

Spain and the Council of Europe 40 years later: Democracy and the Rule of Law

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Abstract: In 1977 Spain joined the Council of Europe after the end of the dictatorship. This paper will try to give a vision of those forty years through an analysis which falls into three parts: the first will highlight the main features of Spain's accession to the Council; the second part will focus on how the standards of the Council of Europe have become an integral part of the Spanish legal order; and, finally, it will analyse the challenges and increasingly complex situations in recent years, particularly the recent opinion issued by the Venice Commission on the reform of the constitutional law in Spain. It will focus on democracy and the rule of law rather than on the protection on human rights.

Keywords: Council of Europe – Spain – Democracy – Rule of Law – Venice Commission

(A) INTRODUCTION

This year, 2017, marks forty years since the entry of Spain into the Council of Europe, which was formalized on 24 November 1977, shortly after the first democratic elections since the end of the dictatorship. 1977 was a year that marked not only a period of intense change in Spain, but also witnessed, together with the first elections, the acceptance of Spain in the select club of democratic States of the Council of Europe, a further boost to the newly installed democracy. Spain, together with Portugal, symbolized the end of dictatorships in the countries of Western Europe as well as the strong will and hunger for political change.

The very process of Spain's entry into the Council of Europe was different from that of all the other States that joined the organization. Indeed, Spain was the only country that joined without having a Constitution in force, a fundamental text that could clearly reflect Spain's adherence to the Council's key values: democracy, rule of law and respect for human rights, enounced in Article 3 of its Statute. The Spanish authorities promised that the future Constitution would adequately include the *acquis* of the Council of Europe, but in reality there was still no Constitution, and it not only had to be adopted, but it also had to be approved by referendum. In an unprecedented decision, the commitment shown by the Spanish authorities was considered as sufficient to accept the entry of Spain in the Council, resulting in a very quick membership.

From that moment on, the forty years of Spain in the Council of Europe, as well as the role of the Council, accompanying the Spanish transition, have gone through various important events. These include the failed coup attempt of 1981, the ratification of numerous treaties, the election of prominent Spaniards in important posts within the Council and significant interactions on the issue of the follow-up of the international obligations accepted by Spain.

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This paper will try to give a vision of those forty years through an analysis which falls into three parts: the first will highlight the main features of Spain's accession to the Council, including the procedure, implications and terms of its participation in the Council of Europe. The second part will focus on how the standards of the Council of Europe have become an integral part of the Spanish legal order and on the interactions throughout the forty years of activity in the field of the Council's main values: democracy, rule of law and human rights. The participation of Spain within the Council and its impact will be highlighted. Finally, the challenges and increasingly complex situations in recent years will lead to an analysis of the reports and opinions regarding Spain issued by the Council of Europe bodies, particularly the recent opinion of the Venice Commission on the constitutional law reform in Spain. It is necessary to underline here that the particular relations between the European Court of Human Rights and Spain will not be dealt with in this paper.

(B) THE ACCESSION OF SPAIN TO THE COUNCIL OF EUROPE

As has already been advanced in the introduction, the procedure by which the entry of Spain into the Council took place is an unprecedented and very *sui generis* process, which demonstrates that the Council of Europe's own bodies seemed to participate in the euphoria shown by the Spanish Government under the Presidency of Suárez and its firm democratic commitment.

On 24 November 1977, Spain joined the Council of Europe by a ceremony held at the Palace of Europe, the main headquarters of the organization. It was the then Foreign Minister, Marcelino Oreja, who delivered the instruments of ratification. The accession of Spain was a unique and peculiar process due to the speed with which it was made and above all was carried out "upon word of honour", as the first Spanish ambassador to the Council of Europe, José Luis Messía, would later write.¹

Indeed, since the creation of the Council of Europe, one of its main organs, the Parliamentary Assembly (PACE), closely followed the Spanish process and referred to the legal obligation set forth in the Council's Statute, requiring the "democratization" prior to accession. In 1974, worried about the Spanish situation, the Council and its Assembly adopted a report indicating that the country was still far from fulfilling the necessary conditions which would enable it to join the Council of Europe as a member with full rights. After a visit to Spain prior to the report, MP Giuseppe Reale, rapporteur, underlined the absence of guarantees, individual liberties and of democratic elections, as well as the presence of censorship and brutal repression of political opponents as factors that prevented the entry of Spain in the Council. Despite this, he pointed out in his report that most Spaniards wanted a change of institutional structures without revolution. He noted that Spain's future accession to the European institutions could reassure those watching with apprehension the end of the dictatorship by providing a transition from the authoritarian regime without a violent

¹ Consul in Strasbourg between 1962 and 1970, Special Ambassador observer in Strasbourg since 1976. In his book, *Por palabra de honor*, he tells the story of Spain accession to the Council of Europe (Historia-Maihdisa, 1995, 211p.).

change of the established regime.²

There was also distrust towards Arias Navarro's Government.³ At the end of the first debates, the Assembly approved Resolution 614, which took note of the "will expressed by the Spanish Government to carry out the reform of the country's institutions", but also drew the Assembly's attention to the lack of concrete measures regarding freedom of association, assembly and expression. It recalled that respect for human rights, the restoration of freedom for all political views and the election of democratic institutions by universal and secret suffrage were indispensable conditions for the admission of Spain to the Council.

After the death of Francisco Franco, the situation in Spain changed very quickly. Already under the presidency of Adolfo Suárez, Giuseppe Reale returned to Spain together with the Socialist Parliamentarian Claude Delorme and Roger Massie, Secretary of the Political Committee of the Parliamentary Assembly, and they clearly perceived the political change after meetings with the Government, the opposition and some media. In his new report, Reale opened the Assembly debate by pointing out the clear "democratizing will" of the new Government, whilst highlighting the difficulties of legalization of political parties, particularly the Communist Party. The parliamentarians were generally inclined to support Spain in its democratization process. Nevertheless, Resolution 640 of the PACE pointed out that although Spain was in an already irreversible phase of political transition, qualified as pre-democratic, it regretted that political parties and unions still could not express themselves and organize normally.

It seems that one of the key points capable of tipping the balance was precisely the legalization of the political parties. The first communist parliamentary group in PACE was formed in April 1977, and was followed shortly afterwards by the legalization of the Spanish Communist Party (*Partido Comunista Español*, PCE). In addition, on 15 June 1977, the first democratic legislative elections were held, leading to direct negotiations prior to accession. In Resolution 656 of 6 July 1977, the Assembly approved a new report⁴ in which it highlighted two key details: on the one hand, it indicated the "political maturity demonstrated by the Spanish people"; on the other, it asked that a delegation of Spanish observers be invited to participate in the October plenary session of the Assembly.

The big question was whether Spain would be invited to participate despite the lack of a Constitution. To show its commitment to the Council and to obtain such an invitation, representatives of the parliamentary groups of the Spanish low Chamber in Parliament, the Congress of Deputies,⁵ issued a formal statement on 8 October 1977. They indicated before the Council of Europe "their firm decision to guarantee constitutionally the pre-eminence of the Law, the respect of the ideals enshrined in the Statute of the Council of Europe and especially the human rights and

² PACE, First report prepared by Giuseppe Reale on Spain, 25 September 1974, doc. No. 3486. See the detailed chronicle prepared on the accession in A. Viñal Casas, "Historia de las negociaciones para el ingreso de España en el Consejo de Europa", 5 *Revista de instituciones europeas* (January-April 1978), pp. 93-113.

³ Speech of King Juan Carlos I in 1979, available [here](#).

⁴ The rapporteurs of this new study were Hofer, Delorme and Paul Channon, who replaced Giuseppe Reale.

⁵ Leopoldo Calvo-Sotelo (*Unión de Centro Derecha*, UCD), Felipe González (*Partido Socialista Obrero Español*, PSOE), Manuel Fraga (*Alianza Popular*, AP), Francisco Ramos Molins (Catalan Socialists), Miquel Roca (Basque-Catalan minority), Santiago Carrillo (PCE) and Raúl Morodo (Mixte Group).

fundamental freedoms contained in the European Convention signed in Rome on 4 November 1950". They hoped that this statement could bring Spain closer to "the earliest possible accession to the Statute of the Council of Europe."

The Assembly debated the new report on "The situation in Spain" on 12 October 1977. With Resolution No. 820, PACE urged the Committee of Ministers to formally invite Spain to become a member. The following day, the Spanish Government presented its formal application for membership through the Consul José Luis Messía. On 18 October, the Committee of Ministers approved Resolution 77 (32) unanimously. By a show of hands and taking note of Spain's firm intention to ratify the European Convention on Human Rights, as well as the favorable opinion of the Parliamentary Assembly, it invited Spain to join. Among the speakers, the President of the Assembly, the Austrian Socialist Karl Czernetz, said that the Spanish accession was a "great event, perhaps one of the most important one in the history of the Council". The Portuguese Socialist Nuno Godinho de Matos honored the work of Juan Carlos I. Once Spain had become the 20th member of the organization, the King himself spoke before the Assembly, on his first visit in October 1979, and praised PACE for having "gone beyond formal and temporary obstacles to make faith and hope prevail in the Spanish transition process".⁶

Marcelino Oreja presented the instruments of accession after the unanimous approval of the Congress and the Senate of the respective bills. His first act was to ratify the European Convention on Human Rights and immediately after he participated for the first time in the session of the Committee of Ministers. The Spanish Constitution would still take thirteen months to enter into force, after being approved by the *Cortes* and in a referendum.

The enthusiasm and unprecedented features which emerged from the process are unique. It is necessary to remember that the Council of Europe was born in the specific context of the Second World War and that, in that immediate post-war period, the States decided to express the firm conviction that it was dictatorships that had led to such extremes, and that, therefore, should be avoided. There was a strong consensus about the benefits of democracy, and that political context left an important imprint on the creation of the Organization and the adoption of the text that serves as its basis, the Statute.⁷ The Statute contains numerous references to the democratic principle as a common value shared by the European States, both in its Preamble and in its articles, and especially in Article 3. To become a member of the Organization, there are three main requirements: to be a European State, to respect the democratic principle, established for the first time as a condition to access an international Organization—a complex requirement, bearing in mind that it is a complex and non-univocal concept—and respect for human rights as an essential complement to democracy. The rights would be those enounced almost immediately afterwards in the European Convention on Human Rights, but in the 50s and 60s, ratifying the Convention was not a key element to consider the entry into the Council of new countries. At that time, the acquisition of membership was very gradual and there were no major formalities when admitting a new member State.

⁶ Speech of King Juan Carlos I in 1979, *supra* n. 3.

⁷ Signed 5 May 1949, entered into force for Spain 24 November 1977 ([BOE No. 51](#), 1 March 1978).

Portugal had acceded to the Council a year before Spain, but its entry had occurred after the approval of its new Constitution. Never again has the accession of a State to the Council been so quick or based on the formal word of honour given by the political leaders of the States in question. Indeed, this procedure was to be tested in 1993, after the fall of the Berlin Wall and with the on mass access of the new States of the former communist bloc. At that moment there was a clear hardening of the entry conditions, one of the prerequisites being the accession to the European Convention as a formal obligation, together with the introduction of the main *acquis* of the Council in domestic law. In order to establish the ratification of the ECHR as an “official” requirement for accession, the Council had to face two issues. The first, referred to the acceptance of the contentious jurisdiction of the European Court of Human Rights, which at that time was still optional, leaving the choice to the States to commit to it or not. Since all States that were already members of the Council of Europe had accepted the optional clause, the solution adopted was that it became *de facto* mandatory, with all candidate States having to accept the jurisdiction of the European Court. The second question raised was in relation to the place of the additional Protocols, since they are optional and constitute in a certain way an *acquis* “a la carte” (with the exception of Protocol I and II and in more recent times, Protocol 14). With regard to the procedure established to formalize the accession to the ECHR, the imposed “obligation” translated into a formal promise made by the candidate State to ratify the Convention within a short period of time immediately after the ratification of the Statute of the Council of Europe. The issue of the deadline was addressed by the Parliamentary Assembly, in Resolution 1031 (1994), which established that ratification should take place within one year.⁸

The increased requirements to accede to the Council of Europe, established by the Parliamentary Assembly and the Committee of Ministers, were not confined solely to the ratification of treaties. Domestic law was also the object of thorough analysis, and the opinions and reports issued by the Council of Europe bodies sometimes recommended changes with a view to accession, further highlighting the Spanish exceptionality. Spanish accession to the Council was, without a doubt, a unique moment.

(C) 40 YEARS WITHIN THE COUNCIL: THE CONSTRUCTION OF A COMMON LEGAL ACQUIS

Interactions between the Council of Europe and Spain throughout the forty years since the accession have been very diverse. Perhaps the most important and most visible changes are those of legal nature. In the months that preceded the accession, two Spanish magistrates, Fernando Martínez Ruiz and José María Morenilla, were sent to Strasbourg to study the legal implications of accession and first steps were taken following their reports, so that Spain could ratify the European Convention of Human Rights. Its ratification preceded even the existence of the Constitution.

It is evident that the changes brought about by this ratification and by the integration of the case-law of the Court of Strasbourg are some of the factors which had the greatest impact in the Spanish

⁸ E. Pérez Vera, “El Consejo de Europa y los derechos humanos”, *Cursos euromediterráneos Bancaja de Derecho Internacional/Bancaja Euromediterranean courses of international law/Cours Euro-Méditerranéens Bancaja de droit international* (2001), p. 495.

legal system. The judicial reforms later embodied in the Constitution led to profound institutional changes. The *amparo* appeal at the Spanish Constitutional Court has also become an important filter of claims on fundamental rights, and one of the factors that surely explain the low number of complaints lodged before the European Court against Spain, compared to other countries with a similar number of inhabitants. The judgments of the Court are also translated and accessible to national judges and Strasbourg cases have opened up debates and have been key to bringing about necessary changes, such as on the rules and judicial interpretations in the fight against terrorism. Indeed, *Barberá, Messegueé and Jabardo* case⁹ and more recently *Del Río Prada*¹⁰ judgment were probably the start of legislative reforms introduced in 2014 and 2015 aimed at improving the execution of the ECHR judgments in Spain.¹¹ However the case-law of Strasbourg, already studied in another contribution, has not been the only element of change and influence in the Spanish legal system.

Spain has ratified 132 Council of Europe treaties so far and has signed another 11, still pending ratification. On some occasions, the road has been slow. One of the former judges of the Court of Strasbourg, José María Morenilla, set out in a publication the complexities and the State's reticence concerning the ratification of treaties in criminal matters. Indeed, he highlighted the complexities to restrict the sacred principle of criminal territoriality, recommending the quick ratification to those treaties whose applicability in domestic law was simple, since their content was already along the same lines as the Constitution and Spanish legislation, and approach the ratification of other treaties, that implied a significant change in the structures necessary for an adequate compliance more gradually.¹²

In some aspects, Spain made an extraordinary quick and effective integration of the Council of Europe's *acquis*. The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention No. 108) has been a source of important inspiration for the development of the Spanish data protection system. The Council of Europe Convention on Access to Official Documents (Convention No. 205) also inspired recent legislative reforms on the issue, although Spain has not yet ratified this treaty, proving the interactions that occur in the field of *lege ferenda*. Something similar happened with the Convention against Trafficking in Human Organs, signed in Santiago de Compostela, a topic in which Spain has been recognized as leader, with the

⁹ *Barberá, Messegueé and Jabardo v. Spain*, ECHR (13 June 1994).

¹⁰ *Del Río Prada v. Spain*, ECHR, Grand Chamber (21 October 2013).

¹¹ Law 25/2014, 27 November 2014, on Treaties and Other International Agreements ([BOE No. 288](#), 28 November 2014), which attributes a rank above ordinary law to obligations derived from international treaties ratified by Spain; and procedural legislation ensuring the re-opening of proceedings following a judgment of the European Court of Human Rights (Organic Law 7/2015 of 21 July 2015 and Law 41/2015 of 5 October 2015 amending various other laws).

¹² Morenilla explores the possibilities concerning the ratification of eleven treaties in the criminal field: the European Convention on Extradition, the European Convention on Mutual Assistance in Criminal Matters, the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, the European Convention on the Punishment of Road Traffic Offences, the European Convention on the International Validity of Criminal Judgments, the European Convention on the Transfer of Proceedings in Criminal Matters, the European Convention on the Repatriation of Minors, the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, the European Convention on the International Effects of Deprivation of the Right to Drive a Motor Vehicle, the European Convention on the Suppression of Terrorism and the European Convention on the Control of the Acquisition and Possession of Firearms by Individuals. J.M. Morenilla Rodríguez, "La ratificación por España de los convenios del Consejo de Europa en material criminal", available [here](#).

most advanced legislation in the fight against these practices.¹³ Indeed, Spain was a pioneer in criminalizing the trafficking of organs and transplant tourism in 2010, with criminal sanctions of up to 12 years. Spain has also been one of the first to promote the adoption of the Oviedo Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, the Convention on Human Rights and Biomedicine, whose ratification took place in 1999, or Convention No. 201 on the Protection of Children against Sexual Exploitation and Sexual Abuse, adopted in Lanzarote on October 25, 2007.

The role Spaniards have played in the creation and integration of the Council's *acquis* is evident. Although it is not possible to give a detailed chronicle of all Spaniards who have played a relevant role in the Council in this contribution, it is important to note that, seven years after accession, Marcelino Oreja became the first and only Secretary General of the Council of Europe of Spanish nationality. There have been four Spanish presidents of the Parliamentary Assembly: José María de Areilza (1981-1983) Miguel Ángel Martínez (1992-1996), Lluís María de Puig (2008-2009) and Pedro Agramunt (2016-2017). In addition, Spain has a delegation of 12 parliamentarians who participate in the meetings of PACE, and who have promoted resolutions, reports, agreements and ratifications. It is also necessary to mention the work of Álvaro Gil Robles, who became the first Commissioner of the Council in the field of human rights, a position created in 1999 and first developed under his mandate, being a pioneer in establishing the importance of visits and the breadth of the Commissioner's reports, especially in crisis situations. Indeed, although it was created as a body to reinforce or support the work of the European Court, helping with a complementary action aimed at preventing greater violations of human rights, it was not endowed with the ability to receive individual communications. It was rather established as a mediator and to provide advice. However, it made the Commissioner an authentic body with the capacity to carry out a general follow-up on compliance with international human rights obligations of the Member States, being able to act *ex officio*, which he used with respect to Spain and the situation in the Basque Country. All of this work was carried on despite the lack of a proper Secretariat and sufficient financial and human resources, something which became critical and very evident especially in the first part of his mandate.

Even so, there are evidently pending challenges. Perhaps one of the most recurrent and most present issues in the current debate on human rights has to do with the ratification of the revised European Social Charter, the other key treaty on human rights of the Council of Europe, together with the Convention. Although Spain ratified the original Turin Charter, it has never ratified the revised Charter,¹⁴ in spite of the work carried out by Luis Jimena Quesada, who became one of the most active and most committed President of the Committee on Social Rights, the only one of Spanish nationality.

It would not be possible to conclude this analysis without making a reference to the weight Spain carries in the budget of the Council of Europe. It is the sixth main contributor, paying 7% of the

¹³ PACE, *Défendre l'acquis du Conseil de l'Europe: préserver le succès de 65 ans de coopération intergouvernementale*, 17 Septembre 2017, doc. 14406.

¹⁴ There is at present a bill, introduced in October 2017 by the parliamentary group of *Podemos*, to propose Spanish ratification of the revised Social Charter and the Protocol concerning Collective Complaints of 1995.

overall budget (almost 19,000.000 Euros on a total budget of the Council in 2017 of 454,586,500). Part of this budget is intended to cover officials of Spanish nationality in the Secretariat of the Council of Europe, even though Spain is one of the few countries that is currently under quota.

(D) SPAIN AND THE COUNCIL OF EUROPE TODAY: PENDING CHALLENGES

Any discussion about the relations between Spain and the Council of Europe in the light of current affairs cannot fail to take into account the challenges that exist, both from the point of view of the organization and more recently in the national context.

From the standpoint of the organization, the current situation is very delicate. The economic crisis of recent years has gradually been paired with an even more important political crisis. Strong voices are conducting a powerful discourse against human rights, and this happens not only in countries that are the most condemned by the European Court, led by Russia, but in many others where the situation until recently was not so critical. Major conflicts between powers, especially between the judiciary and the executive powers, have brought about very problematic situations with regard to the evolution of the rule of law, especially in member States of the European Union such as Romania, Hungary and, more recently, Poland.¹⁵ In addition, since 2014 and prior to the referendum after which the United Kingdom ended up deciding to exit the European Union, there has been an ongoing debate about the possible denunciation of the European Convention on Human Rights as a result of the judgments against this country the United Kingdom on the general ban on the right of the prisoners' vote. Being in open conflict since the first judgment of the European Court in 2005 (*Hirst No. 2 v. United Kingdom*),¹⁶ it seems that this could soon be over following a recent amendment proposed by the British Government to the Department on the execution of judgments.¹⁷ However, while the long-standing opposition on this topic may come to an end concerning the United Kingdom, it is still not the case with other countries. Russia modified its legislation in 2015 precisely to highlight the manifest impossibility of executing certain judgments of the European Court of Human Rights that were contrary to their constitutional principles.¹⁸

Today, there are other major financial challenges in addition the ones described. For the first time in the history of the Council, a member State has stopped paying its contribution to the regular

¹⁵ The European Commission has launched before the Council of the European Union the procedure versus Poland, under Article 7.1 of the Treaty, for the first time in its history in December 2017.

¹⁶ *Hirst No. 2 v. United Kingdom*, ECHR, Grand Chamber (6 October 2005).

¹⁷ In November 2017, the British Government has announced a change in the prisons rule which would allow prisoners convicted of minor offences during temporary release, a situation which is yet to be discussed in order to assess whether the execution of *Hirst No.2* can be considered officially closed.

¹⁸ This happened in the case *Anchugov and Gladkov* (ECHR, 4 July 2013), concerning also the right to vote of Russian prisoners, although there a specific provision in the Russian Constitution which bans generally their voting rights, which makes difficult implementation without a constitutional change. It can also be consulted in this respect the Venice Commission opinion on this change of legislation, in which it is criticized that the Constitutional Court is given this power to decide on the possible execution or not of a ECHR judgment, a role which is a competence and an obligation for all national authorities, and not only by courts and the Constitutional Court in particular (CDL-AD(2016)016, Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court (Venice, 10-11 June 2016).

annual budget. Indeed, Russia decided to suspend its legal obligation in 2017, as a result of the suspension of the right to vote of the Russian Delegation in the Parliamentary Assembly, decided after the annexation of Crimea in 2014. The annual contribution of Russia, one of the major contributors to the Council of Europe, is 33,000.000 Euros. Also, in November 2017, Turkey announced that it will stop contributing the additional contribution to the regular budget, to which it had previously committed, after the “discomfort” expressed by the Prime Minister for awarding the Human Rights Prize Václav Havel of the Council to Murat Arslan in 2017.¹⁹

Within this difficult context, Spain has also been confronted in recent times with significant internal challenges, which have led to interactions with different Council bodies. It is necessary to highlight in this contribution the recent opinion and the exchanges that took place with the Venice Commission as a result of the reform of the law of the Constitutional Court in 2015 and the possibility of organizing a referendum on independence in Catalonia. The Commission, whose full name is the Commission for Democracy through Law, is a consultative and independent body, which was promoted after the fall of the Berlin Wall by Italian diplomacy and to which all the member states currently belong, although it is also open to non-European States. It has at present 61 members, 14 more than the Council of Europe.²⁰ Among those States is Kosovo, which, as established in the Statute of the Commission, needed the favorable vote of two thirds of the States of the Committee of Ministers and not the unanimity required to become a member of the Council of Europe.

The opinion about the reform of the law of the Constitutional Court in Spain was the first, and only one so far adopted regarding Spain. The Venice Commission does not have the right to act spontaneously in a case concerning a specific country. There are two ways for the process of preparing a report or an opinion can be initiated: that the authorities of the country in question request it or that the procedure be initiated by one of the bodies authorized to do so by the Council of Europe, in which case the cooperation is not “voluntary”, but is one of the consequences of acceptance of the Statute of the Commission. In the case at hand, the opinion was requested by the Follow-up Commission of the Parliamentary Assembly of the Council of Europe on the modification of organic law 2/1979 of the Constitutional Court that took place on 16 October 2015.

It is important to note that from a procedural point of view, the opinion followed a characteristic path. Indeed, the Venice Commission is known for its flexibility, which allows it to adopt opinions in a very short time when it is necessary for the report to be useful for the debate of a major legislative or constitutional reform or even postpone adoption to avoid interfering in an electoral campaign. That was the Spanish case. Although the request for opinion came in October 2015, there were several requests to delay it. The first came from the President of the PACE Monitoring Committee, who, in

¹⁹ He was previously the President of the prosecutors and judges union, and who is detained for his alleged ties with association FETÖ, a gülenist organization considered responsible for the failed coup of 2016.

²⁰ On the Venice Commission, see the works of the author, among others, “La régionalisation par la coordination interétatique: le rôle catalyseur de la Commission de Venise”, in S. Doumbé-Billé, Stéphane, ed., *La régionalisation du droit international, Cahiers de droit international* (Bruylant, Brussels, 2012), pp. 149-168 ; “Between Soft and Hard Law standards: the contribution of the Venice Commission in the electoral field”, in H. Hardman and B. Dickson, *Electoral Rights in Europe* (Routledge, London, 2017), pp. 30-49 ; “La Comisión de Venecia y el Tribunal Europeo de Derechos Humanos”, in VVAA, *Liber Amicorum Luis López Guerra* (2018, in print).

view of the holding of general elections on 20 December 2015, requested that the opinion be adopted at the March 2016 plenary session. This is a frequent practice, to avoid that the opinions of the Commission becoming politicized or part of the electoral campaign debate. In view of the difficulties forming a new government in Spain, the visit of the delegation of Commission rapporteurs was delayed until April 2016. In addition, with the new call for elections in June 2016, there was a further delay of the Adoption of the opinion to the next plenary, on October 2016. The peculiarity occurs because in September 2016, the President of the Constitutional Court asked the Commission to delay the adoption of the opinion again, since it was about to resolve appeals filed against the unconstitutionality of the reform by the Basque and Catalan governments. This request, coming from the President of the Constitutional Court and taking into account that the opinion was about the Court's own law, was accepted, and after the adoption of the two judgments,²¹ the opinion was finally adopted in March 2017.²²

The opinion, on the merits, highlights a series of key elements. It begins, first, by recalling the importance of respecting and executing the judgments of the domestic courts, and even more of the importance of executing the decisions of the Constitutional Court, which has a definitive and obligatory character and which follows from the principle of the primacy of the Constitution. The government had indicated in its comments to the draft opinion, as well as all the interlocutors during the visit to Spain, that the reform had obeyed the need to face the problem of possible and frontal disobedience of the Parliament of Catalonia to abide by the judgments of the Constitutional Court, although the Commission expressed from the beginning that, since they were general modifications to the law, they were going to be analyzed and not only in reference to the Catalan situation.²³ The objective was not so much an analysis of the need for reform, since the objective of ensuring the execution of the judgments of the highest Court was, as such, perfectly legitimate, but on whether the amendments made to the legislation were the most appropriate to obtain the achievement of said objective.

Next, the Commission followed its usual *modus operandi*: it uses comparative law and looks for other examples that can be compared to then analyse all the elements established by law, from the possibility of the Court to annul any act that it considers contrary to its own decisions, going through the procedure established in case of failure to comply with the judgment or order of the Court, until the imposition of coercive fines, and the suspension of public offices or officials responsible for the non-execution of judgments.

The conclusions of the Venice Commission should be analysed, then, in the light of its usual practice, in which it makes a distinction between the violation of a European standard, the establishment of a recommendation or the adoption of considerations to the attention and State. Thus, in its opinion, the Commission emphasizes that, in the light of comparative law, the possibility that

²¹ Constitutional Court judgments 185/2016, 3 November 2016 and 215/2016, 15 December 2016.

²² Venice Commission, Opinion on the law of 16 October 2015 amending the Organic Law No. 2/1979 on the Constitutional Court, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017), CDL-AD(2017)003.

²³ *Ibid.*, para. 14.

the Constitutional Court itself be entrusted with ensuring compliance with its own judgments is not prohibited by European standards. They say nothing about it. As such, the State may grant such powers to the body of its choice. But this analysis of comparative law highlights the exceptional nature of such a legislative decision, since it is usual for other competent authorities to execute the judgments of the Court. The Commission stresses that even though there is no such obligation as such, and there is therefore no incompatibility between these “new powers” of the Constitutional Court and the European standards that do not exist in the matter, it would be “desirable” that the final responsibility of the execution of their sentences was not left to the Court, whose role as an impartial arbitrator could be affected and which could also suffer from institutional attrition in the case of repeated non-compliance.²⁴

Regarding the specific enforcement measures, the Commission issued doubts about the coercive fines and the possibility of suspending the holder of public functions in case of refusal to execute the judgment, especially recommending that the personal scope of the application of these measures was specified, as well as the scope of the different measures depending on their application to a public authority, an official or an individual.

After developments of events in 2017 concerning the Catalan situation, there was a series of exchanges following the opinion, this time informal, between the Venice Commission and the Catalan government around the referendum convened in 2017. It is necessary to refer to the fact that the Commission adopted in 2007 the Code of Good Practices on Referenda, which establishes a series of minimum standards that must be respected in the organization of any referendum.²⁵ This Code has been used by the Commission in numerous opinions, such as the one adopted on the referendum held in Crimea in 2014,²⁶ which was declared contrary to international standards, and also to evaluate the Italian law on the regulation of public participation and referendums premises of the Trento region in Italy.²⁷ Thus, the President of the Catalan government sent a letter on 29 May 2017 to the President of the Commission, Gianni Buquicchio, informing him of the decision taken by the Catalan Parliament to negotiate a referendum on the future of Catalonia, for which the collaboration of the Venice Commission would be necessary.

In the same letter, Puigdemont noted that the Government of Mariano Rajoy has not accepted his request to agree a negotiated referendum on the matter. In President Buquicchio’s response, which takes place on 2 June 2017, three elements were reiterated: firstly, the Catalan government’s interest in following the guidelines established by the Code of Good Practice regarding referendums was praised. This clearly highlighted a second key element appearing in the letter, that the first essential requirement for a referendum to be in accordance with international standards is to be carried out in

²⁴ Ibid., paras. 69 to 78.

²⁵ Venice Commission, *Code on good practice on referendum*, Venice, Mars 2017, CDL-AD(2017)008rev.

²⁶ Venice Commission, Opinion on “whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea’s 19 92 constitution is compatible with constitutional principles”, Venice, Mars 2014, CDL-AD(2014)002.

²⁷ Venice Commission, Opinion on the Citizens’ bill on the regulation of public participation, citizens’ bills, referendums and popular initiatives and amendments to the Provincial Electoral Law of the Autonomous Province of Trento (Italy), Venice, June 2015, CDL-AD(2015)009.

accordance with the Constitution and the legal system of the State. Finally, the President of the Commission pointed out another of the key conditions for entering into cooperation with the Venice Commission and that concerns the bodies authorized to initiate the procedure: these bodies are the state authorities in a broad sense, which encompasses the President of the Parliament, the President of the State, the Prime Minister or the Minister of Justice or Foreign Affairs, but does not allow a regional or local government to raise a request for an opinion without the agreement of the central government.²⁸ In numerous interviews given prior to the referendum, both the titular member for Spain before the Venice Commission, Josep María Castellà, and the Secretary of the Commission, Thomas Markert, stated that the referendum did not meet the requirements established in the *Code of Good Practice* as it was not foreseen in the Constitution.

(E) FINAL THOUGHTS

Spain has achieved 42 years of democracy and 40 of those years has done so within the Council of Europe. During all those years, Spain has been present at the great events and debates around democracy, human rights and the rule of law, and has had, as it corresponds to every member state on a rotating basis, the presidency of the Committee of Ministers in its hands. It has witnessed the fall of the Berlin Wall, the mass accession of new states and the negotiations to end the Balkan war, and has actively participated in numerous Council bodies, promoting intergovernmental cooperation. For its part, the legal and constitutional transformation of the Spanish state over these years has also been very important, with the Constitution and the Spanish transition being one of the examples that have been used to advise other countries on their constitutional changes.

However, from the initial enthusiasm to the present moment, there are numerous challenges that have arisen both in Spain and in Europe. If Spain was the 20th member of the Council, it has now 47 States, which is a success in itself, but also poses numerous obstacles and the Council institutions are put to the test. This is why it is even more important to continue developing cooperation, since democracy, like the rule of law and human rights, is not an objective to be achieved, but rather requires a daily and continuous effort to face the constant challenges of the present context.

²⁸ The two letters are available at the Website of the Venice Commission: the one of 29 May 2017 by Puigdemont [here](#), and the one of 2 June 2017 by Dr. Buquicchio [here](#).