InDret
1.2026

Amnesty as Seen by Advocate General Spielmann: Three Counterfactual Questions

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Abstract

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This paper critically examines the core reasons —the absence of a self-amnesty, the regularity of the legislative procedure, and the sufficiency of the stated purpose— explicitly advanced or implicitly assumed by Advocate General Spielmann in his Opinion of 13 November 2025 to support the fundamental conformity of the amnesty for the Catalan independence process with primary EU law and, specifically, with the requirements flowing from the rule of law principle. The analysis reveals a close correspondence between these reasons and those which, in one way or another, underpin the Constitutional Court's rejection of the claim that the Amnesty Law is arbitrary and, therefore, unconstitutional in its recent judgment of 26 June 2025. The author's reflection, based on a comparative assessment of both lines of reasoning, is of particular interest at a time when the Amnesty Law is still awaiting the verdict of the Court of Justice of the European Union.

Sumario

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El presente trabajo examina críticamente las razones de fondo —inexistencia de autoamnistía, regularidad del procedimiento legislativo y suficiencia de la finalidad declarada—, aducidas explícitamente o asumidas implícitamente por el Abogado General Spielmann en sus Conclusiones del pasado 13 de noviembre de 2025, para sostener la fundamental conformidad de la amnistía del procés *con el derecho primario de la Unión y, específicamente, con las exigencias derivadas de la cláusula del estado de derecho. El examen realizado muestra la concomitancia de dichas razones con las que, de una manera u otra, sustentan la declaración de no inconstitucionalidad (por arbitrariedad) de la Ley de Amnistía contenida en la sentencia del Tribunal Constitucional de 26 de junio de 2025. La reflexión que ofrece el autor, basada en la evaluación comparativa de ambas líneas de razonamiento, cobra especial interés en un momento en que la Ley de Amnistía se halla pendiente del veredicto del Tribunal de Justicia de la Unión Europea.*

Título: *La amnistía vista `por el Abogado General Spielmann: Tres preguntas contrafácticas*

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Keywords: *amnesty, rule of law, self-amnesty, arbitrariness, abuse of power, détournement de pouvoir, 'ulterior purpose'.*
***Palabras clave*:** amnistía, estado de derecho, autoamnistía, arbitrariedad, desviación de poder, 'propósito ulterior'.

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1. Introduction*

The Amnesty Law is pending the verdict of the CJEU. Meanwhile, at European level, there have been two relevant and non concordant opinions. One is the 'Written Observations' of the European Commission addressed to the CJEU in relation to the preliminary questions referred by the Tribunal de Cuentas [Court of Audit] (Case C-523/24), dated 9 December 2024, and the other is the 'Opinion' of Advocate General (AG) Spielmann on the questions referred by the Audiencia Nacional [National High Court], dated 13 November 2025 (case C-666/24)[1].

Without prejudice to any collateral reference to the Commission's Observations, these pages focus on the AG's Opinion and their comparative assessment with the arguments put forward in the Spanish Constitutional Court's judgment of 26 June 2025 (STC 137/2025). They do not seek to provide an analytical examination of the issues raised by the preliminary rulings from the point of view of secondary law. Their sole purpose —more theoretical than exegetical— is to assess the underlying reasons that led the AG to affirm *the general conformity* of the Amnesty Law with primary EU law and, specifically, with the requirements of the rule of law (Art. 2 TEU).

I am not unaware that the AG has considered certain specific provisions of the law to be contrary to basic rules of EU law. According to him, for example, Articles 8.3, 10.2 II and 13.3 LA [Amnesty Law] contradict requirements derived from the principles of judicial independence and effective judicial protection enshrined in Articles 19.1 TEU and 47 EUCFR (Opinion II, §§ 111 ff.). Similarly, in relation to specific provisions, the Constitutional Court had previously considered that Article 1.1 LA was unconstitutional by omission: insofar as it does not extend the benefit of amnesty to those who have committed criminal acts in opposition to the 'procés', the Court maintains that it contravenes the equality clause of Article 14 of the Spanish Constitution (STC 137/2025, FFJJ 8.3.4 a) and 8.3.5). However, these and other similar issues are specific matters and, as such, fall outside the scope of this paper. Here, we deal solely and exclusively with the *general conformity* of the amnesty provided for in the law, not with the *specific conformity* of the various parts of its legal regime with higher principles and rules of law.

There are basically three underlying reasons on which the AG bases his *judgement of the general conformity* of the Amnesty Law with the requirements of the rule of law, some simply stated, others somewhat more developed: (i) *absence of self-amnesty proper*: the nationalist MPs who voted for the law did not personally benefit from it; (ii) *mechanical regularity of the legislative procedure*: the processing of the law complied with the formal channels and requirements provided for in the parliamentary legal framework; and (iii) *sufficiency of the stated purpose*: the law's express appeal to reconciliation purges the amnesty of any flaw attributable to the legislator's motivation. These reasons run parallel to those that have led the Constitutional Court to reject the unconstitutionality *in totum* of the Amnesty Law, although it should be emphasised from the outset that the Spanish Court formulates them in significantly more radical terms.

* This work is dedicated to my friend E. P. I would like to thank Isabel Aldanondo, Sebastián Albella, Jesús Alfaro, Manel Aragón, Manuel Atienza, Nuria Bermejo, Pedro Cruz, Pablo de Lora, Javier Díez-Hochleitner, Víctor Ferreres, Fernando Gómez-Pomar, Liborio Hierro, Francisco Laporta, Marta Lorente, Rafael Núñez-Lagos, Fernando Pantaleón, Carlos Paredes, Jesús Remón, Alfonso Ruiz Miguel, Daniel Sarmiento, and Miguel Virgós for taking the trouble to read the paper, make comments, and encourage its rapid publication.

[1] On the same date, AG Spielmann's Opinion on the preliminary questions raised by the Tribunal de Cuentas [Court of Audit] (Case C-523/24) was also published. This second Opinion, which is more limited in scope, is outside the focus of this paper (it will be referred to marginally as 'Opinion II'). It should be noted that the references for a preliminary ruling submitted by the Tribunal Superior de Justicia de Cataluña [High Court of Justice of Catalonia] (case C-587/24) and Criminal Court No. 3 of Vilanova i la Geltrú (case C-123/25) are also pending resolution by the CJEU. Apparently, there are no plans to join the various filings for preliminary rulings (for an initial approach, see Cruz Mantilla, 2025, pp. 173 ff.).

The common denominator of all of them lies, if I may put it this way, in the *priority given to semantics over pragmatics* when determining the meaning of legal statements. I do not dispute that priority. It is clear that the text takes precedence over the context in the understanding and interpretation of laws, and that this should be emphasised when reviewing their conformity with higher rules and principles, whether these belong to European law or the national constitution. What I do dispute, to put it *à la* Rawls, is the *lexicographical* nature that both the AG (more apparent than real) and the TC (more real than apparent) assign to the priority in question, a nature that prevents the various hermeneutic factors from being levelled or weighed: those located earlier —the semantic ones— have absolute value, so to speak, with respect to those that follow —the pragmatic ones—, and are maintained without exception[2].

The hypothesis I defend is simple: the priority of the text cannot translate into the exclusion of context[3]. The constitutional judge, whether European or domestic, cannot close their eyes to reality. The error of the AG —and, more markedly, that of the TC— lies precisely there, in shielding the grammatical text of the law from the intentional context of the legislator. The democratic principle certainly imposes a high degree of deference to the text: *judicial self-restraint* is necessary to prevent the countermajoritarian supplanting or subversion of the will of the represented nation. But at the same time, it requires that the context not be completely ignored: we must avoid that other form of corruption or erosion of democracy that has come to be called *autocratic legalism,* at least when it manifests itself beyond reasonable doubt. This is a fundamental concern in this paper.

The term 'autocratic legalism' has recently been coined to describe political practices characterised by the use of legal mechanisms provided for in a democratic legal system for undemocratic purposes[4]. They conceal attacks of varying intensity on the constitutional order by making use of methods or channels formally authorised by that order, as is particularly the case with amnesty[5]. The processes of autocratisation or de-democratisation served by these practices are a growing concern for European institutions, which should be emphasised at a time when the compatibility of the Amnesty Law with EU law awaits the decision of the Court of Justice in Luxembourg. It should not be forgotten that one of the main missions of the European Union is to ensure the integrity of democracy and the rule of law in the Member States and that autocratic legalism or formalism strategies can only be effectively combated through pragmatic or contextual analysis of the aims pursued by the legislator on which the controls on the misuse of power (*détournement de pouvoir*) or arbitrariness of the legislator are based.

A separate question is whether, in our case, the Court of Justice is procedurally ans substantively empowered to assess the overall legitimacy of the Amnesty Law. I am aware that, in both respects, its room for manoeuvre is narrower than that of the Constitutional Court. In procedural terms, because this is not an infringement action, but rather a preliminary ruling, the Court of Justice's role is in principle limited to assisting the national courts in relation to the questions referred, none of which in the case at hand concerns the general legitimacy of the law, although they do raise issues (particularly those relating to the principle of equality) that could justify its

[2] Cf. Rawls, 1979, pp. 62-63.

[3] Not even the strictest defenders of the semantic conception of legal language do so (see, for example, Laporta, 2007, p. 177). I should clarify that I have taken some liberty in contrasting semantics and pragmatics in our discussion, since I start, first, from a very broad understanding of pragmatics, not limited to classical conversational or linguistic implicatures; secondly, from a certain correspondence between semantics and 'legalism' or, if you prefer, 'constitutional ruleness' (and, by contrast, between pragmatics and principlism); and thirdly, from the need to differentiate between two meanings or dimensions in the 'semantic autonomy' of laws (on these latter aspects, see § 4 *in fine* below).

[4] On this concept, see Scheppele, 2018, p. 548 and footnote 7. The essay is a good introduction to the most recent waves of de-democratisation.

[5] Needless to say, in my opinion, amnesty is not expressly nor implicitily prohibited under our Constitution (see Paz-Ares, 2024, chap. II); on this point, I do not differ from the conclusions of STC 137/2025 (FFJJ 3 and 4).

intervention. In substantive terms, because doubts remain as to whether the connection with EU law based *solely* on the general clause on the rule of law in Article 2 TEU —possibly related to more specific sub principles such as judicial independence (Article 19.1 TEU), equality (Articles 20 and 21 EUCFR) or effective judicial protection (Article 47 EUCFR) — is sufficient for the Court of Justice to examine the merits of the case. These are questions that I leave to the specialists in European law. In any case, my impression is not necessarily negative. The case law of recent years (which points towards an increasingly marked judicialisation and justiciability of the rule of law principles) and the signs that seem to emerge from the development of some cases currently underway (e.g. the Hungarian case on LGBTIQ rights) suggest that the Court of Justice may be prepared to take the next step and ensure the primacy of the values of the Union based solely and exclusively on the general clause of Article 2 TEU. The AG himself seems to take a favourable view of this more 'principled' or less 'legalistic' substantive examination, since he has had no qualms about addressing issues such as self-amnesty, which were not specifically raised in the preliminary ruling and cannot be traced back to any rule other than the aforementioned general clause (Opinion § 91[6]).

Having said that, I will now get down to business. My aim is to subject the AG's three semantic arguments —the non-existence of self-amnesty, the regularity of the legislative procedure and the sufficiency or self-sufficiency of the stated purpose— to the test of pragmatic reasoning. To this end, I will use a number of counterfactual questions, with which I hope to stress the reasoning of the AG —and, incidentally, that of the Constitutional Court— and confront it with its own contradictions.

2. Non-existence of self-amnesty?

The first counterfactual question can be formulated as follows:

> Would the AG have understood that the amnesty approved by the Spanish legislature could not have been classified as 'self-amnesty' even if the measure had directly favoured the seven Junts or ERC MPs themselves?

The question refers, needless to say, to a hypothetical scenario in which the nationalist MPs themselves, whose votes were decisive in the approval of the law, would have been exempted from the prison sentences and obligations to compensate the public treasury that they would otherwise have had to suffer if they had committed or participated in the crimes of sedition and embezzlement of the 'procés'.

I take it for granted that, in such a scenario, the AG would have considered the amnesty to be a textbook case of 'self-amnesty' and, consequently, would have wholeheartedly endorsed the Commission's criterion[7]. The evidence of such a clear and intense conflict of interest would have forced him to broaden the strict —or 'banana republic'— concept of self-amnesty on which he bases his argument in order to include the counterfactual scenario I propose for discussion. Note that the AG reserves the concept for amnesties granted *in extremis,* 'on the eve of a political transition' and through 'a unilateral act imposed by *an authoritarian* power', whose paradigm he illustrates in a footnote with some cases from the Ibero-American Court of Human Rights[8]. The Spanish Constitutional Court's argument is similar:

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[6] In general, incidentally, the AG is personally in favour of this, particularly when the case concerns practices typical or more typical of 'illiberal democracies' (see Spielmann, 2021, p. 19), as in my opinion are the amnesties of political allies.

[7] The Commission's criterion is well known: "It does not appear that the LOA [Organic Law on Amnesty] effectively meets an objective of general interest recognised by the Union. At first glance, the LOA appears to constitute a self-amnesty [...] *because the votes of its beneficiaries were fundamental to its approval in the Spanish Parliament*". (Observations, § 94). In favour of self-amnesty, the Commission adds a second argument that is as powerful as or even more powerful than the previous one, to which I will refer later (see § 4, footnote 21 and corresponding text below).

[8] See Opinion, §§ 92 and 91 and footnote 60.

> As a matter of principle, a law debated and approved by the parliament of a democratic state governed by the rule of law that provides for the extinction of criminal liability through amnesty cannot be classified as self-amnesty, which is characteristic of *authoritarian political systems* or states in transition, dictated or authorised by those who benefit from such immunity (STC 137/2025, FJ 10.2 *in fine*)[9].

However, even admitting the need to broaden the concept of 'self-amnesty' beyond the 'banana republic' stereotype, it is very likely that the AG would still not accept the Commission's opinion in relation to the actual case. He would insist that the counterfactual scenario adduced proves nothing given its remoteness from the actual one. In fact, his main argument against the existence of self-amnesty in Amnesty Law law is that

> the persons who benefit [from it] are not members or representatives of the Government or the legislative power that [promotes or approves it], *so that there is no direct link between the exercise of political power and the benefit of the measure* (Opinion, § 95).

This is clearly a semantic argument, as can be seen at a glance. It is true that, in the actual case, the members of parliament from Junts or ERC are not *direct and personal* beneficiaries of the pardon, but that is precisely what needs to be assessed. The question raised by the counterfactual question is whether the direct and personal nature of the benefit matters, whether it matters so much. And frankly, I don't think so. Wouldn't it be exactly the same if, instead of them being the direct beneficiaries of the measure, it had been their parents or their children? I conjecture that, faced with this new counterfactual, the AG would agree to the equation.

Well, the intriguing question is why he has not considered it necessary to extend the equivalence to the actual case, in which the link between the seven Junts or ERC MPs and the main beneficiaries of the amnesty (specifically, Mr Puigdemont, President of Junts, and Mr. Junqueras, President of ERC), although of a different nature, is equally —or sufficiently— close. There is no need to insist on the internal hierarchy and strict voting discipline that governs the functioning of our parties, including the nationalist parties, and on the political benefit that the amnesty entails for the latter. It suffices here to recall a rule of Spanish parliamentary law, generally overlooked in the discussion, to note that the relevant conflict of interest is not limited to that of the MP themselves, but also extends to their 'related persons' and, among them, to those who are capable of exerting significant influence over them:

> A conflict of interest shall exist [when the MP] has a personal interest, whether direct or indirect through another specific person, that could unduly influence the performance of their duties; in such a way that it could cast doubt on their objectivity and independence, or imply that, as a member of parliament, they are not pursuing the general interest (Art. 3.1 CCCG or Code of Conduct of the Spanish Parliament).

Is there any doubt about Puigdemont's or Junqueras' status as an 'individual' and his decisive intervention in the negotiation process and 'personalisation' of the Amnesty Law finally approved by Parliament? I don't think anyone doubts it[10]. The idea of 'self-amnesty' cannot therefore be rejected so expeditiously. Instead of taking the bull by the horns and addressing

[9] The implicit preupposition underlying the argument —the angelic character of the members of a 'democratic' parliament— is the object of Enrique Gimbernat's biting irony (.v E. Gimbernat, "El Constitucional, los indultos generals y la autoamnistía", *El Español*, 17-X-2025).

[10] On the process of tailoring the law to Puigdemont's personal needs, which arose during the legislative process as a result of various legal proceedings, I refer the reader to Paz-Ares, 2024, pp. 98-106.

the issue of individuals linked to conflicts of interest, the AG ignores the issue or tiptoes around it. In any case, it is clear from his argument that, had he acknowledged the existence of a relevant conflict of interest, he would have classified the amnesty as reprehensible self-amnesty under the principles of European law. I do not think the same of the Constitutional Court, whose semantic argument reaches the heights of a truly extravagant formalism. It goes so far as to exclude self-amnesty because it does not fit the literal wording of Article 102.3 of the Spanish Constitution[11].

From the above, I conclude that, in the case of the AG, the lexicographical or absolute nature of the priority of semantics over pragmatics is more apparent than real. If he had been able to consider all the circumstances involved and had realised that the nationalist MPs were in a situation of genuine conflict of interest, his conclusions would probably not have been the same. I would even venture to suggest that he would have deemed the purpose of the law to be unlawful, as the Commission had previously done, based directly on the general rule of law clause in Article 2 TEU. I cannot say the same for the Constitutional Court or, generally, those commentators who take the semantic argument and the legalistic approach to its ultimate conclusion[12]. I am referring to those who, while admitting – as they should – that there is a conflict of interest in the strict sense and, therefore, 'self-amnesty', consider, in my view somewhat scandalously, that the conflict is irrelevant or trivial in the constitutional review of laws because it refers to an extratextual or contextual circumstance. The position of Prof. García Albero is illustrative, for example:

> Let us admit that in other areas outside parliament, such a context would simply render the decision arbitrary, as the decision-makers would be in a clear conflict of interest (exchange of votes —investiture— in return for the extinction of criminal, administrative, accounting and even civil liabilities of some decision-makers: *rectius*, of persons linked to the formal decision-makers, that is, the real decision-makers). By definition, decisions taken in parliament are the result of the confrontation and articulation of explicit and known prior interests [...] *All corruption, as I have long maintained, can be constructed on the basis of the theory of conflict of interest, but the exception is found in the laws, without excluding the most serious cases* (García Albero, 2024, pp. 118-119).

The argument is undoubtedly consistent with the semantic thesis, but this circumstance does not save it from the much more severe objection of autocratic legalism. The last sentence of the transcribed excerpt is alarming. Would it not be a source of legal shame if constitutional justice were to validate an amnesty law such as the one that was attempted to be passed in Romania in 2019, a prime example of low-intensity authoritarianism? I will return to this instructive case later (see *infra* § 6 c) *in fine*).

3. Regularity of the legislative procedure?

The second counterfactual question generalises the first:

> Would the AG have considered the legislative *process* that led to the adoption of the Amnesty Law to be as orthodox and unobjectionable as he assumes if he had had precise, detailed and duly documented knowledge of the procedural anomalies that paved the way for it?

[11] See STC 137/2025, FJ 10.2.

[12] See STC 137/2025, FJ 11.2.

My impression is again that it would not. It is likely that the preliminary ruling on which the Opinion is based did not address these issues and that, as a result, the anomalies referred to went unnoticed by the AG[13]. Precisely for this reason, it is still worthwhile to ask the question. For anyone familiar with the events, the inaccuracy of the premise on which the AG's argument is based is striking:

> [the Amnesty Law] is the result of a *regular* parliamentary procedure carried out within a pluralistic democratic system (Opinion, § 92).

If we understand regularity pragmatically, considering not only the text of the options and channels available in terms of procedure, but also the context and the aims pursued with a specific plan for *the modus legiferandi,* the processing of the Amnesty Law would have to be considered the antithesis of regular processing. Democracy is defined as 'power in public'. Bobbio used this concise expression to refer to all those institutional procedures that oblige those in power to make their decisions in the light of day, to give reasons for them (their real reasons, not others constructed *ad hoc*) and to withstand scrutiny in the context of an open process[14].

In light of this definition, the processing of the Amnesty Law is a compendium of the worst practices one can imagine in a democratic system: 'Geneva-style' conversations away from the spotlight and stenographers of parliament, the option for urgent processing in the most unsuitable case for it, the absence of proper public consultation and any involvement of the interested parties, the deliberate omission of the impact report, the exclusion of other normally mandatory reports (General Council of the Judiciary, Public Prosecutor's Office, etc.), the management of the 'approval' process for amendments outside of parliament, which amendments were not to change a comma' of what had been negotiated outside of parliament, the unexpected replacement of the Secretary General of Congress by a person trusted by the Government just as the procedure was getting underway, etc., etc., to which must be added the procedural irregularity of the conflict of interest mentioned above (see *supra* § 2)[15].

These are just a few examples from a long list of clear attacks —all based on concrete and tangible facts— on good parliamentary governance and good governance in general. From them, it is clear, with little room for error, that there is a deliberate plan or design to remove the institutional and procedural mechanisms that enable governments and parliaments to be truly accountable and truly worthy of the name of self-government. Their objective —as political scientists say when describing the most typical practices of low-intensity autocracy— is to "sabotage accountability [...] by means of secrecy, disinformation and disabling voice"[16].

Some of the bad practices mentioned have been justified on the grounds that the amnesty originated from a members' bill proposed by the Socialist Parliamentary Group and not from a government bill. This is a poor excuse or pretext. Nothing would have prevented the bill from being processed by complying 'voluntarily' or by 'analogy' with the well-known requirements of transparency, involvement, information and deliberation. Furthermore, it should not be forgotten that the initiative was adopted and the proposal prepared by the government itself, using the resources of the administration it heads. Nothing would have prevented the initiative from being formally processed as what it essentially always was, a government bill, even if this meant waiting for the government to be sworn in. It is irritating that the limitations of an acting government are

[13] Although they deal with a different preliminary ruling, the Commission's observations on this aspect could have alerted the AG. However, in his defence, I would say that they are so brief and generic (see Commission, 2024, § 95) that it was not easy to grasp the true magnitude of the problem being denounced.

[14] Cf. Bobbio, 1999, p. 339; those are the burdens associated with the (equivalent) idea of 'public reason' in Rawls (see, for example, Rawls, 2002, pp. 129-135).

[15] I deal with all of them in some detail in Paz-Ares, 2024, pp. 197-218.

[16] Glasius, 2018, p. 517.

invoked to excuse such an irregular procedure as launching an investiture programme before investiture has been formalised. The famous 'advance payment' is another notable anomaly in the process. It is further evidence of the true purpose of the amnesty (but we will return to this later: see § 4 below), and even of the lack of confidence within the government regarding the agreed behaviour of the deputies and, ultimately, of the legislator. Hence the irony of a former President of the Constitutional Court describing the legislator as a 'man of honour', as Mark Antony called Brutus in Shakespeare's play[17].

The considerations raised by the second counterfactual question point to another *sore point* in the AG's Opinion. One can conjecture that, had he been aware of the scale of the anomalies in the legislative procedure, including the self-amnesty, which were more than sufficient to refute the presumption that the executive and the parliamentary forces supporting it acted in good faith in the public interest, he would have undertaken his work under the *methodological principle of suspicion*[18]. Such circumstances can only reduce the degree of deference due to the legislator[19]. It would be ironic if those called upon to uphold the principles of the rule of law and European legality did not view with the utmost concern the parliamentary trickery and deceit displayed in the passing of the Amnesty Law, beginning with the ruse or ploy of the members' bill so often denounced by Brussels in the Spanish chapter of its reports on the *rule of law* in the Member States.

And speaking of sarcasm, I cannot resist recalling that the programme with which the Socialist Party contested the last regional elections, held a few months before the amnesty bill was processed, contained a commitment that it would only use the members' bill formula with the same guarantees of transparency and integrity required of government bills and, specifically, without dispensing with the 'opinion of the relevant advisory bodies'. No sooner said than done.

4. Self-sufficiency of the stated purpose?

This brings me to the third and final question:

> What would the AG have thought if the law had been titled *Organic Law on Amnesty for the Investiture of the Government of Spain* and its explanatory memorandum had explained in detail the merits of the initiative in enabling the progressive programme of the government coalition to be implemented?

Here too, I have no doubts. I do not believe that the AG would have shared the opinion of those who, based on political pluralism (Articles 1.1 and 6 of the Spanish Constitution) and the non-militant nature of our democracy, speculate that "the mere opportunity to form a parliamentary majority for investiture is sufficient constitutional grounds for an amnesty law"[20]. The AG would have ruled without hesitation, as the Commission had done previously, that in such a case the purpose of the law would be illegitimate because it would not comply with a sufficient reason of 'general interest' recognised by the Union or, at the domestic level, by the Constitution[21]. Moreover, I presume that he would also have condemned the amnesty as a low-

[17] P. Cruz Villalón, 'Las intenciones del legislador', *El País*, 20 June 2025, p. 13.

[18] It is appropriate to refer here to the writing of one of our most incisive constitutionalists: see Ferreres, 2021, chap. VI, pp. 203 ff.

[19] The Commission cites some of the irregularities in the procedure as evidence that the amnesty does not serve an objective of general interest to the Union (see, for example, Observations, § 95).

[20] See, for example, Saiz Arnaiz, 2024, p. 97, with further references; see also, along the same lines, despite considering it morally detestable, Hierro, 2026, para. 4.2.

[21] It should be remembered that the Commission categorically excludes the possibility of using amnesty to achieve investiture. This is another consequence of the 'self-amnesty' argument: "if there is support for the view that self-amnesties in which those in political power seek to shield themselves by guaranteeing their legal immunity are contrary to the principle of the rule of law, it seems that the same criterion should apply when

intensity authoritarian practice. The inevitable erosion of fundamental rights and basic principles of the rule of law that it brings with it cannot be justified by the aim of establishing a 'progressive government' or shielding it in power to 'prevent the right and the far right from coming to power'. On closer inspection, this aim clashes head-on with the ideas of political pluralism and non-militant democracy. I use quotation marks because these expressions marked the beginning of the political process of amnesty in our country[22]. Many commentators have echoed the latent authoritarian impulse, though not all with the effectiveness of the writer Javier Cercas:

> that the left is morally superior to the right [...] is the most poisonous idea circulating in the Spanish political market, especially for the left itself; if the left disregards democracy (or if its commitment to it becomes evanescent or rhetorical), it ceases to be the left: democracy is the condition of possibility for the left (J. Cercas, 'La mayor victoria de Pedro Sánchez' [Pedro Sánchez's greatest victory], *El País*, 1 July 2025, p. 11.

The AG's position is very clear: a political amnesty can only be justified by an objective of *reconciliation*[23]. The pursuit of any other objective, and in particular that of *government* —enabling the investiture to carry out the coalition's progressive programme while avoiding the risk of political alternation— would necessarily lead to the disqualification of the act of approval, either because it entails unjustified discrimination, contrary to Articles 20 and 21 EUCFR[24], or because it represents an abuse or misuse of power, incompatible with the European principles of the rule of law (Articles 2 TEU) or —to use domestic terminology— an act of 'arbitrariness of public powers', incompatible with the requirements of our Constitution (Article 9.3 SC)[25]. The latter has even been recognised by the Constitutional Court:

> [i]f a rigorous analysis of the law reveals that there is no purpose other than a purely partisan transaction [of investiture], the law will be arbitrary (STC 137/2025, FJ 7.2 b).

In short, if the law had been called the Organic Law on Amnesty for the Investiture of the Government of Spain, it would have been rejected without further consideration by both the AG and the Constitutional Court. The *crux* or essence of this conclusion lies in the perplexity it leads to. We all know with certainty that government or investiture was, in the real world, the real purpose behind the Amnesty Law[26]. How is it possible, then, that there is no hesitation in disqualifying the measure on the assumption that its 'official purpose' is to implement a

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those in government guarantee the impunity of their partners in exchange for parliamentary support" (Observations, § 94); for a more detailed elaboration of this argument, see Paz-Ares, 2024, pp. 78-86.

[22] The most eloquent reference is recorded below (see text and footnote 53).

[23] Opinion, § 90.

[24] Opinion, §§ 124–127.

[25] I have referred to the purpose of enabling the investiture, but I could also have referred to that of rectifying a judicial decision. It is therefore pointless to add that the counterfactual question could equally have been posed in these terms: what would the AG have thought if the law had been called *the Organic Law on Amnesty for the Dejudicialisation of the Political Conflict in Catalonia* and if, in its explanatory memorandum, the initiative had been justified by appealing to the need to prevent judges from imposing their criteria in the characterisation of the acts of the 'procés'. To facilitate the explanation, I will refer only to government or investiture, although when I speak of them, it should normally be understood that a reference to dejudicialisation is also implied. Not surprisingly, this was the exchange between the political groups that agreed on the investiture: some wanted to secure the government of the country and, in exchange, others demanded the dejudicialisation of the political conflict, that is, to decriminalise what, according to their language, the judges had unduly 'criminalised' (I will return to this point later: see § 6 b) below.

[26] Even its promoters have acknowledged this openly, at least initially, as we have just recalled (see footnote 22 above and footnote 53 below). Later, when they realised that they had to act strategically, they backtracked. This shift is very revealing, as I have explained in some detail elsewhere (see Paz-Ares, 2024, pp. 212-218).

progressive programme, yet disqualification is rejected simply because it is not declared or stated as the official purpose, when everything indicates that this was its 'real purpose'? This is shocking, to say the least. It is something that needs to be explained, as in the secular sphere it is not easy to accept that the law should be reduced to a mere set of words that are completely abstracted or detached from the circumstances and purposes that motivated them.

The question presents us with a puzzle of legal theory, which I would not like to trivialise with a Manichean presentation. The truth is that the AG does not elaborate on this point. One might thus wonder whether he endorses the Constitutional Court thesis of the sufficiency or *self-sufficiency of the stated purpose*, according to which the only legally relevant purpose, hence its 'self-sufficiency', is the 'official purpose', which is proclaimed by or inferred from the wording of the law. My impression is that the AG's answer to this question would, once again, be negative. At no point in its conclusions does the AG presuppose the irrelevance of the 'actual purpose' or relegate it to the sphere of the particular motives of parliamentarians; on the contrary, as we shall soon see, he emphasises its importance. His fidelity to the doctrine of the CJEU and even the ECHR would have prevented him from embracing the exclusively semantic thesis of the Constitutional Court and not taking advantage of the loopholes left by the case law of both European courts for a pragmatic reading. Because there is no doubt —we shall see it very soon too— that these loopholes exist, even if it is not easy to establish their scope (see § 6 below), and, if this is the case, it is necessary, by definition, *to recognise limits to the 'semantic autonomy' of the stated purpose*. This is precisely the *crux* of my argument.

That being the case, it is necessary to recognise some limit to the 'semantic autonomy' of the stated purpose. I refer to the semantic autonomy of the stated purpose as the independence of the official or stated purpose from the real purpose, in the same way that the semantic autonomy of the established rule is usually referred to as the independence of the text through which it is expressed from its underlying justification. Semantic autonomy serves in the first case to judge the validity of norms and in the second to determine their scope or field of application. I maintain that the semantic autonomy of the stated purpose is, like the semantic autonomy of the established rule, a defeasible autonomy, that is, relative, not absolute. Herein lies the crux of my argument.

Before delving into it, it seems appropriate to make a few points about our use of the concept of 'semantic autonomy'.

a) The concept has been reworked in legal theory by Frederick Schauer in order to identify the defining characteristic of legal rules, which is posited to lie precisely in their independence or opacity from the purpose that justifies them[27]. Semantic autonomy determines that rules must be applied as they are textually formulated, regardless of whether that application satisfies their underlying justification to a greater or lesser extent. Rules would not fulfil their function as such if they were not minimally entrenched in the text that defines them or if they were completely transparent to the principle or balance of principles that justify them. They would cease to be rules and collapse into the underlying purposes and principles.

However, we all know —and our experience as lawyers confirms this on a daily basis— that 'semantic autonomy' does not mean *semantic watertightness*. Often, those who apply the law are forced to extend the scope of a rule beyond what its text indicates (analogical extension) or to reduce it (teleological reduction) or to rectify it in some other way (correction of defective law) in order to preserve its purpose (*ratio legis*). These teleological adjustments to the text are, in any case, the exception in the life of the law and are only admissible to the extent that the benefit derived from fully realising the purpose of the rule outweighs the cost of not respecting its literal meaning in terms of the calculability or predictability of the law, efficiency in the administration of the rules, control of the distribution of power, etc. All this is well known[28]. This leads to a necessary relativisation of 'semantic autonomy' in *determining the scope of rules*. Although this is usually derived from the text, in

[27] See Schauer, 2004, pp. 113 ff.

[28] *Ibid*, pp. 197 ff.

exceptional cases it may be derived from the context or subtext, determined by its purpose. For this reason, we usually specify that, in practice, rules are not strictly speaking conclusive reasons, but simply reinforced reasons for action, and that the best way to define the operation of our legal system is as 'presumptive positivism'[29].

b) Incidentally, I note that the conventional idea of 'semantic autonomy' and the deliberately 'legalistic' strategy followed by the Constitutional Court in the amnesty ruling has exerted enormous pressure to make even constitutional rules (declared by the Constitution or established by constitutional case law) watertight to the broader principles that inspire them. Thus, I fear that the deference due to rules (which in itself should be considerably reduced in view of the anomalies detected above: see § 3 above) has sometimes ended up degenerating into worship (to use an expression widely used in the philosophical discussion of rule utilitarianism). The consequence of this has been the adoption by the Constitutional Court of an openly abstentionist attitude which, in my view, is as incompatible with the role of a deferential constitutional judge as an openly activist one[30]. Worship and abstentionism explain why the Court has completely shied away from applying the principle of proportionality or has not considered the principle of the rule of law in Article 1.1 of the Spanish Constitution (see STC 137/2025, FJ 11.2) to be directly applicable, beyond the specific rules or sub-principles that comprise it. Hence, for example, 'self-amnesty' is left unchecked precisely because it does not violate any of the sub-principles in question (separation of powers, judicial independence, effective judicial protection, etc.).

c) In any case, as noted above, in these pages the concept of 'semantic autonomy' is used primarily in a sense that differs from the conventional one referred to above, although with the same relativity. The problem we now face is not that of discerning the scope of the laws in the event of extensional divergence between the text and the purpose of the rule, but rather that of *judging the validity or regularity of laws* —in particular, the Amnesty Law— in the event of an intentional divergence between the purpose stated in the text and the purpose inferred from the context, between what I have been calling the official purpose and the real purpose. As is easily understood, the issue only becomes relevant when the real purpose is revealed to be illegitimate, since that illegitimacy can lead to the illegitimacy of the law, with the consequences that apply in each case, whether this be the invalidity of the law (if the purpose is found to be contrary to the Constitution) or its inapplicability (if the purpose is found to be contrary to Union law). It is of little relevance when both purposes are found to be legitimate, which does not happen as sporadically as is sometimes thought. Due to the often more strategic than cooperative nature of legislative language, it is not uncommon for legislators, as Andrei Marmor points out, to try to create the impression that they are doing one thing —for example, restricting contributions to political party campaigns— while actually doing the opposite —for example, facilitating such contributions, but less transparently. These cases of 'double talk' are of little significance (in terms of validity, but not in terms of good governance or good administration) if what is actually achieved, even if it is more opaque, is not illegitimate from the point of view of higher law (the constitution, European law, etc.)[31].

Having established the crux of the argument, it is now time to break it down. This is the purpose of the following three sections. In the first, I show that the thesis of self-sufficiency or semantic watertightness of the official purpose is incompatible with the doctrine of the CJEU and even with our own Constitution (see § 5 below). In the second, I verify that, unlike the Constitutional Court, the Advocate General actually starts from the premise that the relevance of the official or stated purpose is contingent upon its authenticity —that is, upon its status as a determining or preponderant motive for the legislator's action— and that, for this very reason, his argument is inconsistent (see § 6 below). And in the third, I bring up the doctrine of *the ulterior purpose* of the European Court of Human Rights (ECHR), in light of which all of the above becomes directly intelligible and, ultimately, so does the illegitimacy of the Amnesty Law both in terms of European law and Spanish constitutional law, duly interpreted (see § 7 below). These three points constitute the bulk of the work, which then concludes with a brief consideration of autocratic legalism (see § 8 below).

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[29] *Ibid*, pp. 266-269.

[30] This attitude is highlighted even by some defenders of the amnesty ruling (see Velasco, 2025, pp. 525–530). For an effective note on the model of the deferential judge between the extremes of the activist judge and the abstentionist judge, see Bayón, 2017.

[31] Marmor, 2011, p. 156. On the problem of pragmatic indeterminacy in law, apart from the summary offered in the aforementioned text book (see pp. 146 ff.), see Marmor, 2008, pp. 423 ff.; see also, from a more critical angle, Ekins, 2012, pp. 236-243.

5. Semantic watertightness advocated by the Constitutional Court: criticism

The first step in the reasoning announced consists of presenting the semantic thesis in all its radicalism. Nothing better for this purpose than to review the Constitutional Court's ruling on amnesty, in which the paradigm is perfectly outlined. The Constitutional Court starts from the assumption that, in the sphere of legislative power, it makes no sense to speak of a *real* purpose of the legislator that is different from or opposed to its *official* purpose. The only relevant purpose is the one stated in the text of the law (or inferred from it through interpretation). This is so, we are told, because the law is an objectified product, it is the resulting text, not the causative context:

> if the Amnesty Law is driven by a particular interest that is unsuitable to justify, from the perspective of Article 9.3 of the Spanish Constitution, the legitimate exercise of legislative power is something that this court can only determine by scrupulously exercising its jurisdiction, through *a legal examination of the normative text* that is the subject of the proceedings (STC 137/2025, FJ 7.2 a).

In other words, the law has no other purpose than that which "the law itself states as its own"[32]: "one must not confuse the ultimate motivations that may underlie a particular act of legislation (beyond what is stated [...] in its preamble) with the rules laid down therein" (STC 137/2025, FJ 3.2.1). "The motives or intentions of those who promoted it" constitute "*a matter unrelated to the law*" (FJ 6.3). The "will of the legislator cannot be confused with that of each member of parliament who, with their vote, contributes to the formation of the will of the Chamber" (FJ 7.2 b) and, therefore, "the intentions of the members of parliament who voted in favour of the law [...] are not subject to our control" (FJ 7.3.1). The "procedural debate taking place in this court [...] concerns rules, not intentions" (FJ 11.4 *in fine*), etc. The error lies not so much in what the Constitutional Court says, but rather, as I say, in the radical way in which it says it. Legislation is certainly a process of objectification, but a process of objectificacion must not be confused with a process of crystallisation, capable of turning 'semantic autonomy' into true watertightness, the priority of the official purpose over the real purpose into a lexicographical priority or, in other words, the presumption of coincidence between the official purpose and the real purpose into a presumption *iuris et de iure*.

Therein lies the crux of the matter: in the rejection of evidence to the contrary. For the fact that priority must generally be given to the semantic aspect of meaning —to what can be inferred from the text of the law, including its explanatory memorandum— does not mean that its pragmatic aspect, which can be inferred from the 'extralinguistic' context in which the law originated, should be disregarded, at least when such meaning emerges with *indisputable clarity*. Ordinary physiology should not serve as an excuse for ignoring extraordinary pathology. 'Semantic autonomy', not only conventional autonomy, but also the autonomy referred to here, is always relative. Consequently, if it can be proven, in exceptional cases, that the real or contextual purpose is illegitimate and that this purpose has in some way transcended the legislative process, it must be concluded that it affects the validity of the law[33]. The concept of

[32] Velasco, 2025, p. 511.

[33] In any case, I note that episodes of rupture or defeat of this form of 'semantic autonomy' are considerably more exceptional and rare than those of conventional semantic autonomy, which are commonplace. The breakdown of that 'semantic autonomy' is an anomaly or pathology that is unlikely to occur in a well-ordered parliament and is itself a symptom of institutional deterioration. Perhaps that is why Ekins' thoughtful

law as a simple set of words cannot be taken to extremes. Laws must also be seen as an expression of collective intentions and as artefacts endowed with a purpose or finality. Although intention, finality and justification are three distinct things, they often merge into the idea that the judge's job is to understand the meaning of and give meaning to the law, rather than slavishly follow its words.

We can agree on the empirical difficulty of proving the intentions of the legislator, but not on its conceptual impossibility, which is what a divided Constitutional Court (six votes to four) ultimately postulates when it states apodictically that it is not possible to 'lift the veil' or "expect this Court to exercise political realism [...] to investigate and assess underlying political facts that would ultimately explain the intentions of the parliamentarians who voted in favour" (STC 137/2025, FJ 7.2 b)). Our opinion is resolute: legal formalism cannot completely replace 'political realism', lest it undermine the substantive dimension of the rule of law. Ascertaining the intentions of the legislator is an epistemic question and, as such, can be elucidated through ordinary procedures for discovering and establishing the facts[34].

More precisely, the epistemic difficulty of scrutinising the mental states of MPs cannot be used as an argument to rule out the possibility of attributing an intention to a group. It is possible to develop an idea of collective agency that does not presuppose 'collective entities' but rather complex networks of rules of attribution[35]. In fact, in everyday life we find no impediment whatsoever to attributing intentions to groups, organisations or institutions, whether through *representative intentions* (we identify certain individuals whose intentions count as the intentions of the group) or through *shared intentions* (as in our case, where it is not difficult to assume that many people have the same intentions)[36]. Such attribution must be possible, especially where party discipline operates with an iron fist and circumstances allow us to presume that all or almost all members of parliament share the real objectives.

It should also be borne in mind that it makes no sense to radically disregard the intentions of those involved in the legislative process. If we assume that the laws made by MPs do not represent their intentions, we would have to assume that whether these intentions are stupid or wise, partial or impartial, self-interested or selfless, *self-serving or public-spirited,* is irrelevant, which is irrational. Such a premise would only be acceptable if we could rely on some kind of 'invisible hand' mechanism to ensure the goodness or desirability of laws regardless of the beliefs and intentions of MPs, but such a Smithian or Hayekian mechanism can hardly operate in party-dominated parliaments (cf. Raz, 2009, p. 275). The epistemic difficulty is therefore just that, a difficulty, which can be overcome with more or less sophisticated or more or less demanding evidentiary procedures.

The epistemic difficulty has certainly not been an insurmountable obstacle in European case law. When necessary, it is perfectly capable of shifting from the 'semantic' mode to the 'pragmatic' mode[37]. To illustrate this, it suffices to recall a single episode, perhaps the simplest one, from the tortuous judicial reform in Poland[38]. I am referring to the Polish parliament's

monograph (2012), which focuses on the British Parliament, with its safeguarding rules and conventions, does not even consider it.

[34] Marmor, 2001, p. 220.

[35] Cf. Bayón, 2017, p. 71.

[36] Cf. Marmor, 2001, pp. 206-212.

[37] The Constitutional Court believes it has sidestepped this obstacle by demonstrating the limited relevance of the CJEU rulings cited by the appellants (see STC 137/2025, FJ 7.3.1). However, perhaps because it is aware of the greater receptivity of the case law of the Court of Justice (and even of the European Court of Human Rights) to pragmatic arguments, especially in sensitive matters of the rule of law, it has felt the need to cover its bases by pointing out in advance that, in any case, European rulings 'cannot constitute an autonomous canon of constitutional adjudication' (see STC 137/2025, FJ 7.3.1). Needless to say, this clarification is not accurate, or at least not entirely so: the principle of interpretation in conformity with EU law also binds the constitutional judge.

[38] The latest and most general ruling is CJEU 5-VI-2023, case C-204/21, §§ 91-110 and 112; see also CJEU 2-III-21, case C-824/18; CJEU 15-VII-2021, case C-719/19,§ 157; etc. These disputes and others before them (see CJEU 6-XI-2012) are part of a landscape marked in recent years by the Court of Justice's leading role in defending the

approval of the law lowering the retirement age for magistrates to 65. Although the officially stated aim was to harmonise the retirement age with that of other workers and to promote a more balanced seniority structure in the judiciary, the CJEU had no qualms about considering that the real aim was to facilitate the removal of the most troublesome judges from the Supreme Court and, on that basis, ruled that the law posed a threat to the separation of powers[39]. It saw this so clearly that it issued a precautionary measure ordering the suspension of the application of the reform under threat of coercive fines of one million euros per day.

It can therefore be said that the European Court ignored the assertive content of the legislative text while focusing on the content communicated in the context, from which it inferred that the dominant purpose of the reform was to control the Supreme Court, with the inevitable result of undermining judicial independence, a basic principle of the rule of law (Articles 2 and 19 TEU). The arguments put forward were varied, but were largely based on circumstantial evidence, the unsuitability of the measures taken and the lack of need to make them retroactive immediately in order to achieve the desired goal of harmonising the retirement age, something similar to what, in my view, should have happened —and did not happen— with the Amnesty Law in Spain[40]. In short, what the CJEU said was that, although the official purpose was legitimate, the actual context undermined its credibility:

> [the context raises] doubts as to the fact that the reform made genuinely seeks to standardise the retirement age of those judges with that applicable to all workers and to improve the age balance among senior members of that court (CJEU 24-VI-2019, § 84).

In this way, the EU Court of Justice flatly rejects the axiom on which the domestic amnesty judgment is built: "the purpose of the law is one thing [...], and the ultimate intention of its author another" (STC 137/2025, FJ 7.2 b)). From that premise, its conclusion could be nothing other than the following:

> Having regard to all the foregoing considerations, it must be held that the application of the measure lowering the retirement age of the judges of the Sąd Najwyższy (Supreme Court) *to the judges in post within that court is not justified by a legitimate objective*. Accordingly, that application undermines the principle of the irremovability of judges, which is essential to their independence (CJEU 24-VI-2019, § 96) / It follows that the Commission's first complaint, alleging breach [of the principle of judicial independence] of the second subparagraph of Article 19 TEU, must be upheld (CJEU 24-VI-2019, § 97).

The logic behind the Court's reasoning is similar or close to that which governs Article 18 of the ECHR, namely the logic of *abuse or misuse of power (détourmnement de pouvoir)*: a formally legitimate measure may be incompatible with the rule of law if, by its design and context, it allows ends to be achieved that are incompatible with judicial independence. It even argues that there is no need to prove subjective intent or conspiracy; structural risk is sufficient. The spectre of institutional deterioration associated with autocratic legalism runs, not without drama, through the CJEU judgment of 24 June 2019.

Furthermore, it should not be forgotten that the idea of semantic watertightness and the purely lexicographical priority to which it leads are untenable from a strictly positive point of view. *Analytically, they amount to nullifying the control of arbitrariness sanctioned by Article 9.3 SC* [or

rule of law and by the progressive refinement and honing of legal weapons to respond to democratic regression in various countries, notably Poland and Hungary.

[39] See CJEU 24-VI-2019, case C-619/18, especially §§ 80-97.

[40] The considerations arising from the principle of proportionality are relevant in this regard (see Paz-Ares, 2024, pp. 106–138).

Spanish Constitution] *in fine*[41]. Assuming as a methodological hypothesis that no lawmaker in their right mind —like no defendant in theirs— would publicly confess what is hardly confessable, the conversion of the lawmaker's statement into an unassailable dogma of faith leads to the a priori exclusion of the possibility of verifying whether they have acted or may have acted with a twisted intention and, with it, the very possibility of controlling the legislative branch's abuse of power. The only way to guarantee a minimum content to the positive clause prohibiting arbitrariness is to configure the priority of the text over the context as a non-absolute priority, as a qualified or highly qualified priority or presumption, if you will, but relative or *iuris tantum*, rebuttable by proving beyond reasonable doubt that the primary purpose does not coincide with the stated one. This demanding condition is not disputed: the ordinary functioning of a parliamentary democracy critically depends on the qualified strength of the priority or presumption.

The Constitutional Court itself is aware that it may have gone too far in its defence of lexicographical priority and its particular theory of semantic watertightness. So much so that it can think of nothing else to save its reasoning than to end it with this new dialectical pirouette:

> All of the above does not mean, however, that every express explanation provided by the legislator must be validated without further ado. The important thing, it should be emphasised, is the legal analysis [what has been called here semantic analysis] of the contested law. Whether the legislator intends to achieve a spurious purpose with it is, ultimately, something that this court can only legitimately determine by analysing the normative object on which its judgement is based, and not through a judgement of political intentions (STC 137/2025, FJ 7.2 c); similar terms had already been used in FJ 7.2 a)).

I recommend that the reader reread the transcribed passage more carefully. You will notice that the Constitutional Court's attempt at salvation cannot fare any better than that of Baron Münchausen. The profound contradiction in its argument —the Court is trying to have its cake and eat it too— is clearly evident. It is pragmatically inconsistent to affirm the Court's willingness to control the spurious purpose of the legislator and, at the same time, to maintain that the spurious nature of the purpose can only be proven by the text of the law. It is tantamount to relying on the defendant's confession for any conviction[42]. We will also see that, even assuming its criterion, the opposite conclusion must be reached in the case at hand, since there are data in both the explanatory memorandum to and the articles of the Amnesty Law which give the parliament away (see *infra* § 6 b) *in fine*).

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[41] On the meaning of the clause in domestic and foreign constitutionalism (the Swiss case is of interest), see, among others, Tomás Ramón Fernández, 2016, pp. 83 ff (this work offers the distilled product of his three sector-specific books on the subject).

[42] Imagine that the parliament of the Autonomous Community of Murcia passes a law prohibiting the use of sports facilities for religious purposes at the proposal of Vox and in view of the well-known precedent of the Jumilla City Council. From the context, it could easily be inferred that the stated purpose (reserving sports facilities for uses of this nature only) conceals an attack on the religious freedom of Muslims and the principle of equality, as the government rightly argued on this occasion (see, for example, *El País* 11-VIII-2025; 'The Government challenges the PP and Vox veto on Islamic celebrations in Jumilla'). I am grateful to Víctor Ferreres for bringing this illustrative example to my attention.

6. Pragmatic openness of the AG: authenticity of purpose

The next step in our reasoning aims to show that, although it may appear so, the AG does not make the same mistake as the TC. His approach leaves more room for pragmatics. A careful reading of his Opinion shows that the legitimising effectiveness of the stated purpose is contingent upon proof of its empirical authenticity[43]. The AG takes the trouble to review the case law of the ECHR on amnesties precisely in order to highlight the need for the objective of reconciliation to be, as common sense dictates, the genuine objective pursued by the legislator or, at least, if there are several objectives, the main objective. In less than a page, he insists on four occasions on the requirement that the amnesty "be part of a *credible framework* of transitional justice"; respond to "a *genuine* process of national reconciliation"[44]; "be part of a *genuine* process of justice that includes reparation for victims and, where appropriate, reconciliation"[45]; and be adopted "in a *real context* of political and social reconciliation"[46]. This insistence is easy to understand given the inherent risk that this act of clemency may be adulterated or used for nefarious purposes in the context of political strategies of dubious democratic quality.

It is true, however, that after so much insistence on authenticity, the AG concludes —somewhat hastily, somewhat disappointingly and without the slightest hint of critical analysis of the plausibility of such a goal of reconciliation— that

> "this seems to be the case here, as suggested by the very purpose of the [Law], expressed in its official title: 'Organic Law 1/2024, of 10 June, on amnesty for institutional, political and social normalisation in Catalonia'" (Opinion, § 90; it insists on the same point when ruling out discrimination on ideological grounds in §§ 126-128).

It is precisely here that we notice the superficiality of his analysis, both legally and factually. On the legal level, one misses the fact that the examination of the ECHR case law has not been extended to its doctrine on the abuse or misuse of power in light of Article 18 of the ECHR, which is anything but irrelevant in this case, as we shall later see (see § 7 below). And on a factual level, it is difficult to understand why the AG did not question the authenticity or credibility of the stated objective in view of the well-known background to the amnesty, of which it will suffice to highlight two points at this stage.

a) One lies in the very circumstance of the *narrow majority* with which the law was passed. On this point, unlike the Commission[47], the AG did not make the most of the Venice Commission's report. The AG agrees with the Council of Europe experts in stating that a political amnesty can only be justified for the purpose of reconciliation[48]. However, he departs from them when he ignores or overlooks the suspicious fact, to say the least, that the law was passed by such a narrow simple majority.

It is well known that the Venice Commission argued that the amnesty should be approved by a large, comfortable or qualified majority. This requirement was not a desideratum devoid of legal relevance (there is no doubt that it is best for any law to be approved with the greatest possible consensus!), as some analysts have suggested. Such a superficial interpretation of the

[43] *Rectius*, upon the non-rebuttal of the presumption of authenticity that supports it.

[44] Opinion, § 82.

[45] *Ibid*, § 84.

[46] *Ibid,* § 90.

[47] Observations, 2024, § 95.

[48] Venice Commission, 2024, §§ 78 and 80.

Venice message is not convincing. It should not be forgotten that the message is included in a report on the legal viability of the measure from the perspective of the rule of law (not on its political expediency)[49]; that the authors of the report are highly qualified jurists, who weigh every move or leave nothing to chance; and, above all, that the reference to a qualified majority takes on a 'backbone' force in the report. This is not a simple marginal allusion or a passing comment. The claim that the law should be approved by 'an appropriate qualified majority' was insistent and recurrent. In a relatively brief, sober and very measured text, the phrase is repeated no less than six times[50]. Why such insistence? How can it be explained? In my opinion, there is only one explanation: as a structural requirement of any political amnesty or, if you prefer, as a *sine qua non* condition for the objective that justifies it. *Reconciliation lacks credibility without a comfortable majority*[51].

When the Amnesty Law was announced, a headline in *The Economist* (9 November 2023) summed up the situation perfectly: "Spain's prime minister secures his job, at high cost. An amnesty for separatists may calm some Catalans, but it infuriates other Spaniards". The fury and anger unleashed by the decision did not go unnoticed by the experts at the Council of Europe, who observed the disruptive effects of the amnesty everywhere: in academic, professional and political circles, etc., and in civil society itself, whose mass demonstrations against the measure should not be ignored. The Venice Commission adds opinion polls to the data it has compiled and reworked, noting, for example, that according to Metroscopia, 70% of the population surveyed was against the amnesty, compared to 26% in favour[52]. Given the "fierce criticism" and the "deep and virulent" confrontation caused by the amnesty at all levels (these are the words and judgements of the Venice Commission), its conclusion was that the very objective of reconciliation pursued by the amnesty was in danger. And it was precisely to avoid "its highly divisive effects on society" that the experts urged the law to be approved by "an appropriate qualified majority".

The premise implicit in their entire analysis is *the existence of a direct and necessary correlation between the credibility of reconciliation and the breadth of consensus*. Ultimately, the Venice Commission suspects that the invocation of reconciliation is a sham. This is where I see the crux of its report: a narrow or scraped-together majority—and the resulting fracture of political representation into two irreconcilable halves—is itself divisive. A scraped-together majority and reconciliation are therefore a *contradiction in terms*.

b) The other fact that should have led the AG to question the authenticity or credibility of the proclaimed intention of reconciliation is the fact that the Amnesty Law was forged as *a condition for the investiture* of the Government among the political parties of the coalition. I am not confusing motives and ends. I am simply noting that, oftentimes, the two overlap. Achieving the investiture was not, moreover, a simple motive for those who sought to remain in power; it also incorporated a specific purpose —albeit insufficient to justify an amnesty, as

[49] It does not seem admissible either to consider this requirement as a deduction from 'the rational idea of the rule of law' and, at the same time, to declare it irrelevant from a legal point of view (however, see Velasco, 2025, p. 522). The idea of the rule of law, from the moment it is enshrined in Article 1.1 of the Spanish Constitution or Article 2 of the TEU, is a legally relevant idea, and that relevance accompanies all its derivations. This is very clear in recent European case law (see, for example, CJEU judgment of 16 February 2022, case C-156/21, §§ 127 and 232).

[50] Cf. Venice Commission, 2024, §§ 62, 75, 78, 80, 122 *in fine* and 128.

[51] A comfortable majority must be interpreted broadly, encompassing both a large affirmative majority and a more restricted majority without significant opposition (the observations of Aguado, 2024, pp. 83-85 are relevant to this point). The absence of significant opposition indicates that the majority is not divisive.

[52] See Venice Commission, 2024, §§ 32 and 98. Although it does not cite this report, the AG echoes the 'deep and virulent debate' caused by the amnesty in Spanish institutions, the political class and society (Opinion II, § 4).

we saw before (see *supra* § 4 *ab initio*) — which was to enable the development of a 'programme of progress'. President Sánchez could not have expressed it more clearly when, in view of the election results, he set the process in motion:

> on behalf of Spain, in the interests of Spain, in defence of coexistence among Spaniards, I defend amnesty in Catalonia today [...] because this is the only possible way to have a government in Spain and not give Feijóo and Abascal a second chance to form a government that would set us back decades in just a few years[53].

Add to this the fact that on the eve of the elections, none of the parties in the governing coalition considered amnesty to be suitable for reconciliation. Those who rejected it (basically the PSOE) did so because they believed it could poison coexistence: their understanding was that the policy of concord had reached the edge of the precipice with the pardons and penal reform and that taking a further step would mean falling out of, or tumbling down from, the zone of equilibrium with a certain and serious risk of deepening the division instead of promoting reconciliation (as the Venice Commission would later confirm[54]). And those who demanded it (especially Junts and ERC, but also Sumar and Podemos, etc.), because they considered it necessary, not to promote reconciliation (which the nationalists abhorred), but for a radically different reason —and one radically incompatible with the principle of separation of powers—, which was to undo the injustice they believed had been committed by the courts in applying the Criminal Code to the Catalan insurgents and, ultimately, to rectify or overturn the Supreme Court's ruling on the 'procés' and what they imagined would be its consequences for other defendants. This is precisely what the famous 'dejudicialisation' consists of[55]. Is there not reason to doubt the authenticity of the stated purpose in the text of the law when the context —everything that was said publicly by both sides the day before and what some later recorded in the minutes of the Congress and Senate sessions— overwhelmingly indicates that none of the parties promoting and agreeing to it really believed in reconciliation?

Reconciliation was a pretext. The real objective of the amnesty was government (investiture). The explanation of the amnesty as the result of the negotiation of a common programme by the parties forming the investiture coalition is certainly accurate. What is not accurate is the view of this negotiation as *business as usual*, in which amnesty is presented as yet another concession made by one party to another in order to obtain its support, as if it were the transfer of commuter trains to the Generalitat of Catalonia or an adjustment demanded by the other party in housing policy. That is where the mistake lies. Amnesty, as an exceptional remedy, does not lend itself to being used as a bargaining chip in a political transaction. The AG himself underlines this idea on several occasions. One is when he recalls the danger inherent in 'periods of political turmoil', namely that "political forces resort to amnesty as a means of extending and consolidating power"[56]. Another is when he specifies his teleological speciality:

> only a strictly limited amnesty that is part of a genuine process of justice, involving reparation for victims and, where appropriate, reconciliation, can be considered compatible with the positive obligations incumbent on the States Parties to the ECHR (Opinion, § 84).

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[53] These words spoken by the President before his party's Federal Committee were echoed throughout the press (see, for example, *El País*, 29 October 2023, pp. 22–23). There are many other similar testimonies that could be cited (see Paz-Ares, 2024, pp. 79–80 and 85–86).

[54] Therefore, we cannot share the opinion of those commentators who speculate with the possibility that, in reality, the amnesty was not inconsistent with the PSOE's previous policy (see, for example, López Guerra, 2024, p. 25). They ignore Paracelsus' lesson: *sola dose facit venenum*. Even less so those who venture that the PSOE's opposition to the amnesty during the election campaign was a simple 'white lie' (I. Sánchez Cuenca, 'El PSOE en el laberinto de la amnistía', *El País*, 16 May 2024, p. 13).

[55] This point, which is discussed in detail in my book (see Paz-Ares, 2024, pp. 86-97), would later be taken up incisively by Mestre (2024, pp. 175 ff.).

[56] Opinion, § 2, footnote 6.

But, in this case, the amnesty bears in addition an original sin that amplifies or emphasises its illegitimacy from the perspective of both the European principles of the rule of law and the Spanish Constitution. I am not referring to the exchange of favours that colours the self-amnesty agreement, as emphasised by the Commission[57], but to the purpose for which, as stated above, it was originally conceived by its promoters: de-judicialisation (or judicial rectification), which is incompatible with the separation of powers and the exclusive jurisdiction of the courts (Arts. 117.1 and 3 of the Spanish Constitution). Such a purpose cannot be altered or erased retrospectively by a simple change of name; it is not enough to say that what was previously judicial rectification is now reconciliation. Dejudicialisation cannot be whitewashed by a simple appeal to reconciliation and the general interest in the explanatory memorandum, even if repeated six times over[58]. The irritation caused in the judiciary by the amnesty does not stem from its supposed opposition to a genuine policy of concord, but from the interference of the legislator in its work, an interference that it has perceived as undermining its classification of the 'procés' as a serious crime of sedition and confirming the accusation vehemently spread by the independence supporters, who have branded the Supreme Court's rulings as 'political persecution'.

For all these reasons, anyone who has closely followed the process cannot help but be surprised by judgements such as this: "it is not possible to discern in the Amnesty Law the intention to criticise or censure the Judiciary that the appellants attribute to it"; without the decriminalisation of conduct "giving rise to any legislative assessment of the jurisdictional activity that the judicial bodies may have carried out in the past with regard to conduct that is now eligible for amnesty" (STC 137/2025, FJ 11.4). It is difficult to escape the feeling of emptiness that these words produce. Despite all the care taken in the defensive wording of the law, the idea of dejudicialisation has ended up appearing in it, even *expressis verbis*. There are two particularly telling pieces of information. One is the passage from the explanatory memorandum in which we read that the Spanish Parliament approves amnesty as a way "to address a political conflict through politics" (Preamble, section II, 5th paragraph *in fine*). The complete sentence sounds like more than just *an excusatio non petita*; it is directly revealing[59]. It does not speak of crimes, but of political conflict; it does not speak of illegalities and disobedience to the law; it only speaks of politics, everything is politics, and in politics—as one commentator ironically observed—judges should not intervene (De Carreras, 2024, p. 78). Ultimately, the idea of dejudicialisation cannot be separated from the concept of 'lawfare' touted by the separatists, a concept that would eventually emerge, as is well known, in the PSOE-Junts political agreement for the investiture, made public on 9 November 2023.

The other, even more revealing piece of information lies in the very definition of the scope of the amnesty, from which Article 1.1 LA excludes practically all criminal acts committed by those who opposed the 'procés' and secession (the only exceptions being the 'police actions' provided for in letter e) and related acts in letter f). This exclusion, which the nationalist forces insisted on during the legislative process, can only be explained as confirmation that the true purpose of the law was to 'dejudicialise' acts of affirmation of independence and secession, which the independence supporters saw, as indicated, as 'political persecution' when classified as criminal offences by the judges. The curious thing about the case is that the Constitutional Court, instead of interpreting this asymmetry in the treatment of supporters and opponents of secession as positive evidence that dejudicialisation was part of the real purpose of the law, interprets it – once again assuming the axiomatic nature of the official purpose – as a simple inconsistency with the idea of reconciliation, to which it limits its corrective intervention (see STC 137/2025, FJ 8.3.4). In this specious manner, the Court avoids having to annul the entire law on the basis of the constitutional illegitimacy of its real purpose. Assessing the inconsistency as a simple violation of the principle of equality (Art. 14 CE), it suffices to declare art. 1.1 LA unconstitutional ('by omission'). The only consequence of this defensive approach is to extend, against the clear will of the historical legislator, the benefits of the amnesty to opponents of the 'procés' (STC 137/2025, FJ, 8.3.5).

[57] Observations, 2024, § 94.

[58] We must be careful with words: 'dejudicialisation' may be plausible as an expression of 'enhancing the capacity for dialogue', but it is unacceptable if it is understood as a means of 'immunity for politicians' (cf. Aragón, 2024, p. 306), which is how it has been understood by nationalists.

[59] Full quote: 'In this way, by taking on this legislative policy decision, the Spanish Parliament not only does not encroach on other areas, but, on the contrary, in exercising its powers, takes the best possible approach to addressing a political conflict through politics'.

I do not dispute the logic of minor surgery within the general framework of understanding or pre-understanding of the law assumed by the Constitutional Court[60]. What I dispute —and object to— is that the Court has not pulled on that thread to question, with a strictly textual argument, that general framework of understanding and, on that basis, undertake a major surgical operation. In this respect, the Advocate General's reasoning is methodologically much less objectionable. The reason now put forward by the Advocate General for rejecting the existence of 'self-amnesty' (i.e., for rejecting the general illegitimacy of the amnesty) does not fail normatively. It fails only factually, which is a more excusable error given the limitations of cognition inherent in the preliminary ruling procedure in which it is involved. The AG lacked the data to question that the amnesty 'operates impersonally', which is why he affirms this. In other words, the AG probably failed to notice that Article 1.1 LA was intended to operate asymmetrically, benefiting only those who participated in the 'procés' in order to 'protect a political regime [i.e. the pro-independence government of the Generalitat and the forces that supported it] or its representatives against possible legal action' rather than operating symmetrically for the benefit of all (including those who committed crimes against the 'procés', with the aim of 'responding to an exceptional situation with a declared objective of normalisation' or reconciliation[61]. This observation is anything but irrelevant. It allows us to conjecture that if the AG had noticed the asymmetry denounced —as the Constitutional Court did—, it would not have been content with modifying the law in the additive sense proposed by the Constitutional Court. The logic of its reasoning would have led it to annul it or declare it inapplicable in its entirety, as it constituted a 'self-amnesty' contrary to the principle of the rule of law.

I highlight these aspects because they are of great importance from the point of view of the European Union. The CJEU has long assumed that all national courts, insofar as they are called upon to apply European law, must be protected against any state, legislative or executive measure that could undermine the effectiveness of judicial independence and effective judicial protection enshrined in Articles 19 TEU and 47 EUCFR for the judiciary of the Union[62]. Experience has also shown that the effectiveness of the defence of the rule of law lies not so much in 'political mechanisms' (Article 7 TEU) as in 'judicial mechanisms', whether through the bringing of infringement proceedings before the CJEU or through the submission of preliminary questions, as in this case.

c) Had the two above circumstances been taken into account and properly intertwined, it is very likely that the AG would have seen the amnesty as a high *structural risk to the rule of law* (in itself and in associated principles: separation of powers, effective judicial protection, equality, etc.), in the same way that the CJEU saw the Polish pension reform as a structural risk to judicial independence. I say this because, even though the AG did not pay due attention to the warning signs, the most essential aspect or truth of his message remains and cannot be overlooked: *amnesty cannot be taken lightly; it cannot be resorted to for mere reasons of political expediency; it must respond to a genuine objective of national reconciliation*.

At this point, it goes without saying that authenticity implies a minimum connection between the context of discovery and the context of justification by the legislator. The radical separation between the aims of the law and the motives of the legislator maintained by the Constitutional Court is difficult to reconcile not only with the European conception of the rule of law and the letter of our constitutional order (Art. 9.3 SC)[63], but also —and this is the point we wish to emphasise here— within the Constitutional Court's own case law. Indeed, in previous rulings it had proclaimed, with both prudence and precision, the need to go beyond a purely semantic

[60] If I am not mistaken, this type of law-saving surgery was proposed at the time by Saiz Arnaiz, 2024, pp. 106–115.

[61] The quotations are from the AG's own words (see Opinion § 94; see also § 126).

[62] For an initial overview, see, in our literature, Magaldi, 2022, pp. 135 ff., with reference to European case law since the inaugural case of the CJEU 27-II-2018, case C-64/16 (case ASJP or of the Associação Sindical dos Juízes Portugueses).

[63] This last point, already anticipated, is highlighted throughout legal doctrine. As an example, specifically in relation to amnesty, see Fernández Farreres, 2024, pp. 191 ff.; further information can be found in Paz-Ares, 2024, pp. 224-236.

analysis. The fact that the constitutionality of a law cannot be judged on the basis of 'political intentions' —as can be read in one of those rulings—

> does not mean that it should be carried out exclusively on a purely formal level, *disregarding the context in which the contested provision was enacted, which is essential for assessing whether or not that* [constitutionally legitimate] *purpose actually exists* (thus, literally, STC 122/2016; in the same vein, although more oriented towards the analysis of suitability and necessity in the proportionality test, see STC 203/2013[64]).

The immediate consequence of this standard of review is obvious: one cannot focus solely on the *result* (the text of the law); one must also consider the *process* that produced it (the context of its drafting), which inevitably leads to scrutinising the objectives pursued by those who promoted the initiative and participated in its drafting and approval. And there is no other way to do this than by inferring intentions from that process, which is precisely what the amnesty ruling denies (as we mentioned earlier, its position on this point is radical: "the intentions of the members of parliament who voted in favour of the law [...] are not subject to our control"[65]). Had it acted in accordance with its previous doctrine, the Court would have had to recognise that the purpose that motivated the majority of MPs to approve the amnesty was the investiture of the Government (on which the continuity of the legislature and their seats also depended) and, if you like, the associated possibility of implementing their 'programme of progress', and that this purpose transcended the subjective sphere of each member of parliament to the objective sphere of the law precisely because it became *the common and determining motive* for their actions[66].

The common and determining character is what, according to private law doctrine, causes the motive to be incorporated into the cause. Although that concept cannot be extrapolated mechanically, the intuition behind it retains a certain explanatory usefulness in the legislative sphere. If the Minister of Transport promotes an amendment to the Coastal Law for a corrupt motive (imagine the most serious case: receiving a million-dollar bribe from a wealthy family interested in renewing the extension of the concession provided for in section 1 of its first transitional provision) and the amendment goes ahead due to the inertia of voting discipline and the unwillingness of MPs to question the purpose for which it is officially presented by one of their own (e.g., the need to delay the occupation, management and conservation of the public maritime-terrestrial domain that would otherwise be released, given the enormous financial burden that assuming those responsibilities would place on public authorities while a high public deficit persists), the resulting law can hardly be annulled on the grounds of arbitrariness. The corrupt motive must have transcended the legislative process, because without a 'twisted intention' or a 'deviant intention' there is no form of arbitrariness that is relevant. The conduct of parliament and the legislative power as such will be objectionable for lack of diligence, not for lack of loyalty to

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[64] It is not a matter of entering into the judgement of proportionality now, assuming that it can be clearly distinguished from the judgement of reasonableness or non-arbitrariness (on this point, I refer to Paz-Ares, 2024, pp. 48 ff. and 106 ff.). I reiterate, in any case, the reluctance of STC 137/2025 to assess the amnesty from the perspective of proportionality.

[65] STC 137/2025, FJ 7.3.1.

[66] To justify the doctrine of STC 137/2025, Paco Velasco emphasises the distinction between "the objective purpose of the law and the motives of parliament members". "The purpose of the law is objective and shared. The motives or intentions of lawmakers are subjective and individual. And just as the objective purpose of the law allows for a judgement of constitutionality, the motives and intentions of lawmakers are not amenable to the control of the law" (Velasco, 2025, p. 511). The error of our dear colleague is not conceptual (the distinction is fine), but factual (the subsumption of the facts at hand into it is not so fine). Everyone knows that the shared and decisive reasons of the socialist MPs (first of the Prime Minister, then of the Federal Committee of the PSOE, then of the Socialist Parliamentary Group and then of its members) for voting in favour of the Amnesty Law were not those that appear in the Preamble or, at least, they were not solely or primarily those. All MPs were aware of the underlying exchange and, from that moment on, the motives and intentions ceased to be subjective and individual and became objective or 'causal' as the legislator's purpose (cf. Paz-Ares, 2024, pp. 152-157 and § 5, footnote 35 and corresponding text).

the public interest, which is what usually justifies the charge of abuse of power (see Paz-Ares, 2024, pp. 163-166). Needless to say, the opposite response would be appropriate if the corrupt or illegitimate motive had infected the process in some way with the participation, intermediation or acquiescence of key figures in the government, the party, the parliamentary group and, ultimately, the parliamentary machinery.

Aware of the doctrinal contradiction it is committing, the Constitutional Court strives to sidestep it in the amnesty ruling. Another pirouette in the air, in my view[67]. What we are now being told is that the standard of authenticity and the contextual or pragmatic review it entails does not apply to the Amnesty Law. The argument put forward to this effect is that the standard in question was established in relation to a singular, self-applicable law with a single recipient, and that its application must be limited to this special class of laws. And it is true that the rulings invoked (from 2016 and 2013) did indeed concern laws of this class or nature[68]. My question, however, is whether this circumstance matters, whether it matters so much once the Constitutional Court has admitted singular laws and measure laws.

The standard for judging constitutionality should not depend on the structure of the law —whether it is a self-enforcing law or not, whether it is based on an 'administrative decision' or of another nature, whether its recipients are many or few— but on its function. It should depend in particular on the legitimacy of its purpose, not simply the stated purpose, but the authentic purpose that motivated those who were involved in its production. And if this is the case, it seems irrelevant whether the law is singular (as were those of 2013 and 2016) or based on a single factual assumption (as is the case with the amnesty law) or based on a general factual assumption. If, as is repeatedly claimed in STC 137/2025, intentions are really "a matter outside the legal sphere", if the "will of the legislature cannot be confused with that of its members", then the structure of the law —whether singular or general— becomes irrelevant. In either case, the same approach should be taken, limiting oneself to the text and ignoring the context. "This court judges the law and abides by the content of the law"[69]. Or is a singular law not a law? Or is it that, if the parliamentary machinery has not been affected and the members of parliament who approve the singular law are completely unaware of the proposer's unjust motive and approve it convinced of its public interest objective, the law can also be annulled without further ado? Is it not necessary that there be a context in which the MPs can at least be accused of having pursued a policy of burying their heads in the sand, or in which the proponent's instructions have left the strictly private sphere?[70]

The case of the Romanian amnesty of 2019, which was ultimately aborted, provides an eloquent example. With the aim of granting amnesty to a number of political allies (convicted of fraud and corruption with sentences of up to five years), the Romanian government and the bloc of parties that supported it proposed the approval of an amnesty law to parliament, which on paper —this was the official purpose stated in the bill— responded to the need to reduce prison overcrowding and court congestion[71]. The law, in effect, benefited all those convicted

[67] That is why I think it is naive to believe that the Constitutional Court really 'adheres to previous constitutional doctrine', as Velasco argues, 2025, p. 503; see also pp. 507-508.

[68] Although this circumstance was not always inferred from the text of the law under review; it was certainly not inferred in STC 122/2016.

[69] STC 137/2025, FJ 7.2 b).

[70] The existence of voting discipline introduces a degree of simplification or flexibility into the requirement that the grounds for challenging the constitutionality of the law through the prohibition of arbitrariness must be common and decisive.

[71] It is worth noting that, in principle, the official purpose of the Romanian amnesty could be considered legitimate, as it has in fact been considered legitimate in Italy, where this type of amnesty has been relatively common. As a historical curiosity, I would like to recall that the amnesty granted on 3 July 1931 at the proposal of Fernando de los Ríos in relation to the falsification of secondary school diplomas at a school in Madrid was granted 'due to the inability of the judiciary to address the cause' (I take the reference from De Miguel Bárcena, 2024, p. 114).

and prosecuted for minor offences, a category that included anyone with a sentence of five years or less in prison. Contextual evidence that the legislature's hidden objective was to benefit convicted or prosecuted politicians of the party itself and that eliminating prison and court congestion was merely a pretext fuelled protests in the country, followed by enormous pressure from European institutions to drop the bill[72]. The final nail in the coffin was the reprimand issued to the Romanian authorities by the then President of the European Commission, Jean Claude Juncker, during a press conference held in Bucharest on 11 January 2019. His words were enough: "If amnesty is granted, as some in this country foresee, it would be a step backwards for the rule of law"[73]. "Divine words," as Araceli Mangas put it (2024, p. 259). They saved the indignity of a twisted amnesty tailored for the government's corrupt partners.

I bring up this case to propose a new thought experiment to the reader. I ask you to imagine what the Constitutional Court's response would have been if such an amnesty had been approved in Spain and the contextual evidence of the corrupt motive had been as liquid and clear as it was in Romania. I have no doubt that, despite their insistence on semantic watertightness, our magistrates would have declared the law unconstitutional under the principle of prohibition of arbitrariness, either directly or through the proportionality test. Frankly, I find it difficult to believe that in such a case, the Court would wash its hands of the matter on the pretext of the 'self-sufficiency of the official purpose'. Ultimately, the content of the domestic rule of law clause (Art. 1.1 CE) does not differ from the content of the European clause (Art. 2 TEU), as recognised by the Constitutional Court itself in its ruling on the amnesty (STC 137/2025, FJ 1.2.2 c) [ii]).

Finally, I note that the inconsistency of the Constitutional Court's semantic thesis does not only occur externally, that is, between the amnesty ruling and the doctrine proclaimed by the Court in previous rulings. On closer inspection, it also occurs internally, within the amnesty ruling itself, where the legitimacy of the measure is made subject to *the requirement of exceptionality*[74]. The requirement of this condition is not at all consistent with the semantic radicalism of its doctrine, in which the only relevant factor is the text of the law. In fact, for this reason, it has been criticised by the authors who are most strongly in favour of semantic theses[75]. I interpret this theoretical anomaly in the ruling as a covert concession to the pragmatic thesis, as an adjustment or palliative that the Constitutional Court has been forced to introduce to protect itself from the serious consequences its basic or initial approach is exposed to. Only in this way, for example, could it put a stop to an attempt as obscene as the Romanian amnesty mentioned above. It is a pity that the same approach has not been applied in the case of the Spanish amnesty.

That said, I fully agree with the doctrine of exceptionality proclaimed by the Court. Political amnesty must pass a test of aggravated exceptionality: "it is exceptional within the exception of the measure itself. Therefore, it is not enough for it to be justified, but it must be exceptionally justified"[76]. *Exceptional justification* does not mean only, or not so much, that the assumption —he illness— that motivates it is exceptional in terms of recurrence and severity (as the 'procés'has been), but above all that the solution —the remedy— is exceptional in terms of effectiveness. To say that the remedy is exceptionally justified means that there is no doubt that it is appropriate or, if you prefer, that it is appropriate beyond reasonable doubt, which brings us back to square one (see § 6 a) above). There needs to be broad consensus on its appropriateness or the adoption of the necessary safeguards to achieve it (e.g. making the

[72] The pressure came from all the European institutions – the Parliament, the Commission, the Council – and took the form of various threats: no lifting of the Cooperation and Verification Mechanism (CVM), risk of suspension or blocking of European funds, possible activation of Article 7 TEU, etc.

[73] See the article by E. Zalan, "EU warns Romania over corruption amnesty", *Euobserver*, 11 January 2019: "EU Commission President Jean Claude Juncker on Friday (11 January) warned the Romanian government not to press ahead with a planned law that would grant amnesty for corruption offences, undermining such EU 'essentials' as the rule of law".

[74] STC 137/2025, FFJJ 2.2 and 6.2. It is true that the ruling on the amnesty draws on a point made in STC 147/1986, but the development of the argument is entirely its own.

[75] Notably from Velasco, 2025, pp. 503 and 512-514.

[76] These are words from Cruz Villalón, 2024, p. 59.

effectiveness of the measure conditional on repentance and the implementation of minimum restorative justice measures, as respectfully requested by the Council of Europe experts[77]). Only countermeasures of this nature could confer a minimum of credibility on an amnesty adopted for purposes in which none of the groups that endorsed it believed or trusted the day before[78].

My hypothetical interlocutor will argue that the above argument is undermined by empirical evidence. Subsequent events would have shown that the goal of reconciliation has been achieved. Allow me to question the premises of this reasoning. Not so much the minor premise (which posits the irrelevance of *ex post* analysis when judging the validity of an act or a rule), but rather the major premise, which accepts or takes for granted the reconciling effect of amnesty. My impression is quite the opposite. Amnesty has probably been the factor that has contributed most to aggravating emotional polarisation since the promulgation of the Constitution and, therefore, coexistence in the Spanish society, the most divisive measure of the last fifty years. The improvement in the social and political situation in Catalonia does not serve as counter-evidence. It is true that the turmoil that followed the ruling on *the Catalan independence process* has subsided. It could not be otherwise, given that it achieved its objective —an amnesty to neutralise it— without even requiring its beneficiaries to acknowledge their wrongdoing and commit to not repeating it. It remains to be seen, however, whether the balm will last, especially in the medium and long term, in a scenario of political alternation. The real test lies behind this question: is it reasonable to think that in a context in which right-wing forces come to power in the national government and the Generalitat returns to the hands of the separatists, there will be no risk of new constitutional turmoil? Is it plausible to believe this when the amnesty has been granted without making it conditional on the prior renunciation of 'unilateralism' or any kind of restorative justice? Can we rule out in advance that in such a scenario social unrest, political confrontation and, eventually, the subversion of the constitutional order will return to Catalonia? The perception of the author is not optimistic. Without an effective 'renunciation of unilateralism', the amnesty, rather than guaranteeing the stability of the constitutional order and harmony, becomes an incentive to break it in the future. We must not deceive ourselves about the direction of causality. The relative social peace achieved in Catalonia: has it been the result of criminal deterrence or of the measures of clemency granted (pardons and then amnesty)? Has it been due to the ordering and expressive effectiveness of the law or to the relaxation or mitigation of its harshness? Historians of our 19th century and the first half of our 20th century agree on one thing, and that is that it was precisely the customarily reinforced *ex ante* expectation of obtaining an amnesty that multiplied *ex post* the incidence of military pronouncements.

7. Arbitrariness and the doctrine of 'ulterior purpose'

We thus come to the end of our journey with a clear idea: the exceptional legitimacy of the amnesty for the 'procés' is contingent upon the undoubted authenticity of the goal of reconciliation that it proclaims. Our hypothetical detractor will note that the fact that the Amnesty Law pursued certain objectives (investiture and dejudicialisation) does not in itself exclude the possibility that it may also have pursued other objectives and, specifically, reconciliation. I have no objection to acknowledging this point. I do not deny that many of those MPs who voted in favour of the amnesty *also* wanted reconciliation, and even committed themselves to it[79]. Nor do I deny that the Polish MPs who approved the reduction in the retirement age also wanted, as stated in their explanatory memorandum, to harmonise the retirement age for judges with that of other workers and public employees and to optimise the seniority of the judicial workforce, or that the proponents of the Romanian amnesty also sought to relieve congestion in prisons and courts.

This clarification is relevant in order to take the final step in our reasoning and bring it into line with European doctrine on the misuse of power. We must now turn our attention to the European Convention on Human Rights for several reasons: because domestic rules protecting fundamental rights affected or undermined by the amnesty (equality, effective judicial

[77] Venice Commission, 2024, § 127.

[78] This point is emphasised, and rightly so, by Aguado, 2024, pp. 75-77.

[79] Another thing is that they were somewhat more sceptical about their chances of success, which is ultimately the implied meaning behind the famous motto 'make a virtue of necessity'.

protection, etc.) must be interpreted in accordance with the Convention in question (see Article 10.2 of the Spanish Constitution), because the Amnesty Law considered it necessary or appropriate, for rethorical reasons, to emphasise that it is based on the Convention in its Preamble (see section III, 4th paragraph) and, above all, because it was AG Spielmann himself who invoked the case law of the ECHR to justify that the amnesty should be based on a genuine purpose of reconciliation (see *supra* § 6 *ab initio*). Our complaint is that the AG did not then extend the invocation to that other case law of the ECHR, which is just as interesting, if not more so, for our purposes, in which, in the light of Article 18 of the ECHR, an increasingly well-defined doctrine on *ulterior purpose* is established, a case law with which the AG should be familiar, given that he was President of the ECHR.

The doctrine of ulterior purpose' posits the existence of abuse or misuse of power —arbitrariness in domestic terms— when a state measure that restricts fundamental rights for an apparent or formally legitimate purpose is actually used for a different and not so noble purpose. It is therefore a doctrine that invites us to 'lift the veil' of the stated purpose, which is precisely what the Constitutional Court has closed its doors to[80]. The *leading case* in this area is the judgment of the Grand Chamber of the Strasbourg Court in the dispute of *Merabishvili v. Georgia* (ECHR 28-XI-2017). The judgment is important for our purposes for three main reasons:

First: because it clarifies the *possibility of the coexistence of legitimate and illegitimate purposes*. A right or freedom is sometimes restricted for an unforeseen or illegitimate purpose under the Convention, but more often, the Court states, it is restricted for an unforeseen or illegitimate purpose and, at the same time, for another foreseen or legitimate purpose, which is precisely what we have assumed as a working hypothesis *ad arguendo*: in the adoption of the Amnesty Law, the (legitimate) purpose of reconciliation may have coexisted with the (illegitimate) purposes of investiture and dejudicialisation. What is interesting about Merabishvili is that the ECHR considers the idea of multiple aims or purposes to be susceptible to scrutiny under the abuse of power provision in Article 18 of the ECHR. Therefore, the premise of our Constitutional Court, which would only be willing to admit the control of arbitrariness —and this would already be a great concession— in those cases where the illegitimate motives or purposes are the "*sole* explanatory cause of the legislature's act", cannot be accepted[81].

Secondly, because it establishes the criterion of *determining or preponderant causality* when examining the compatibility of the measure with the ECHR. In the case of multiple purposes, the question is to determine "whether the stated purpose invariably erases or eliminates the ulterior purpose, whether the mere presence of the ulterior purpose contravenes Article 18, or whether there is an intermediate answer"[82]. Unsurprisingly, the Strasbourg Court recognises that

> there is a considerable difference between cases in which the prescribed purpose was the one that truly actuated the authorities, though they also wanted to gain some other advantage, and cases in which the prescribed purpose, while present, was in reality simply a cover enabling the authorities to attain an extraneous purpose, which was the overriding focus of their efforts. Holding that the presence of any other purpose by itself contravenes Article 18 would not do justice to that fundamental difference, and would be inconsistent with the object and purpose of Article 18, which is to prohibit the misuse of power (ECHR 28-XI-2017, § 303).

[80] Cf. STC 137/2025, FJ 7.2 b) and § 5 *ab initio* above.

[81] STC 137/2025, FJ 7.2 a).

[82] ECHR 28-XI-2017, § 292.

The conclusion is simple: where several purposes coexist, the decision as to whether there has been a misuse of power —and therefore a violation of Article 18 of the ECHR— must be made by weighing up which purpose had the greatest causal weight, which was decisive or simply preponderant in the decision.

> Consequently, the European Court considers that a restriction may be compatible with the substantive provision of the Convention that authorises it, since it pursues an objective that is permissible under that provision, *but still infringes Article 18 because it mainly referred to another purpose that is not prescribed in the Convention; in other words, if that other purpose was predominant.* Conversely, if the main purpose was the prescribed purpose, the restriction is not contrary to Article 18, even if it also pursues another purpose (ECHR 28-XI-2017, § 305)[83].

An examination of the background reveals that this role corresponds to the purpose of government (investiture) for some and dejudicialisation (rectification) for others or, in other words, to the exchange of the former for the latter. The definitive question in this regard, the one that hits the nail on the head, is very simple: would there have been an amnesty if it had not been necessary for the investiture, as would have been the case, for example, if the Socialist Party had obtained an absolute majority in the election? I do not believe that there is a single person in Spain who doubts the negative answer to this question.

Thirdly, because, even though it establishes a very demanding standard of proof, it broadly admits *circumstantial evidence*. This is another fundamental innovation of the *Merabishvili* doctrine, which deals the final blow to the purely semantic theses exemplified by the Constitutional Court's ruling[84]. The Strasbourg Court considers, in effect, that the preponderance of the ulterior motive —and, therefore, the abuse of power—, although it must be proven "beyond any reasonable doubt", does not need to be inferred directly or indirectly from the text of the law. It is sufficient that it can be proven by sufficiently strong, clear and consistent inferences or similar presumptions of fact[85]. And it is not necessary to show now how easy this task is in the case of the Amnesty Law in view of the existing contextual evidence. It is such a well-known public fact that it is practically exempt from proof[86]. The Constitutional Court itself ends up acknowledging this in its ruling on the amnesty:

> This court is not unaware of [...] the particular circumstances in which the Amnesty Law was passed, as well as *the express link that has existed between the passing of that law and the investiture of a candidate for the Presidency of the Government*. [...] This court neither endorses nor censures this action, as it is not its institutional role. Its mission is to analyse the contested law and, based on its content, determine whether there is a

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[83] Note the contrast between this criterion and that of the Constitutional Court, which limits the control of arbitrariness to the extreme case in which the law lacks 'any rational explanation' and, consequently, denies it if it can be inferred from the preamble that it has some rational explanation, even if only 'a little' or secondary or marginal (STC 137/2025, FJ 7.2.a).

[84] It is appropriate to note that in *Merabishvili,* the Court expressly acknowledges that it is overruling its own criteria. It recalls that until then, it had been requiring "direct and incontrovertible proof" of the illegitimate purpose, which practically deprived the control of abuse of power of any effect. States do not normally confess their less than saintly intentions; they do not allow themselves to be caught red-handed (see ECHR 28-XI-2017, § 260). On the historical importance of this change in criteria, see, most recently, with further references, Finnerty, 2023, pp. 447 ff.

[85] ECHR 28-XI-2017, § 314.

[86] See Paz-Ares, 2024, pp. 232-236 with further references. The truth is that no effort is required to 'lift the veil' and discover the true purpose of the law, which is by no means 'hidden' (Aragón, 2026, ap. 2.1).

constitutionally legitimate purpose and, as far as arbitrariness is concerned, a justifiable reason of general interest (STC 137/2025, FJ 7.2).

In view of the foregoing, my conclusion is that the *doctrine of ulterior purpose* is called upon, or should be called upon, to play a relevant role in the CJEU's decisions on the Amnesty Law. I hope I am not mistaken, either in my diagnosis or in my prognosis. Not surprisingly, its case law on abuse or misuse of power is equivalent to that of the European Court of Human Rights in relation to Article 18 of the ECHR[87] and to that which, in relation to Article 9.3 of the Spanish Constitution, was noted in Constitutional Court Ruling 122/2016 (and, to a certain extent, also in Constitutional Court Ruling 203/2013) and, in my view, should also have been followed in STC 137/2025 to establish the scope of the clause prohibiting arbitrariness[88]. The three cases are similar in nature: all are directed against the political exploitation of formally legitimate measures, all operate as a structural limit to low-level authoritarianism, and all link their effective implementation to the quality of the rule of law, which is measured precisely by the degree of control over arbitrariness[89].

8. Final consideration

The three counterfactual questions I have used to organise this reflection reveal a certain superficiality in AG Spielmann's analysis and, at the same time, reinforce the need for a strong response from the Court of Justice to defend the integrity of the rule of law as a guarantee of the primacy of Union law and the principle of mutual trust. The three questions certainly stretch the hypothesis under examination, but that is precisely what was needed for a clear analysis. I trust that the answers obtained through the stress test will help to understand the formidable violation of the constitutional order —both domestic and European— that lies behind the amnesty for the 'procés'. Its magnitude can be seen by lining up the three resulting objections —the reality of self-amnesty, the irregularity of the legislative procedure and the hollowness of the stated purpose— and observing how they interact or reinforce each other. For rather than adding to the damage, they multiply it.

Nothing new under the sun. The strategy followed by our legislators, attempting to conceal the substantive illegitimacy of this specific amnesty under the formal legality of amnesty in the abstract, perfectly fits, in my view, the strategic pattern of autocratic legalism, which sometimes manifests itself crudely and sometimes subtly. The reader will judge which is the case. This composite sketch of the autocratic legalist may serve as a yardstick or reference for you to form your own opinion:

[87] A case in point is the CJEU judgment of 16 April 2013, cases C-274/11 and C-295/11, § 33: "An act only constitutes a misuse of power where there are objective, relevant and consistent indications that it was adopted solely or at least in a decisive manner to achieve objectives other than those for which the power in question was conferred or to circumvent a procedure specifically established by the Treaties to deal with the circumstances of the case" (see also CJEU judgment of 4 December 2013, case 111/10, § 80, and CJEU judgment of 13 November 1990, case C-331/88, § 24, and *ibi* further references). It should also be noted that the doctrine of misuse of powers is part of *primary EU law*. Article 263 TEU expressly recognises that the European Parliament itself, as co-legislator, may be guilty of this. It is a different matter that the hypothesis is certainly exceptional; in fact, none of the known cases refers to legislative acts of the European Parliament.

[88] On this point, the dissenting opinions to STC 137/2025 by C. Tolosa Tribiño (§§ 20-22 and 275-280 and 303-309) should be shared; C. Espejel (app. II.6), E. Arnaldo (app. VI) and R. Enríquez Sancho (app. 3).

[89] "Opposition to the exercise of arbitrary power is the value animating the rule of law". This is the central thesis and guiding thread of Gerald Postema's recent book on the rule of law (see Postema, 2022, p. 17).

> Instead of operating in the world of liberalism, then, autocratic legalists operate in the world of legalism. Liberal, democratic constitutionalism as a normative political theory is committed to the protection of rights, to checked power, to the defense of the rule of law, and to liberal values of toleration, pluralism, and equality. By contrast, legalism's requirements are simply formal: law meets a positivist standard for enactment as a technical matter when it follows the rules laid down, regardless of the content or value commitments of those laws. Laws that meet the test of legalism are enacted according to law; laws that meet the test of constitutionalism must substantively comply with the principles of a liberal legal order. When legality undermines constitutionalism, it is because the values of the new laws have superseded the values of constitutionalism rather than the other way around, as constitutionalism itself requires. The cure for laws that violate constitutional values is to nullify them as unconstitutional, which is one reason why some of the autocratic legalists begin their power grabs by disabling constitutional courts (Scheppele, 2018, pp. 562-563).

I conclude by invoking once again the doctrine of 'ulterior purpose'. It is no coincidence that, in his speech on 25 January 2019 in Strasbourg, President of the ECHR Guido Raimondi noted that the increasing application of Article 18 of the ECHR is an indicator of the decline of the rule of law and democracy, the cause of which is associated with political leaders who are more concerned with advancing themselves than with protecting or strengthening the fundamental institutions of the democratic system ("they see the judiciary, the press and the opposition as 'enemies of the people'[90]). This is no coincidence, because the spread of autocratic legalism can only be effectively combated through control techniques based on the abuse of power and arbitrariness. In our country, many analysts consider the Amnesty Law to be the epitome of the 'deterioration of our constitutional democracy'[91]. The question is whether the amnesty ruling and, following it, the opinion of the AG are heading —thoughtfully or thoughtlessly— in the same direction and, instead of subjecting politics to the law, have ended up allowing or facilitating the subjugation of law to politics. This is precisely the shadow hanging over this case.

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[90] The quote from Raimondi is taken from Kahn 2022, pp. 129-130, footnote 51, to which I refer for a more detailed elaboration of the idea that violations of Article 18 serve as a barometer of the state's return or regression towards forms of authoritarianism (*ibid*, p. 142).

[91] Thus, for example, Aragón, 2024-b, pp. 136-139.

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