of substantive requirements in respect of amnesty may be identified in international law:[26]

i. Amnesties in respect of serious international crimes

65. There is a recent trend in support for the proposition that amnesties covering serious international crimes are impermissible and should not be recognised by the international community. For example, the International Criminal Tribunal for the former Yugoslavia held in its *Furundžija* case that "it would be senseless to argue, on the one hand, that on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures (…) would not be accorded international legal recognition."[27]

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[22] See above ch. V, paras 48ff. See also Venice Commission, Opinion on the Provisions relating to Political Prisoners in the Amnesty Law of Georgia, CDL-AD(2013)009 (Georgia), para. 29 and J. Close, *Amnesty Provisions in the Constitutions of the World: A Comparative Analysis*, in International Law Blog.
[23] Cf. above ch. V, para. 49.
[24] Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, II.A.3.i.
[25] See among others, *Anja Seibert Fohr*, « Amnesties », Oxford Public International Law (https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e750?rskey=H8EpNQ&result=1&prd=OPIL), with selected bibliography. In Protocol II (1977) to the Geneva Conventions Article 6(5) permits (encourages) states to issue "as wide as possible" amnesties following civil war, but in the ICRC commentary (and in doctrine) this is interpreted not to include people suspected or convicted of war crimes or crimes against humanitiy. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."
[26] A thorough analysis of the state of international law on amnesties may be found in the judgment of the European Court of Human Rights in the case of Marguš v. Croatia, [GC], 27 May 2014, (appl. no. 4455/10).
[27] Judgment of 10 December 1998, para. 155.

66. A similar stance was taken by the Inter-American Commission on Human Rights (IACHR), in particular in its 1994 Report on El Salvador[28] and about amendments to the Suriname Amnesty Act of 1992[29] under the presidency of Bouterse in 2012.

ii. Amnesties in respect of serious human rights violations

67. There is a recent trend in support for the proposition that amnesties covering serious human rights violations are impermissible.

68. Human rights treaties, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the International Covenant on Civil on Political Rights and the Inter-American Convention on Human Rights offer protection to those who fall victim to the commission of criminal offences, often by acknowledging that State authorities are under a positive obligation to offer *effective* protection to victims of criminal acts, and to provide for an *effective* deterrent vis-à-vis potential perpetrators from committing those criminal acts.

69. The *United Nations Human Rights Committee* (HRC) has held that "[a]mnesties are generally incompatible with the duty of States to investigate [acts of torture]; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future".[30] In other documents, the HRC made similar statements concerning (serious) human rights violations.[31] This approach is also taken on the UN level by the *United Nations Commission on Human Rights*.[32]

70. In the *inter-American system*, it has been held that amnesties related to serious human rights violations are incompatible with international human rights obligations, as such measures keep States from investigating and punishing the perpetrators. The *Inter-American Court of Human Rights* has rendered a number of judgments in this sense in the context of undemocratic regimes or internal armed conflicts.[33]

71. The European Court of Human Rights (ECtHR) has identified the following positive obligations under Articles 2, 3 and 8 of the *ECHR:*

- the obligation to introduce criminal law provisions and the effective enforcement of those provisions.[34]

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[28] El Salvador 1994 - Table of Contents (oas.org)
[29] IACHR Expresses Concern about Amnesty Legislation in Suriname (oas.org).
[30] General Comment No. 20 (1992), para. 15.
[31] 1997 Concluding observations in respect of Lebanon; 2001 Concluding observations in respect of Croatia.
[32] Resolution 2002/79 of 25 April 2002 and Resolution 2003/72 of 25 April 2003. The word 'serious' has not been used in Resolution 2004/72 of 21 April 2004 and Resolution 2005/81 of 21 April 2005 ('violations of human rights and international humanitarian law that constitute crimes').
[33] *Gelman v. Uruguay* (Judgment of 24 February 2011, Series C No. 221, para .195): "This Court, the Inter-American Commission on Human Rights, the organs of the United Nations, and other universal and regional organs for the protection of human rights have ruled on the non-compatibility of amnesty laws related to serious human rights violations with international law and the international obligations of States"; *Barrios Altos v. Peru* (Judgment of 14 March 2001, Series C No. 75), para. 41; *the Moiwana Community v. Suriname* (Judgment of 15 June 2005) para. 206; *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil* (Judgment of 24 November 2010, Series C No. 219); *The Massacres of El Mozote and Nearby Places v. El Salvador* (Judgment of 25 October 2012, Series C No. 252). See also IACHR, *Las Hojas Massacre v. El Salvador* (Case 10.287, Report No. 26/92 of 24 September 1992).
[34] See, for example, ECtHR 19 July 2018, *Sarishvili-Bolkvadze v. Georgia*, appl. no. 58240/08, para. 77, in which the Court found a violation of the positive obligation under the Convention to provide an effectively functioning regulatory framework that would ensure compliance with the applicable regulations; ECtHR 4 December 2003, *M.C. v. Bulgaria*, appl. no. 39272/98, para. 153: "[…] the Court considers that States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution, ECtHR 26 March 1985, *X. and Y. v. the Netherlands*, Series A-91, para. 27: "This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions"; ECtHR 9 June 2009, *Opuz v. Turkey*, appl. no. 33401/02 in which the Court conducted – within the

- the obligation to conduct an effective investigation in order that perpetrators may be identified and punished.[35] Such a prompt response by the authorities may avoid the "appearance of tolerance of unlawful acts".[36] This entails an obligation to ensure that operational difficulties do not hamper an effective implementation of criminal law provisions.[37]

72. This part of the European case-law has been mainly developed when dealing with criminal offences constituting physical violence. The ECtHR accepted the above-mentioned positive obligations under the procedural limb of Articles 2, 3 and 8 ECHR. An amnesty allowing for impunity would run counter to the rationale of this body of case-law.[38]

73. Concerning specifically amnesties, the ECtHR held that, while there is so far no international treaty explicitly prohibiting the granting of amnesty in respect of grave breaches of fundamental human rights, "[a] growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights. Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances."[39] In other words, the ECtHR did not completely rule out that amnesties may be allowed under particular circumstances as part of a reconciliation process and/or in presence of a form of compensation of the victims, including for violations of Articles 2 and 3 ECHR.

iii. Other possible limits

74. There is some support for other limits to amnesties: those which might undermine the judiciary;[40] amnesties excluding civil liability;[41] self-amnesties (i.e. when perpetrators or responsible institutions grant themselves or their members immunity from prosecution, often on the eve of a political transition).[42]

framework of a case concerning domestic violence – a comparative analysis and found that, although there was no general consensus, the practice showed that the more serious the offence or the greater the risk of further offences, the more likely it was that the prosecution would proceed in the public interest even when the victim had withdrawn a complaint; ECtHR 30 November 2004, *Öneryildiz v. Turkey*, appl. no. 48939/99, para. 93: "the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation; ECtHR 20 December 2007, *Nikolova and Velichkova v. Bulgaria*, appl. no. 7888/03, para. 62: "It follows that while the Court should grant substantial deference to the national courts in the choice of appropriate sanctions for ill-treatment and homicide by State agents, it must exercise a certain power of review and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed. Were it to be otherwise, the States' duty to carry out an effective investigation would lose much of its meaning, and the right enshrined by Article 2, despite its fundamental importance, would be ineffective in practice."

[35] See for example ECtHR [GC] 15 May 2007, *Ramsahai and others v. the Netherlands*, appl. no. 53291/99.

[36] ECtHR 9 June 2009, *Opuz v. Turkey*, appl. no. 33401/02.

[37] ECtHR 28 January 2014, *O'Keeffe v. Ireland*, appl. no.35810/09.

[38] See ECtHR 17 March 2009, *Ould Dah v. France* (appl. no. 13113/03): "The obligation to prosecute criminals should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty law that may be considered contrary to international law."

[39] See ECtHR [GC] 27 May 2014, *Marguš v. Croatia* (appl. no. 4455/10), para. 131 and 139.

[40] IACHR 1994 Report on El Salvador. See also IACHR Annual Report 1985: The IACHR has taken a very critical stance in respect of amnesties covering *inter alia* perjury, false expert opinions and reports, false evidence, et cetera.

[41] The IACHR stated that amnesty laws should in principle respect the rights of victims to claim compensation in civil proceedings: in the IACHR 1994 Report on El Salvador, it stated that the "sweeping" amnesty in El Salvador "extinguishes criminal and civil liability and thus disregards the legitimate rights of the victims' next-of-kin to reparation".

[42] The leading case in the field is the *Barrios Alto v. Peru* judgment of the Inter-American Court of Human Rights, related to Amnesty Law No. 26479 adopted by the Congress of Peru, which had exonerated from criminal responsibility members of the army, police force and also civilians who had violated human rights or taken part in

- **Legal certainty, Foreseeability of the laws: Are the effects of the laws foreseeable? Are the laws written in an intelligible manner?[43]- Nullum crimen sine lege and nulla poena sine lege principles[44]**

75. Amnesties are in most cases adopted through a formal law, but not exclusively so. They may be adopted by a decision or other act of parliament or even by an act of the executive subject or not to parliamentary approval. The Venice Commission considers, that, insofar as amnesty may have very divisive effects in the society, parliament should strive to adopt it through an appropriately large qualified majority.[45]

76. An amnesty law should meet the qualitative requirements that any law needs to meet. The exceptional nature of amnesty laws does not mean that basic quality standards do not have to be met. To the contrary, it is especially important for amnesty laws to meet these basic parameters as they affect criminal liability in an often very sensitive societal environment. The principle of no punishment without law, as developed in the case-law of the ECtHR, requires a clear definition of the crimes and penalties. Clarity, determinacy, accessibility, foreseeability are qualitative requirements of any law affecting the criminal domain. These principles apply to legislation that introduces or modifies crimes and penalties, as well as to legislation that decriminalises crimes and penalties. All the domain of criminal law – *la matière pénale* - is governed by the principle of strict legal certainty: as stated in the Rule of Law Checklist, "[t]he necessary degree of foreseeability depends (…) on the nature of the law. In particular, it is essential in criminal legislation". Since amnesty laws de-criminalise a specific set of acts, even if only for a delimited period of time, they must be subject to the same principles that apply to criminal law acts.

77. Even when amnesties are taken through other kinds of parliamentary acts or through governmental decisions (see above), it is essential that their effects be formulated with sufficient precision and clarity so as to make them foreseeable as to the personal, substantive and temporal scope of the amnesty.

- **Legality, Law-making procedures: is the process of enacting law transparent, accountable, inclusive, and democratic? Where appropriate, are impact assessments made before adopting legislation? [46]**

78. Amnesties are generally motivated by reasons of social and political reconciliation. These legitimate goals require to be attained by coherent methods and procedures. The procedural means must be rationally connected and coherent with the intended purpose, in order not to frustrate such purpose. Therefore, the means and the procedures designed to approve the amnesty should be inspired by inclusiveness, participation, appropriate timeframe and public discussions. In particular, meaningful consultations, coupled with an appropriate timeframe, should assist the elected bodies in assessing the proportionality of the envisaged amnesty. These requirements are even more important when there is no constitutional requirement of qualified majority for the approval of amnesty.

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such violations from 1980 to 1995. The Court considered this law as a self-amnesty law and declared it as such as incompatible with the American Convention on Human Rights: *"Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated." Inter-American Court of Human Rights, Barrios Altos v. Peru* (Judgment of 14 March 2001, Series C No. 75), paras 2.i, 43, *44*.

[43] Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, II.B.3.i.

[44] Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, II.B.7.

[45] See above para. 62.

[46] Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, II.A.5(v).

79. The Venice Commission has already underlined with reference to general legislation that hastiness may harm the quality of the law. This is particularly true in the field of criminal law where, as already said, strict legality applies, and the input of the various branches of the judiciary may be very useful to measure the impact of the law, and when acts of Parliament regulating important aspects of the legal or political order are at stake.[47] A fast-tracked legislative procedure is therefore not appropriate for the adoption of amnesty laws given the far-reaching consequences of such laws and the fact that amnesty laws are often of a controversial nature.

- **Equality in law: are there individuals or groups with special legal privileges? Are these exceptions and/or privileges based on a legitimate aim and in conformity with the principle of proportionality?**[48]

80. Amnesties are exceptional measures, which decriminalise acts which are normally prosecuted as criminal. By definition, they accord special legal benefits to a certain group of individuals who qualify under the law. As a consequence, they introduce a difference in treatment in respect of individuals who, having committed the same acts but in different contexts, for different reasons or at different times, do not benefit from the amnesty and remain the object of criminal procedures and sanctions. When an amnesty intends to achieve reconciliation after certain events, the determination of the acts to be covered by it should be based on a list of general criteria with a strict link of causality with such events. As amnesties are impersonal measures applying to all persons or certain classes of persons, the criteria should not be designed to cover specific individuals. Further, for the difference in treatment not to be arbitrary, amnesties should pursue a legitimate aim in the interests of the community; the more radical the amnesties are, the more legitimate the aim should be. National unity and social and political reconciliation are considered to be legitimate aims of amnesties. In the Commission's opinion, proportionality requires that, in each given case, the proposed amnesty should be a suitable means to ultimately achieve a legitimate aim. Elected bodies dispose of a margin of appreciation in judging whether amnesty is an effective tool to use or whether other avenues, such as individual pardons and/or making amendments to the criminal legislation, could better be pursued. It is the opinion of the Venice Commission that such decisions should be taken with an appropriately large qualified majority, which builds bridges across the national separation.

- **Independence of the judiciary, as an integral part of the fundamental democratic principle of the separation of powers**.

81. Amnesty has the effect of cancelling or preventing judicial decisions and procedures. Unlike the abrogation or modification of a criminal provision, which, by virtue of the principle of *lex mitior*, produces effects on all pending judicial decisions and procedures concerned by that provision but also apply to all future cases related to that provision, amnesty does not have a general application in the future, it only affects a category of crimes already committed during a limited period of time in the past and under certain circumstances. Judges are bound to apply the law, both in case of changes in the criminal legislation and in case of amnesty. In order to be reconciled with the principle of separation of powers, amnesties should not remove the authority of the judiciary altogether. For this reason, the Venice Commission has previously considered that a procedure by which the Judiciary is entrusted, by decision of Parliament, to decide on whether specific individuals fulfil the general criteria determined by Parliament for the application of amnesty is in line with the principle of separation of powers.[49]

[47] Venice Commission, Romania - Opinion on draft amendments to the Criminal Code and the Criminal Procedure Code, CDL-AD(2018)021, paras 35-39.
[48] Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, II.D.3.iii.
[49] Venice Commission, Opinion on the Provisions relating to Political Prisoners in the Amnesty Law of Georgia, CDL-AD(2013)009, paras. 43 to 46.

82. Furthermore, affected individuals, such as victims, should have an effective access to courts to challenge a decision if it interferes with their rights.

B. The amnesty bill

83. The bill is defined as "a singular law" aiming to address the "exceptional situation" […] "of high political tension that Catalan society has experienced particularly intensely since 2012".[50] In the absence of a constitutional provision regulating the specific case of amnesty, the Congress of Deputies has submitted a legislative proposal for an organic law, which as such requires absolute majority for adoption.

84. In its version of 13 November 2023, it consists of three parts, which may be summarised as follows:

85. Part I: Objective scope and exclusions:

- Temporal scope: The scope of the Bill is to grant amnesty for actions declared or classified as criminal offences or criminal conduct giving rise to administrative or accounting liability in relation to the informal consultation of 2014 and the referendum of 2017, which took place between 1 January 2012 (the year in which the actions of the pro-independence process began) and 13 November 2023 (the date the draft law was proposed) (Article 1 [1]). The draft as adopted by the Congress on 14 March 2024 has extended the temporal scope, making it start on 1 November 2011.
- Substantive scope: The amnesty applies not only to the organisation and holding of the consultation and referendum, but also to other potentially unlawful acts linked to them, such as preparatory actions, protests in favour of holding a referendum or demonstrations against the trial or conviction of those responsible, including participation, collaboration, advice or representation in any form, the provision of protection and security to those responsible, as well as all those acts covered by the bill which are indicative of a political, social and institutional tension that the bill seeks to resolve (Article 1 of the bill).
- Exclusions: A number of acts are excluded from the application of the amnesty. The amnesty does not cover acts against persons resulting in (among other things) death, the crime of torture or inhuman and degrading treatment as defined in Article 3 of the ECHR, "provided they exceed a minimum threshold of seriousness", acts classified as terrorist offences under the Spanish Criminal Code, "provided that a final judgment has been passed"; the crimes of treason and against the peace or independence of the State and relating to National Defence under the Spanish Criminal Code, crimes affecting the financial interests of the EU, and crimes found to be motivated by discriminatory reasons (Article 2 of the bill).The draft as adopted by the Congress of Deputies on 14 March 2024 has changed the scope of the exclusion: firstly on torture or inhuman and degrading treatment, which is excluded from the amnesty if it "does not exceed a minimum threshold of severity because it is not likely to humiliate or degrade a person or show a diminution of human dignity, or to cause fear, distress or inferiority in a manner likely to break a person's moral and physical resistance"; secondly on terrorism: the exclusion now concerns "acts which by their purpose may be qualified as terrorism, according to Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism, and in turn have intentionally caused serious violations of human rights, in particular those regulated in Articles 2 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in international humanitarian law"; thirdly, on the crimes of treason and against the peace or independence of the State and relating to National Defense: the exclusion now only applies to "acts classified as crimes of treason and against the peace or independence of the State and relating to National Defence under Title XXIII of Book II of the Penal Code, provided that there has been both an effective and real threat and an effective use

[50] See CDL-REF(2024)002, pp. 8-9.

of force against the territorial integrity or political independence of Spain in the terms established in the United Nations Charter or in Resolution 2625 (XXV) of the United Nations General Assembly of 24 October 1970, which contains the declaration on the principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations".

86. Part II: Effects: The law has the effect of extinguishing criminal, administrative and accounting liability (Article 3). The amnesty law will be applied by the courts/administrative bodies that have previously pronounced a judgement or initiated proceedings (see part III) in relation to acts to promote Catalan independence that took place within the specific period (see part I).

- Criminal liability (Article 4): Prisoners will be immediately released from prison, the criminal record will be expunged, national and international arrest warrants and detention orders will be cancelled (among which the European arrest warrant), precautionary measures will be lifted.
- Administrative liability (Article 5): the competent administrative authority shall decide on the final closure of all administrative proceedings and all precautionary measures in respect of acts or omissions amnestied shall be lifted, except for those relating to civil liability.
- Effects on public officials (Article 6): sanctioned or convicted public officials shall be reinstated with full rights but shall not be entitled to compensation.

87. Amnesty does not entitle to compensation or reimbursement of fines or penalties (Article 7). Civil and accounting liabilities shall be extinguished, but civil liability for damage suffered by individuals shall be respected.

88. Part III: Competence and procedure: The bill identifies the competences to apply amnesty and describes the procedure.

- Competence for the application of the amnesty (Article 9) for crimes is vested in judicial bodies determined in Article 11 of the Bill, after hearing the Public Prosecutor's Office and the parties to the case, for infractions of administrative nature with the respective bodies.
- Amnesty cases are subject to preferential and urgent processing (Article 10), and decisions shall be taken within a maximum period of two months. There is no sanction for the non-respect of this deadline, and pursuant to Article 9.3 of the amnesty bill an act may be considered "to be granted amnesty when it has been so declared by a final decision issued by the competent body in accordance with the law".
- Procedure in criminal matters (Article 11) shall be applied by judicial bodies *ex officio* at any stage of the criminal proceedings.
    - If amnesty is applied during the investigation phase, the case is dismissed.
    - If amnesty is applied during the oral trial phase, the judicial body hearing the prosecution shall issue an order of dismissal or acquittal.
    - There are rules for final and not yet final judgments; in any case, amnesty is declared *ex officio*.
- Regarding the time limit for the recognition of the rights covered by the Bill (Article 15), a statute of limitations of five years is established.
- Appeals (Article 16) may be lodged against all decisions ruling on the termination of criminal liability or administrative and accounting infractions, as provided for in the Bill.

89. The bill (Article 10.2) establishes that the amnesty will be applied within two months without prejudice to any subsequent appeals, which will have no suspensive effect.

C. Compatibility of the elimination of criminal responsibility for the acts covered by the amnesty bill with the Rule of Law (Senate's question 2)

90. As indicated above, the Rule of Law imposes certain substantive and procedural requirements on amnesty.

91. As regards the substantive limits under international law, to the extent that some of the crimes covered by the amnesty bill might amount to serious human rights violations (for the crime of terrorism specifically, see below), the Commission notes with approval that the amnesty bill does not cover acts against people resulting in death, abortion or injury to the foetus, the loss or permanent damage to an organ or limb, impotence, sterility or serious deformity, and acts defined as crimes of torture or inhuman and degrading treatment in accordance with Article 3 ECHR "provided that they exceed a minimum threshold of severity because it is not likely to humiliate or degrade a person or show a diminution of human dignity, or to cause fear, distress or inferiority in a manner likely to break a person's moral and physical resistance". The Commission underlines that the limits under international law relate to *serious human rights violations*, which are not necessarily the same as *serious crimes* under domestic law.

92. The amnesty bill rightly preserves civil liability for damage suffered by individuals. The Venice Commission considers that, in addition, the recent notion of restorative justice procedures could be worth exploring, because on the one hand these procedures respect the rights of the victims (especially the right to know the truth) and on the other hand they are based on the assumption of responsibility by the perpetrators.[51]

93. As concerns the conformity of the amnesty law with the Constitution of Spain, the Commission delegation has listened with great interest to the arguments brought forward by Spanish constitutional experts of opposing views. However, it is not for the Venice Commission to rule on the matter of constitutionality. This matter is to be addressed, taking these arguments into consideration, first by the Spanish parliament, and subsequently by ordinary judges and, in a final manner, by the Spanish Constitutional Tribunal. However, the Commission is of the view that the vivid controversy that this matter has sparked suggests that it would be preferable, when the time is ripe, to regulate this matter explicitly by way of a constitutional amendment.

94. As concerns legal certainty, the Commission notes that the material and temporal scope of application of the amnesty as defined in Article 1.1 of the amnesty bill is very broad and undetermined. It defines the acts through their intention ("any act classified as a criminal offence" intended to (in)directly promote, support or facilitate the secession or independence of Catalonia"; to call, promote or procure the holding of the consultations") in the "framework of the consultations held in Catalonia on 9 November 2014 and 1 October 2017, their preparation or their consequences", " even if they are not directly related to these consultations or even if they were carried out after the respective consultations have taken place". Article 1 further contains a list of offences, which however does not refer to specific crimes identified by the criminal legislation. Open clauses or expression like "as well as any other acts criminalised for the same purpose" or "as well as any other acts criminalised with the same intention" add to the vagueness.

95. The amendments adopted on 14 March 2024 have extended the temporal scope of the amnesty, which now starts on 1.11.2011. Amnesty thus applies to a very lengthy period of time

[51] The Council of Europe has approved a number of documents encouraging these practices, especially in situations where a country aims at reconciliation, pacification and appeasement after a period of harsh conflict. See for example: Recommendation CM/Rec(2018)8 of the Committee of Ministers to member States concerning restorative justice in criminal matters (Adopted by the Committee of Ministers on 3 October 2018 at the 1326th meeting of the Ministers' Deputies), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808e35f3; Venice declaration: in December 2021 the Ministers of Justice of the Council of Europe have adopted the Venice Declaration on the role restorative justice in criminal matters https://rm.coe.int/0900001680a4df79.

between 1.11.2011 and 13.11.2023. The Spanish legislator has not given any explanation as to why these dates are "appropriate". The Venice Commission fails to see the causal link between the rationale behind the amnesty and these dates. It therefore recommends reducing the temporal scope of application of the amnesty.

96. In conclusion, the Commission recommends narrowing down and defining the material and temporal scope of the application of the amnesty in a more precise way, so as to make the effects of the law more foreseeable. As amnesty affects the value of *res iudicata*, it must adhere to legal certainty, as otherwise it would undermine the public confidence in the observance and respect of the constitution and the law. The Commission stresses that the law will have to be interpreted and applied by the judges in each case to determine whether each case is eligible for the amnesty. The lack of clarity and determinacy of its scope of application carries the risk that a very large number of cases and controversies will arise about the correct application of the law. This in turns risks shifting the conflicts from the political to the judicial level. This result would not be coherent with the purpose of the amnesty as such.

97. As concerns equality in law, the Commission finds that if the link between "the consultations held in Catalonia on 9 November 2014 and 1 October 2017, their preparation or their consequences" and the acts covered by the amnesty is not strong enough, amnesty could also cover many citizens who have committed ordinary crimes that have little or nothing to do with the social tensions that led to the amnesty law; this would make the justification for the special benefits questionable and would infringe the principle of equality in respect of those who have committed the same ordinary crimes for other reasons or during different periods, and do not benefit from the decriminalisation brought about by the amnesty. The Commission therefore reiterates its recommendation to narrow down and define in a more precise manner the scope of application of the amnesty. The Commission recalls that an amnesty is an impersonal measure applying to all persons or to a class of persons, and the criteria for its application should not be designed to cover specific individuals. The recent extension of the temporal scope of application of the amnesty by two months without any justification raises concerns in this regard.

98. As concerns the legitimate aim, the Commission is mindful of the criticism that the amnesty bill was part of a political deal for achieving the majority to support the government. The institutional, political and social normalisation of Catalonia is nonetheless a legitimate aim, and it does not belong to the Commission to assess the proportionality of the amnesty bill in relation to the proclaimed goals. The Spanish parliament, in deciding whether, with what content and by what majority to adopt the amnesty bill, will have to address the question of whether the normalisation of Catalonia may be achieved despite the fact that the amnesty bill has deepened the profound and virulent division in the political class, in the institutions, in the judiciary, in the academia and, above all, in the society of Spain.

D. Compatibility with the Rule of Law of amnesty for crimes of terrorism (Senate's question 3)

99. Under Article 2.c of the amnesty bill in its version of 13 November 2023, acts classified as terrorist offences – with additional qualifications – are only excluded from amnesty if a final judgment has been passed. Amnesty typically applies also to pending procedures, so that the criterion of the stage of the procedure should be irrelevant. This criterion was removed in the version of 14 March 2024. It was replaced by the following text "Acts which, given their purpose, may be qualified as terrorism according to Directive EU 2017/541 of the European Parliament and of the Council of March 15, 2017 on combating terrorism, and which, in turn, have intentionally caused serious violation of human rights, particularly those set out in Article 2 and 3

of the European Convention on Human Rights and Fundamental Freedoms and in international humanitarian law."[52]

100. The Venice Commission reiterates its appreciation for the exclusion from amnesty of "acts against people resulting in death, abortion or injury to the foetus, the loss or permanent damage to an organ or limb, impotence, sterility or serious deformity". The Commission notes that the further exclusion now reads: "acts classified as crimes of torture or inhuman or degrading treatment under Article 3 ECHR with the exception of treatment which does not exceed a minimum threshold of severity because it is not likely to humiliate or degrade a person or show a diminution of human dignity, or to cause fear, distress or inferiority in a manner likely to break a person's moral and physical resistance". Finally, the amnesty law now excludes terrorist acts which fall under the EU Directive, and which have intentionally caused serious violation of human rights, particularly Article 2 and 3 ECHR and international humanitarian law.

101. The Venice Commission reiterates that, also in the interpretation of the above exclusions, the guiding principle should be that amnesties are only compatible with international standards if serious human rights violations are excluded from their scope of application.

E. Compatibility of amnesty for offences of embezzlement and corruption with the Rule of Law (Senate's question 4)

102. The Commission reiterates that the substantive limits to amnesty under international law relate to *serious human rights violations*, which are not necessarily the same as *serious crimes* under domestic law. However, as explained above, in the Commission's view there needs to be consistency in the determination of the acts covered by amnesty, which should be intrinsically linked, to avoid arbitrariness. Only a closer causal link between "the consultations held in Catalonia on 9 November 2014 and 1 October 2017, their preparation or their consequences" and certain acts of embezzlement and corruption could justify the application of amnesty to the latter. A broader, less precise definition of these acts would be difficult to reconcile with the principle of equality in law. Therefore, a stronger link with the events should be the main guidance in the interpretation of the material law.

F. The effects of the amnesty bill on the procedural powers of the courts (Senate's question 5)

103. The amnesty bill provides for certain derogations to the ordinary procedural powers of the courts.

104. The amnesty affects all stages of the procedure (Article 11 of the amnesty bill). Article 4.1 of the amnesty bill provides for the immediate release of persons benefitting from the amnesty who are in prison and Article 4.3 provides for the cancellation of arrest and detention warrants. These are logical consequences of the retrospective erasure of criminal liability: pending prosecutions are dropped, new ones are not pursued; sentences are cancelled, and penalties are not executed or their execution is interrupted (see above para. 43). As long as the decision as to whether the individual benefits from the amnesty is taken by the judge (on the basis of the general criteria contained in the amnesty), and the lifting of the arrest, detention and precautionary measures are a consequence of such judicial decision, in the Commission's opinion there is no issue of separation of powers.

105. Article 10 of the amnesty bill provides for a preferential and urgent processing of the requests for application of the law on amnesty. The relevant decisions shall be adopted "as a matter of priority

[52] The European Commission has underlined that the current wording of Article 2.c means that not all of the terrorist offences criminalised by Directive EU 2017/541 on combating terrorism are excluded from the scope of the amnesty bill.

and urgency", "within a period of two months". The Commission welcomes in this respect that there is no consequence, including in terms of disciplinary sanctions, for the non-respect of this time-limit, and that in any case amnesty is applied only after a specific judicial decision. The Venice Commission considers it as justified to deal as a matter of priority with the case of persons who could be released from prison.

106. Insofar as the question refers to the suspensive effects of an appeal to the Constitutional Tribunal, the Commission notes that Article 30 of the Organic Law 2/1979 of 3 October 1979 provides that the Constitutional Tribunal cannot suspend a law which has been deferred to it (unless upon request of the government in relation to regional matters).

107. As concerns the suspensive effects of questions of unconstitutionality brought by judges before the Constitutional Tribunal, Article 35.3 of Organic Law 2/1979 provides that they "shall result in the provisional suspension of actions in the judicial process until the Constitutional Tribunal decides on admission. Once this decision is made, the judicial process shall be suspended until the Constitutional Tribunal has made a final ruling on the question". Article 10 of the amnesty bill provides that "[…] any subsequent appeals […] shall have no suspensive effect". As to whether Article 10 is intended to derogate from the rule in Article 35.3 of Organic Law 2/1979, the Spanish authorities have informed the Commission that the rules that apply to appeals are, in principle, the ordinary ones and that the exclusion of the suspensive effect does not apply to the procedure before the Constitutional Tribunal. The Commission stresses that at any rate this clause cannot be interpreted in such a way as to deprive the judicial review of the amnesty bill of any practical effect, including possibly with regard to the application of criminal law principles.

108. Finally, a distinction should be made between a possible declaration of non-conformity of an amnesty law with superior law (constitutional, European Union, international law) and its revocation. The European Court of Human Rights has clarified that "[w]ith regard to amnesties, their retroactive revocation is generally not allowed, as they are adopted by the legislature and their revocation would be contrary to the principle of legal certainty and to the principle of non-retroactivity of criminal law".[53]

G. The powers of the committees of inquiry (Senate's question 6)

109. The Senate has put the following question to the Commission: "would summoning judges to appear before these committees of inquiry or others that may be set up in Congress in relation to judicial actions in the independence process jeopardise the independence of the judiciary and the separation of powers, which are pillars of the Rule of Law?"

110. Article 76 of the Spanish Constitution (Committee of inquiry) provides that "1. The Congress and the Senate, and, where appropriate, both Chambers jointly, may appoint Committees of inquiry on any matter of public interest. Their conclusions will not be binding on the Courts, nor will they affect judicial resolutions, without prejudice to the result of the investigation being communicated to the Public Prosecutor's Office for the exercise, when appropriate, of the appropriate actions. 2. It will be mandatory to appear at the request of the Chambers. The law will regulate the sanctions that may be imposed for failure to comply with this obligation." Article 52 of the Standing orders of the Congress of Deputies[54] provides that the full House may set up a Committee of Inquiry "into any matter of public interest." Such committees "shall draw up an agenda and may appoint reporting sub-committees among their members and require, through the Speaker, any person to give evidence." The Committee's findings, which shall not be binding upon the courts nor affect judicial decisions, once approved by the full House are published in the Official Parliamentary Bulletin and notified to the Government, without prejudice to the

[53] ECtHR, 23 September 2008, *Lexa v. Slovakia.* Application no. 54334/00, para. 94.
[54] https://www.congreso.es/webpublica/ficherosportal/standing_orders_02.pdf

possibility of their being sent by the Bureau of the House to the Public Prosecutor for the institution, if appropriate, of legal proceedings.

111. The Venice Commission has not been able to obtain precise information on the mandate of these committees of inquiry, on the status of their work or on any relevant precedents (the Commission delegation was told however that in the past judges summoned to appear before parliament as witnesses have been instructed by the General Council of the Judiciary not to do so, and no sanctions were applied). The Commission has been unable to establish, in particular, whether the aim of these committees is to look into specific judicial procedures and whether they have the power and the mandate to summon and question the judges who were in charge of such cases. A number of interlocutors of the Venice Commission expressed concern about this.

112. The Commission has previously underlined that "Parliamentary committees of inquiry are an instrument for what is usually referred to as the "control", "supervisory" or "oversight" function of parliament, the essence of which is to oversee and scrutinise the work of the executive branch. The main purpose of this supervision is to ensure democratic political accountability and to improve the transparency and efficiency of the government and the administration. But the supervisory function may also provide parliament with information of relevance to its own legislative and budgetary procedures."[55] "[P]arliamentary committees of inquiry conduct processes that are essentially of a political nature, and which should not be confused with criminal investigations and proceedings. The result of these activities does not alter the legal order. The report which closes its work is in itself only an incentive to parliamentary discussion. The ultimate aim of the committees' investigations is transparency with a view of ensuring that the public is informed of matters which affect the res publica (the public good)" […] "the means conferred to the committee must always serve the jurisdiction of the parliament in a system of separation of powers – either to establish the responsibility of government and ministers or to collect information necessary for more effective legislation or to present political recommendations to government."[56]

113. The Venice Commission has repeatedly referred to the independence of the judiciary and of individual judges as essential elements of the Rule of Law. As stated in the Rule of Law Checklist, "the independence of individual judges must be ensured, as also must the independence of the judiciary from the legislative and, especially, executive branches of government". This principle is expressed in the question "Are judicial activities subject to the supervision of higher courts – outside the appeal framework -, court presidents, the executive *or other public bodies*?"[57]

114. Further, the Commission stresses that, as stated in Recommendation (94)12 of the Committee of Ministers on the independence, efficiency and role of judges (Principle I.2.d): "In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. […] Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary."

115. In relation to parliamentary investigation committees, the Consultative Council of European Judges has stated that "[t]here is a danger of an overlap between the proper role of the judges

[55] Amicus Curiae brief in the case of Rywin v. Poland (Applications Nos 6091/06, 4047/07, 4070/07) pending before the European Court of Human Rights (on Parliamentary Committees of inquiry), (CDL-AD(2014)013), para. 7; Urgent Opinion on the Law of Poland on the State Commission to Investigate Russian Influence on Internal Security in the Republic of Poland between 2007 and 2022 and on the draft law amending that Law, para. 32 in fine, CDL-AD(2023)037.

[56] Ibidem, paras. 28 and 29.

[57] Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, para. 87 and II.E.1.b.i.

and that of parliamentary investigation committees. The CCJE recognises that national or local parliamentary bodies may, under the legislation of many member states, set up committees of inquiry to investigate social phenomena or alleged breaches of or a poor application of law. The powers of these committees are often similar to those of judicial authorities, such as the power to summon witnesses, order disclosure or seizure of documentary evidence, etc. In the CCJE's opinion, in order to preserve a proper separation of powers, in general the reports of committees of inquiry should never interfere with investigations or trials that have been or are about to be initiated by judicial authorities. If such reports must comment on existing judicial decisions in individual cases, they must do so with proper respect and should refrain from expressing any criticism in terms that would amount to a revision of decisions made. However, if the inquiry is investigating possible defects in the administration of justice which have been highlighted by a particular case, those proceedings can, with due care, be examined. An inquiry can never replace a proper judicial process.[58]

116. A 2010 comparative survey entitled "Parliamentary committees of inquiry in national systems: a comparative survey of EU member states" summarised their role as follows: "The main purpose of PCIs in most systems is supervising the actions of the government or the administration. In some states PCIs have the additional duty to ensure respect of the Constitution or other legal provisions." It did not mention any possibility to supervise the judiciary in the then 27 member states of the Union.[59]

117. Under Article 122 of the Constitution of Spain, the body competent to address disciplinary issues of judges is the General Council of the Judiciary. Requiring judges to report to a political body, in public, about the manner in which they dealt with a specific case represents a political interference in the administration of justice. Furthermore, it creates a chilling effect on other judges, particularly those who are currently or will in the future hear pending cases or those linked to causes of exclusion from the application of the amnesty bill.

118. The Commission considers therefore that to comply with the principles of separation of powers and of independence of the judiciary, the committees of inquiry set up by the Congress of Deputies of Spain should not be given the mandate to summon, nor even to invite judges to report to them, in particular on the merits of the cases which they have decided. It is therefore not enough that judges will not be obliged to appear before parliament.

VII. Conclusion

119. The Venice Commission has been asked by the President of the Parliamentary Assembly of the Council of Europe, with reference to an exchange of views on the Rule of Law in Spain, to identify the Rule of Law requirements of amnesties. The Commission has also been asked by the President of the Spanish Senate to reply to the following questions: 1) what are the general criteria that the Venice Commission considers necessary for a measure like the amnesty to adhere to the standards of the Rule of Law; 2) is the complete elimination of criminal responsibility for the acts committed in relation to the territorial integrity of Spain with the intention of promoting or procuring the secession and the independence of Catalonia compatible with the Rule of Law; 3) is the possibility of granting amnesty for crimes of terrorism if a final sentence has not been handed down compatible with the criteria of the Venice Commission; 4) is the possibility of granting amnesty for offences of embezzlement and corruption in accordance with the Rule of Law; 5) do the measures contained in the amnesty bill which condition, restrict or even impede the actions of the Spanish criminal judges comply with the Rule of Law; 6) would summoning judges to appear before the committees of inquiry set up by the Congress of Deputies in relation

[58] CCJE, Opinion n°18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy, https://rm.coe.int/16807481a1, para. 46.
[59] European Parliament (2010), Directorate-General for Internal Policies, Policy department citizens' rights and constitutional affairs -Parliamentary committees of inquiry in national systems: a comparative survey of EU member states (p. 5).

to judicial actions in the independence process jeopardise the independence of the judiciary and the separation of powers. This opinion responds to both the request of the President of PACE and the request of the President of the Spanish Senate.

120. In responding to these requests, the Venice Commission has relied on European and international standards, as well as on comparative material; in this connection, the Commission has collected relevant information on 54 of its member states. The Commission has not intervened in the political discussion. In particular, it has not commented on the desirability of the amnesty bill, nor on its suitability to achieve its stated aim, as these are political decisions for the Spanish Government and Parliament to take. Furthermore, the Venice Commission is not competent to comment on the constitutionality of the amnesty bill, which is a matter for the Spanish Constitutional Tribunal ultimately to decide, and for the Spanish constitutional experts to debate. In addition, in line with its established practice, the Venice Commission has not assessed the compatibility of the amnesty bill with European Union law.

121. For the purposes of this opinion, the Venice Commission has used the following definitions: amnesty is a measure of clemency which is impersonal and applies to all persons or to a class of persons, while a pardon concerns a specific individual or a group of individuals. While a pardon typically serves to remit a sentence, an amnesty may be granted before criminal proceedings have commenced or at any stage thereafter. While amnesty generally falls within the realm of the legislature, the power to grant a pardon is seen as one of the prerogatives of the head of State.

The rule of law requirements for amnesties:

122. The Venice Commission finds that the following Rule of Law requirements are applicable to amnesties (question of the President of the Parliamentary Assembly and Senate's question 1):

- Legality, Supremacy of the law

  Amnesties, whether adopted through statutory law, other decisions or acts of parliament or executive decisions with or without parliamentary involvement, must comply with the Constitution. Constitutionality is to be controlled through the bodies and procedures provided for in the Constitution.

- Respect for international law, in particular, human rights law, including binding decisions of international courts

  The substantive requirements of international law in respect of amnesties, notably as regards the impermissibility of amnesties on serious international crimes and serious human rights violations, should be respected.

- Legal certainty, Foreseeability of the laws

  Amnesty laws should meet the qualitative requirements of any law affecting criminal liability: clarity, determinacy, accessibility, foreseeability. Even when amnesties are taken through other kinds of parliamentary acts or through governmental decisions, it is essential that their effects be formulated with sufficient precision and clarity, so as to make them foreseeable.

- Legality, Law-making procedures

  Amnesties are generally motivated by reasons of social and political reconciliation: these legitimate goals require to be attained by coherent methods and procedures, in order not to frustrate such purpose. The procedure of adoption of amnesty measures should be inspired by inclusiveness, participation, appropriate timeframe, and public discussions. In particular,

meaningful consultations, coupled with an appropriate timeframe, should assist the elected bodies in assessing the proportionality of the envisaged amnesty. Fast-tracked legislative procedures are therefore not appropriate for the adoption of amnesty laws, given the far-reaching consequences and the often-controversial nature of such laws.

- Equality in law

By definition, amnesties accord special legal benefits to a certain group of individuals who qualify under the law, thus introducing a difference in treatment in respect of individuals who, having committed the same acts but in different contexts, for different reasons or at different times, do not benefit from the amnesty and thus remain the object of criminal procedures and sanctions. In order to avoid arbitrariness, there should be consistency in the determination of the acts covered by amnesty, which should be linked by an intrinsic connection. As amnesties are impersonal measures applying to all persons or certain classes of persons, the criteria should not be designed to cover specific individuals. Amnesties should pursue a legitimate aim in the interests of the community; the more radical the amnesties are, the more legitimate the aim should be. National unity and social and political reconciliation are legitimate aims of amnesties. In the Commission's opinion, proportionality requires that, in each given case, the proposed amnesty should be a suitable means to ultimately achieve unity and reconciliation. Elected bodies dispose of a margin of appreciation in judging whether amnesty is an efficient tool to use and what realistic paths, including individual pardons and amendments of the criminal legislation, may be followed to achieve the legitimate aims. In the Commission's view, this decision should be taken with an appropriately large qualified majority.

- Independence of the judiciary, Separation of powers

Amnesties have the effect of cancelling or preventing judicial decisions and procedures. In order to be consistent with the principle of separation of powers, the judiciary should be entrusted to decide on whether specific individuals fulfil the general criteria determined by Parliament for the application of amnesty.

As concerns specifically the parliamentary bill "on the organic law on amnesty for the institutional, political and social normalisation of Catalonia":

123. As concerns the material and temporal scope of application of the amnesty bill (Senate's questions 2, 3 and 4), the Venice Commission recalls at the outset that an amnesty is an impersonal measure applying to all persons or to a class of persons, and the criteria for its application should not be designed to cover specific individuals.

124. The Commission makes the following recommendations:

- To narrow down and define in a more precise way the material and temporal scope of the application of the amnesty, so as to make the effects of the law more foreseeable; the recent extension of the temporal scope of application by two months without any justification raises concerns as regards the general nature of the amnesty.

- To ensure that a closer causal link is established between "the consultations held in Catalonia on 9 November 2014 and 1 October 2017, their preparation or their consequences" and the acts of embezzlement and corruption; a closer causal link should be the guiding principle for the interpretation and application of the amnesty.

- As concerns terrorism, to make sure that, in the interpretation of the exclusions, the guiding principle will be that amnesties are only compatible with international standards if serious human rights violations are excluded from their scope of application.

125. As concerns the derogations to the ordinary procedural powers of the courts (Senate's question 5), the Venice Commission finds that these are logical consequences of the retrospective erasure of criminal liability and that, as long as the decision as to whether the individual benefits from the amnesty is taken by the judge (on the basis of the general criteria contained in the amnesty bill), and the lifting of the arrest, detention and precautionary measures are a consequence of such judicial decision, there is no issue of separation of powers. The amnesty bill should be interpreted in such a way that it does not deprive the judicial review of the amnesty bill of any practical effect.

126. As concerns the committees of inquiry set up by the Congress of Deputies of Spain (Senate's question 6), the Venice Commission recalls that the main purpose of parliamentary investigative committees is to oversee and scrutinise the work of the executive branch, so as to ensure democratic political accountability and to improve the transparency and efficiency of the government and the administration. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary. The Spanish Constitution grants the power to address possible disciplinary offences committed by judges to the General Council of the Judiciary. The Venice Commission therefore makes the following recommendation:

- that the committees of inquiry set up by the Congress of Deputies of Spain should not be given the mandate to summon, nor even to invite judges to report to them, in particular on the merits of the cases which they have decided. It is not enough that judges will not be obliged to appear before parliament.

127. Finally, the Venice Commission observes that the amnesty bill has been presented in the form of a legislative proposal, which is a procedure with limited consultation of the public, of the stakeholders and of other state institutions, and has followed an urgent procedure. Yet, the amnesty bill has deepened a profound and virulent division in the political class, in the institutions, in the judiciary, in the academia and in the society of Spain. The Commission encourages all the Spanish authorities and political forces to take the necessary time for meaningful dialogue in the spirit of loyal cooperation among state institutions as well as majority and opposition, in order to achieve social and political reconciliation, and to consider exploring restorative justice procedures.

128. In light of its considerations about the desirability of an appropriately large qualified majority for the approval of amnesties, the Venice Commission recommends to the Spanish authorities, even if the Constitution does not provide for it**,** to attempt to reach a higher qualified majority than the absolute majority of the members of the Congress which is required for the adoption of an organic law.

129. The Venice Commission remains at the disposal of the authorities of Spain and of the Parliamentary Assembly for further assistance in this matter.