AGREEMENT ON THE INSTITUTIONAL STATEMENT OF THE GENERAL COUNCIL OF THE JUDICIARY ADOPTED ON NOVEMBER 6, 2023 WITH THE VOTE OF MEMBERS WENCESLAO OLEA GODOY, CARMEN LLOMBART PÉREZ, JOSÉ ANTONIO BALLESTERO PASCUAL, FRANCISCO GERARDO MARTÍNEZ TRISTÁN, JUAN MANUEL FERNÁNDEZ MARTÍNEZ, JUAN MARTÍNEZ MOYA, JOSÉ MARÍA MACÍAS CASTAÑO, NÚRIA DÍAZ ABAD AND MARIA ÁNGELES CARMONA VERGARA.

The General Council of the Judiciary, exercising and reaffirming its constitutional functions for the defense of the full validity of the Constitution, of the rule of law and of the integrity of jurisdictional power, has agreed to approve the following

INSTITUTIONAL STATEMENT

I

The General Council of the Judiciary has been observing with growing concern the statements made by members of some minority political parties, some of them with government responsibilities, regarding the eventual amnesty of crimes committed on the occasion of the episodes that occurred on October 1, 2017, as well as those also committed prior to their preparation, including corruption crimes, and those also committed subsequently to oppose the legitimate action of the State to bring their perpetrators to justice and restore the altered public and constitutional order.

Insofar as these declarations were not backed up by a statement from the acting President of the Government, this Council has preferred to maintain an attitude of prudent expectation. The silence of the acting President of the Government, however, was broken last Saturday, October 28, and in a personal statement of wide public diffusion he has affirmed two things: first, that he has indeed agreed an amnesty law with political parties which includes, among others, the one led by a fugitive from justice who will personally benefit from the measure; second, that the measure will be adopted in the "interest of Spain" to prevent an eventual government of right-wing parties in the event of a repetition of the elections.

II

In view of the comments made in the last few hours regarding the untimeliness of this statement under the argument that this Council should have waited until it knew the text of the bill to issue its opinion, we affirm both our legitimacy and the opportunity to do so now.

The legitimacy to pronounce in relation to legislative initiatives such as those related to an amnesty law not only results from art. 561.1.8ª LOPJ but is also part of the European standards on judicial independence. As the Consultative Committee of European Judges, an advisory body to the Council of Europe, an international organization of which Spain is a member, points out, "*40. Parliamentarians and members of the executive branch must, of course, respect the law in their relations with the Council of Justice and not infringe its role and its functioning by violating or circumventing legal norms. Furthermore, relations with the Council should be based on a culture of respect for the rule of law and the role of the Council of Justice in their respective member state. 41. The Councils of Justice should actively participate in dialogue with the other branches of government, especially when providing input on draft legislation. This dialogue should be conducted in an atmosphere of mutual respect*" (Opinion of the Consultative Committee of European Judges of the Council of Europe No. 24-2021). It can in no way be considered alien to the functions of the Councils of Justice, and certainly not of this General Council of the Judiciary, to raise their voice when democracy, fundamental freedoms and the rule of law may be at risk (Report of the General Council of the Judiciary of June 2023 on the codes of conduct of the members of the European Councils of Justice).

In view of such a transcendental initiative, reasons of prudence and institutional loyalty justified its processing as a bill and not as a proposal to give the State's advisory bodies the opportunity to issue their technical opinion. This will not be the case. The parties that promote the legislative initiative, the same parties that support the action of the acting Government, announce that they have opted for the parliamentary procedure that allows to dispense with such reports. It is therefore absurd that we are being asked to wait to do something that could not be done because they have deliberately chosen the path that prevents it.

This statement is not intended to replace the report that is avoided by the procedure chosen for the legislative initiative, but it is issued in view of the impossibility of formulating it. And to do so, it is not necessary to know the

objective and subjective aspects that will delimit the contours of the law that is announced. It is not necessary because the substance has already been announced by the different political leaders who are negotiating the future law, among them some with responsibilities pending to be elucidated before the courts and who are negotiating and determining their own exemption from responsibility. And to this we must add that, in any case, the approval of an amnesty law, whatever its basis, and whatever its objective and subjective aspects, conflicts with various constitutional principles, as will be shown below, including the principle of exclusive jurisdiction, which justifies this Council, as a constitutional body whose essential mission is to watch over judicial independence, to express its concern at the imminent passage of such a law.

III

The present institutional declaration is based on a series of considerations that constitute its foundation: on the one hand, that fundamental rights bind all powers (article 53 of the Constitution); on the other hand, that the granting of an amnesty in our current constitutional system constitutes a serious violation of fundamental rights and of the very system of division of powers on which our Constitution is inspired and on which the rule of law is based. This constitutional body cannot remain silent in the face of an initiative such as the one referred to, due to the serious consequences it has on the very configuration of the Judicial Power as set forth in the Constitution, the source of legitimacy of all the powers of the State, which conditions the exercise of its powers.

This Council does not dispute the powers of the parliamentary groups represented in the Cortes to make as many proposals for laws as they consider pertinent; but neither can it accept that an initiative be undertaken that so ostentatiously curtails the fundamental rights of citizens and the powers that the Constitution reserves to the Judiciary. And this is affirmed without prejudice to the specific content of the aforementioned proposal, because such clear constitutional breaches are produced by the mere fact of undertaking a law -which must be of an organic nature- granting an amnesty.

Without prejudice to the debate as to whether the institution of amnesty can be constitutionally admissible -in the more than forty years that the Constitution has been in force, the most established parties have been arguing that it is not admissible, as has the most authoritative constitutionalist doctrine- it is certain that there is no Amnesty Law in our

legal system, which will force the projected amnesty which is intended to be submitted to the Cortes -Spanish Parliament- to be a singular law which, always according to the words of the President of the Government in functions, would have as its purpose to solve the conflict between Catalonia and Spain and to de-judicialize the referred "political conflict in Catalonia".

The linking of the aforementioned conflict with the projected amnesty makes the Courts responsible, if not for the genesis of the conflict, at least for having sustained it. With this idea, which inspires the promise of initiative, it is forgotten that the intervention of the Courts in the events occurred in Catalonia since 2013, or even since 2006, have been, as far as the Constitutional Court is concerned, to the defense of the Constitution that is entrusted to it by constitutional mandate. As regards the Courts of Justice (Supreme Court, National High Court, High Court of Justice of Catalonia, Provincial Courts and Courts of that Community), especially, but not only, those of the criminal order, have been limited to the prosecution and punishment of the crimes committed in connection with the aforementioned events, as, moreover, was their constitutionally mandated task. These actions have been carried out with a procedural neatness that has led to the confirmation of all its decisions in the appropriate procedural channels.

An amnesty law such as the one announced by the acting President of the Government can only have the purpose of rendering null and void the decisions -generally in sentences- adopted by the Courts in relation to the aforementioned facts of the alleged Catalan conflict. That is to say, purely and simply, a law of these characteristics can only entail declaring the nullity of these decisions. In other words, the Courts would come to affect the Judiciary by declaring the nullity of the sentences passed by the courts that are part of it.

The fact that in our Law there is no Amnesty Law, as has already been said, means that an amnesty such as the one announced can only be granted through the enactment of a singular law in which such a declaration is made. In other words, by means of this (singular) law, the sentences passed by the different Courts would be declared null and void, and this (singular) law would invade the exclusive competences (Article 117-3 of the Constitution) entrusted to the Courts.

It is true that amnesty, by its very nature, entails rendering jurisdictional decisions null and void, but in the case of the proposed law it is not a law of that nature, but rather, in the absence of prior recognition of the institution,

it directly grants amnesty to specific and determined persons (all those who took part in the "conflict") for specific and determined acts (all those executed in that "conflict" that constituted a crime according to the law), it directly grants amnesty to specific and determined persons (all those who took part in the "conflict") for specific and determined acts (all those executed in that "conflict" which constituted a crime according to the law) and for a specific period of time (the period in which the conflict was generated and developed), so that it is a decision of the Cortes which invades very specific competences of the Courts, the annulment of sentences, by means of an *ad hoc* law.

Although the jurisprudence of the Constitutional Court does not declare singular laws to be contrary to the Constitution, it does consider them to be an institution of very restrictive and exceptional use, because they distort the characteristics of the law, which is governed, among other characteristics, by the generality of its effects and, in addition, limit the fundamental rights of judicial protection and the various fundamental rights affected by such laws; hence the need for this exceptionality to require a special and specific motivation that justifies its necessity and reasonableness. This is one of the cases in which the legislative power requires a specific statement of reasons, which is not generally required for the laws passed by the Cortes, which are limited by the requirements imposed by the Constitution, the only rule that binds the Legislative Power.

In the case of the announced bill, insofar as it affects - by declaring its radical nullity or nullity by operation of law - on final judgments handed down by the Courts, it entails an inadmissible invasion of our Constitution, specifically, of the powers that, under a regime of exclusivity, the Supreme Law entrusts to the Courts. And this invasion by a law of these characteristics cannot be legitimized, not even by a motivation that could be considered reasonable, because there is no admissible reason for Parliament to arrogate to itself powers that the Constitution entrusts to the Courts by means of this type of law. The Parliament could, if our Constitution really legitimizes it to do so, approve an amnesty law with the characteristics proper to any law, which are its imperativeness, generality and abstraction; and, in application of that specific regulation, adopt the decision to apply the amnesty to specific and determined cases and with the effects already contemplated in the general law which, on the other hand, must be applied by the Courts themselves. What is not admissible is that an *ad hoc law* recognizes the institution for its application to a specific and determined case.

A law of these characteristics can have no basis or reason whatsoever, and the arguments for its motivation will be futile. The Constitution not only configures the Rule of Law that inspires it under the principle of the separation of powers, but also, in a concrete manner, tries to preserve that none of the powers invades the competences constitutionally assigned to another. In particular - as is the case with the very denomination of the Judiciary as the exclusive Power of the Judiciary - the constituent had a special concern to guarantee, in favor of the citizens, the competences of the Courts and the Judiciary, the competences of the Courts and Tribunals and took to article 117-3º the axiom ["*il n'y a point encore de liberté si la puissance de juger n'est pas separeé de la puissance législative et de l'exécutrice*" ("there is *no freedom if the power to judge is not separated from the legislative and executive power*")] that it corresponds "exclusively" to the Courts "*the exercise of the jurisdictional power*"; that is, to judge and execute what has been judged. If it is authorized that by means of singular laws a no lesser facet of that power can be altered, such as that of executing what has been judged, by means of a particular declaration that would leave without effect what has been declared in a final judgment, such as an ad hoc amnesty, a very dangerous interference of the Legislative Power in the Judicial Power would take place, altering the requirement of the separation of powers and, with it, the essential principle of the Rule of Law that our Constitution guarantees. The Parliament cannot, by a minimum constitutional logic, arrogate to itself, under the protection of temporary majorities -which are depositaries, but not holders of national sovereignty-, to influence specific sentences of the Courts declaring their nullity, whatever the motivation for such declaration may be.

IV

In view of the foregoing considerations, the General Council of the Judiciary expresses with this statement its intense concern and desolation for the degradation, if not abolition, of the rule of law in Spain, which, from the moment it is adopted, will become a mere formal proclamation that will inevitably have to produce consequences to the detriment of the real interest of Spain.

Whatever the formal or apparent justification given in the preamble of the future law, its real motivation has already been expressed, and beyond the discussion on whether singular amnesty laws are really constitutionally acceptable to circumvent the constitutional prohibition of general pardons, what in no case is acceptable is an amnesty, and not even a particular pardon

of those generically admitted by the Constitution, with the real basis expressed by the President of the Government in office.

To confuse the "interest of Spain" with the interest of the acting President of the Government to avoid the hypothetical formation of governments of parties of a different ideology from his own is something manifestly incompatible with the political alternation, embedded in the basic principle of political pluralism which, according to article 1 of our Constitution, is a superior value of our legal system. But to do so by exempting the application of the law to prevent the ongoing action of the courts or to render ineffective that which has already taken place by means of firm sentences, turning those sentences into a dead letter, is something categorically incompatible with the principle of the rule of law in which, again according to article 1 of our Constitution, Spain was intended to be constituted and indeed was constituted... at least until now. Using the enactment of a singular law to invade the competences of the Judiciary as a means of political negotiation constitutes a perversion of the constitutional regime, because nothing would prevent temporary majorities in the composition of the Courts from imposing their criteria over and above constitutional requirements, under the protection of the fact that a rule of this rank cannot be questioned by the citizens.

This is so, **firstly**, because it is not compatible with the principle of the rule of law proclaimed by article 1 of our Constitution, and not even with the principle of responsibility of the public authorities referred to in article 9.3, that political leaders are exempt from answering for their crimes before the courts, whatever the nature of their crimes, so that an aspiring President of the Government can obtain the personal and political benefit of preventing the government of other political forces or, expressed in reverse, to be able to remain in government. This means degrading and converting our rule of law into an object of marketing at the service of personal interest that pretends to present itself, from the rejection of political pluralism, as the "interest of Spain".

Second, because it means generating a political class that is legally irresponsible and unpunished for its crimes, which, without being justified by any constitutionally legitimate aim, means contravening not only the principle of responsibility of the public authorities, but even the most elementary principle of equality of citizens before the law, as proclaimed in Article 14 of the Constitution.

Third, because the independence of the courts is violated in its most basic aspect: if independence is the necessary instrument for the courts to be able to act neutrally and guarantee, through the effectiveness of their decisions, the principle of legal certainty, there can be no question of independence or legal certainty when political forces use the laws to their advantage to prevent the action of the courts. The enormity of the consequences of what has been announced by the acting President of the Government is that it turns the independence of the courts and legal certainty, justice in short, into a chimera.

And, **finally**, this General Council of the Judiciary cannot fail to point out that what is being violated with the measure announced by the acting President of the Government is not only the Constitution with which we Spaniards have provided ourselves as a framework of coexistence, but also the commitments assumed by Spain in articles 2 and 19 of the Treaty of the European Union so that at all times the principles of the rule of law and judicial independence prevail. The risk that the time will come when the European Union will decide not to be the alibi of a State that does not comply with its principles should be very present, at this critical moment, in the foresight of those who really intend to act in the "interest of Spain".

Madrid, November 6, 2023

Wenceslao Olea Godoy
Vocal

Carmen Llombart Perez
Vocal

José Antonio Ballestero Pascual
Vocal

Francisco Gerardo Martínez-Tristán
Vocal

Juan Manuel Fernández Martínez
Vocal

Juan Martínez Moya
Vocal

José María Macías Castaño
Vocal

Nuria Díaz Abad
Vocal

Maria Ángeles Carmona Vergara
Vocal