

OPEN LETTER TO  
COMMISSION PRESIDENT JUNCKER AND EUROPEAN COUNCIL  
PRESIDENT TUSK

cc. First Vice-President Frans Timmermans

**UPHOLDING THE RULE OF LAW IN THE EUROPEAN UNION**

3 November 2017

Dear President Juncker, dear President Tusk:

We are scholars, politicians, public intellectuals and members of the European Parliament writing to you with the following concern:

The European Union has proclaimed the Rule of Law principle and respect for fundamental rights and freedoms to be binding on its Member States (Articles 2 and 6 of the Lisbon Treaty). The EU's leadership has been a staunch protector of these fundamental norms, most recently in countering the Polish government's attempts to undermine the independence of judges as well as the Hungarian government's actions to limit civil society and media freedoms.

However, we are deeply concerned that the EU's governing bodies are condoning the violation of the Rule of Law in Spain, in particular regarding the Spanish central authorities' approach to the 1 October referendum on Catalan independence. We do not take political sides on the substance of the dispute on territorial sovereignty and we are cognizant of procedural deficiencies in the organisation of the referendum. Our concern is with the Rule of Law as practised by an EU Member State.

The Spanish government has justified its actions on grounds of upholding or restoring the constitutional order. The Union has declared that this is an internal matter for Spain. Issues of national sovereignty are indeed a matter of domestic politics in liberal democracies. However, the *manner* in which the Spanish authorities have been handling the claims to independence expressed by a significant part of the population of Catalonia constitutes a violation of the Rule of Law, namely:

1/ The Spanish Constitutional Tribunal banned the referendum on Catalan independence scheduled for 1 October, as well as the Catalan Parliament session scheduled for 9 October, on grounds that these planned actions violate Article 2 of the Spanish Constitution stipulating the indissoluble unity of the Spanish nation, thus rendering secession illegal. However, in enforcing in this way Article 2, the Tribunal has violated Constitutional provisions on freedom of peaceful assembly and of speech – the two principles which are embodied by referendums and parliamentary deliberations irrespective of their subject matter. Without interfering in Spanish constitutional disputes or in Spain's penal code, we note that it is a travesty of justice to enforce one constitutional provision by violating fundamental rights. Thus, the Tribunal's judgments and the Spanish government's actions for which these judgments provided a legal basis violate both the spirit and letter of the Rule of Law.

2/ In the days preceding the referendum, the Spanish authorities undertook a series of repressive actions against civil servants, MPS, mayors, media, companies and citizens. The shutdown of Internet and other telecom networks during and after the referendum campaign had severe consequences on exercising freedom of expression.

3/ On referendum day, the Spanish police engaged in excessive force and violence against peaceful voters and demonstrators – according to Human Rights Watch. Such disproportionate use of force is an undisputable abuse of power in the process of law enforcement.

4/ The arrest and imprisonment on 16 October of the activists Jordi Cuixart and Jordi Sànchez (Presidents, respectively, of the Catalan National Assembly and Omnium Cultural) on charges of sedition is a miscarriage of justice. The facts resulting in this incrimination cannot possibly be qualified as sedition, but rather as the free exercise of the right to peaceful public manifestation, codified in article 21 of the Spanish Constitution.

The Spanish government, in its efforts to safeguard the sovereignty of the state and indivisibility of the nation, has violated basic rights and freedoms guaranteed by the European Convention on Human Rights, the Universal Declaration of Human Rights, as well as by Articles 2 and 6 of the basic law of the EU (the Lisbon Treaty). *The violation of basic rights and freedoms protected by international and EU law cannot be an internal affair of any government. The silence of the EU and its rejection of inventive mediation is unjustifiable.*

The actions of the Spanish government cannot be justified as protecting the Rule of Law, even if based on specific legal provisions. In contrast to rule-by-law (rule by means of norms enacted through a correct legal procedure or issued by a public authority), Rule of Law implies also the safeguarding of fundamental rights and freedoms – norms which render the law binding not simply because it is procedurally correct but enshrines justice. It is the Rule of Law, thus understood, that provides legitimacy to public authority in liberal democracies.

We therefore call on the Commission to examine the situation in Spain under the Rule of Law framework, as it has done previously for other Member States.

The EU leadership has reiterated that violence cannot be an instrument in politics, yet it has implicitly condoned the actions of the Spanish police and has deemed the actions of the Spanish government to be in line with the Rule of Law. Such a reductionist, maimed version of the Rule of Law should not become Europe's new political common sense. It is dangerous and risks causing long-term damage to the Union. We therefore call on the European Council and Commission to do all that is necessary to restore the Rule of Law principle to its status as a foundation of liberal democracy in Europe by countering any form of abuse of power

committed by Member States. Without this, and without a serious effort of political mediation, the EU risks losing its citizens' trust and commitment.

The crisis has in the meantime developed further (the Catalan government was detained, arrest warrant was issued against Mr Puigdemont). We follow closely the situation with the interests of democracy in Catalonia, Spain and Europe in mind, as they cannot be separated, and we insist all the more on the importance for the EU to monitor the respect of fundamental freedoms by all parties.

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