Rule of Law Eroded

Unpacking the Catalan Amnesty Law

Germán M. Teruel Lozano

06.12.2023 doi: 10.59704/196393d30e10249b

Spain is going through turbulent times, marked by a strong political polarization and an increasingly evident decline in the rule of law due to the partisan takeover of institutions. This situation has been exacerbated by President Sánchez's investiture agreements with pro-independence parties, particularly Junts, led by the fugitive Puigdemont, who spearheaded the Catalan secessionist insurrection in the autumn of 2017. In compliance with this investiture pact, the Spanish Socialist Party has already introduced a draft bill in the Spanish Parliament to grant amnesty for crimes committed in connection with secessionist efforts, including, among others, misappropriation of public funds, prevarication, and attacks against authority.

The agreement also calls for the establishment of parliamentary investigation commissions to examine instances of "lawfare", potentially leading to actions against judges or legislative amendments. The use of the term "lawfare" implies an assertion that there have been cases of judicial persecution for political reasons in Spain in relation to the events of the Catalan process. This particular part of the agreement has been unanimously rejected by all the associations of judges and public prosecutors, both progressive and conservative, the majority of the General Council of the Judiciary, many governing chambers of the Spanish courts, most state senior civil servant associations, and hundreds of Spanish jurists (see here). They view it as an unprecedented interference in judicial independence in Spain.

The purpose of this analysis is limited to the constitutional debate that has arisen in Spain regarding the constraints on the legislator in a democratic state under the rule of law in relation to the proposed amnesty for the Catalan process. I argue that the amnesty, as it currently stands, violates both the Spanish Constitution and basic tenets of the rule of law.

The Place of Amnesty in Spanish Law

It is not disputed that various forms of pardon or amnesty can be utilized in a democratic state, with notable examples found in European countries. However, it is important to differentiate: on the one hand, there are pardons justified on criminal-policy grounds, usually for minor offenses (such as the recent pardon granted to young offenders in Portugal in 2023 during the World Youth Day), or as part of reforms to an outdated Penal Code, which have a less problematic constitutional fit. On the other hand, there are "political" amnesties, which grant impunity even for serious crimes in response to a particular context (such as processes of political transition or decolonization, or to overcome armed conflicts or situations of serious social and political breakdown).

These political amnesties must be conceived as a highly "exceptional" instrument (Spanish Constitutional Court Judgement n. 147/1986 and, more in general, see the Recommendation CM/Rc (2010)12, § 17 and the Venice Commission Opinion n. 710/2012). Ideally, there should be explicit constitutional authorization to grant them, given that this is an exorbitant power of Parliament, very different from the ordinary legislative power. Furthermore, qualified majorities should be required for their adoption. For instance, Italy, after a controversial use of clemency instruments, amended its Constitution in 1992 to require approval by a 2/3 majority of each of the parliamentary chambers.

Moreover, there are certain crimes that cannot be amnestied. In accordance with international law, amnesties cannot cover war crimes or crimes against

humanity, torture or serious human rights violations (e.g., ECHR (Grand Chamber) of 27 May 2014, Marguš v. Croatia). However, a democratic rule of law must go further to avoid spaces of impunity: "Amnesty laws adopted by parliament have to comply with the rule of law principles of legality, prohibition of arbitrariness as well as non-discrimination before the law" (Venice Comission Opinion n. 710/212, 11 March 2013). This is why it has been problematic when amnesties have been granted to "political prisoners" in Georgia, defined with no clear criteria. Likewise, self-amnesties that seek impunity for those who hold political power for abuses committed in the exercise of their positions should raise concerns. This was the case in Romania in 2019, which triggered alarm bells in Europe when it was proposed to amnesty corruption offenses affecting political leaders in the country. Recently, the UK Parliament has adopted an amnesty law over Northern Ireland Troubles which has been widely criticised by human rights and victims' associations.

Within this framework, the analysis of the amnesty proposal for the crimes of the Catalan process should address two key questions: What is the constitutional fit of the amnesty in Spain? And, would it be democratically legitimate for Parliament to approve this amnesty under the current circumstances?

Regarding the first question, it is worth noting that the Spanish Constitution does not provide for this mechanism. It prohibits the granting of "general pardons", and the constituent Parliament rejected two amendments proposing the introduction of amnesties in the Constitution. Both arguments have led most scholars to conclude that amnesty does not fit within the Spanish constitutional system. The most recent amnesty in Spain was that of 1977 during the Transition, which is pre-constitutional. Subsequently, some so-called tax amnesties were approved, which are not real amnesties but special tax regularizations. Additionally, the 1995 Criminal Code included the singular pardon, which is constitutionally permitted, as a cause for exemption from liability, but not amnesties.

However, some academics argue that the rejection of the amendments by the constituent Parliament does not imply the unconstitutionality of this instrument because the constituent Parliament could have expressly excluded an amnesty, as it did with general pardons. They believe that Parliament has broad discretion regarding what is not prohibited by the Constitution. This is the logic on which the Explanatory Memorandum of the bill is based.

Lacking Legitimacy

While I hesitate to argue that an amnesty does not fit in *any* case and under any circumstances in the 1978 Constitution, I do believe that there is a strong presumption of unconstitutionality because, as I have pointed out, amnesty is a special law that profoundly impacts the principles that uphold the rule of law. Moreover, I believe that any constitutional analysis should also consider the democratic process and whether a genuine political consensus has been achieved. If, in the face of a serious political crisis in Spain, a very large parliamentary majority had decided to respond by granting an amnesty, the constitutionality of the amnesty would have been less debated. However, the amnesty for the Catalan secession process not only has a shaky constitutional foundation but is also democratically problematic.

In this regard, it should be noted that amnesty was not included in the electoral program of any national party. Prominent ministers and President Sanchez himself, even a few days before the elections of July 23, clearly rejected amnesty. Furthermore, the report that accompanied the granting of pardons to those convicted of the Catalan process, signed by the then Minister of Justice of the Socialist Government and now constitutional justice, also states that an amnesty would not be constitutional. In addition, in March 2023, the Bureau of the Congress of Deputies, presided over by a socialist and supported by a report of the law clerks of the Congress, rejected an amnesty draft bill proposed by the pro-independence groups, considering it unconstitutional. To make matters worse, the Law, if approved, will have 173 votes against and just 177 in favor in the Congress; a large absolute majority vote against in the Senate (which can be overcome later by the Congress); and the opposition of at least eleven regional presidents (out of seventeen),

several of whom have already announced that they will challenge the constitutionality of the measure. In the current circumstances, as expressed by Professor Cruz Villalón, former President of the Spanish Constitutional Court, "the current Spanish Parliament lacks the legitimacy to enact a political amnesty" (here).

Undermining Separation of Powers

An additional problem arises because the Catalan conflict, although its most intense phase took place in 2017, is still very much alive. We are not dealing with events that are firmly in our political past. The leaders of the Catalan process continue to assert the legitimacy of their illegal acts of secession and have been implementing policies in Catalonia for decades that have divided Catalan society. In response to this, the amnesty law does not include any safeguard clause in case the beneficiaries were to reoffend or promote secession yet again.

Above all, these are events that have been or are still being adjudicated by Spanish courts. Any amnesty law impacts the principle of equality before the law. In this case, separation of powers and the principle of the reservation of jurisdiction are intensely compromised, since Spanish courts are being prevented from fulfilling their function. The law is drafted defensively against the judiciary. For example, the law anticipates that all precautionary measures imposed on the amnestied individuals will be lifted, "even when the filing of an action or a question of unconstitutionality against the present law takes place". In an attempt to prevent Spanish judges from posing preliminary questions to the CJEU, the law expressly excludes conducts that affect the "financial interests of the EU" from its scope. This nullifies a potential point of connection with EU law that could have justified intervention from Luxembourg for review. This is certainly disconcerting: if the financial interests of the State have been affected, impunity is guaranteed; but if the European ones are affected, punishment is posible.

Furthermore, the constitutionality of this amnesty law, once approved, will be decided by a Constitutional Court, whose credibility is at its lowest due to its high politicization, with recent appointees, having not been chosen for their professional prestige, but for their links with the parties that appointed them. In fact, in recent years most of the decisions adopted by the Constitutional Court in politically sensitive cases have reproduced the 7-4 majority, divided into two ideologically aligned blocks. The problem of political colonization of counterbalance bodies has been very serious in Spain for years and the dynamics are becoming increasingly perverse. The amnesty law could be included in an anthology of how the potential checks on the Government have been dismantled, piece by piece.

It should also be noted that this amnesty would cover not only serious crimes, but also administrative and accounting responsibilities. This spans a time frame that goes from 2012 to the end of 2023. We must remember that all these criminal cases and liabilities fall on political leaders not for defending a program or ideas, but for placing themselves, as the Constitutional Court ruled, "completely outside the law..., entering into an unacceptable de facto path" (Judgment n. 114/2017). This secessionist drift is especially reprehensible because the Spanish Constitutional Court, much more generous than others – such as the German (2 BvR 349/16), the Italian (118/2015, 29/04), or the US Supreme Court (Texas v. White, 74 US 700 (1968))-, offered a democratic way to channel the pro-independence demands: the reform of the Constitution. The Catalan Parliament could have approved a proposal for constitutional reform with its aspirations for self-determination, but the pro-independence leaders preferred the now amnestied unilateral breakup.

Lastly, we must remember that this law will be passed thanks to the vote of the MPs of the parties whose leaders will benefit from the amnesty, making it a sort of self-amnesty. It will leave unpunished officials and authorities who diverted public money and issued resolutions knowing their illegality.

On a Slippery Slope

For all these reasons, my conclusion is that the amnesty for the Catalan process is not compatible with the Spanish Constitution and the fundamental tenets of a democratic rule of law: it represents a serious

breach of the principle of equality before the law and does not have the consensus that we owe to a law of quasi-constitutional value. Moreover, in light of the specific circumstances, it represents a dangerous interference in judicial independence, and this amnesty bill essentially amounts to a law of impunity in exchange for political power. This amnesty is unprecedented in European democracies and places Spain on a very slippery slope. What other political circumstances could justify a "sovereign act" of Parliament to establish the impunity of the partners of a Government?

ABOUT THE AUTHOR

Germán M. Teruel Lozano
Germán M. Teruel Lozano is an Associate Professor of Constitutional Law and co-director of the Chair of Good Governance and Public Integrity at the University of Murcia.

SUGGESTED CITATION

Lozano, Germán M. Teruel: Rule of Law Eroded: Unpacking the Catalan Amnesty Law, Verfassungsblog, 06.12.2023, doi: 10.59704/196393d30e10249b.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20231207-133717-0.