

European Commission  
Frans Timmermans, First Vice-President, Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights  
Vera Jourová, Justice, Consumers and Gender Equality

Dear Commissioners,

The undersigned organizations are writing to express their grave concern in relation to serious threats to the rule of law in Spain.

Since 2012, the Spanish government has been introducing reforms that, taken collectively, would seriously weaken the rule of law. A Court Fees Act and an initial reform to the Organic Law of the Judiciary were passed in 2012; a law to reform the Judicial Council (*Consejo General del Poder Judicial*) was passed in 2013; and reforms to the Criminal Code and the Citizen Security and Public Safety Act have been passed in March 2015. Proposed reforms to the Legal Aid Act, the Criminal Procedure Act and additional reforms of the Organic Law of the Judiciary are still under discussion in parliament.

We are deeply concerned that these legislative reforms adversely affect the proper functioning of the institutions responsible for safeguarding the rule of law, and attack the following elements of the rule of law: access to justice and independent and effective judicial review; non-discrimination and equality before the law; separation of powers and judicial independence; legal certainty and respect for human rights; and a transparent, accountable, democratic and pluralistic process for enacting law. Any attempt to attack these values and threaten the rule of law undermines the mutual trust between the Member States required for the EU to function, as well as the commitments made by national governments and the Union towards its citizens.

The European Commission has affirmed that “in cases where the mechanisms established at national level to secure the rule of law cease to operate effectively, there is a systemic threat to the rule of law and, hence, to the functioning of the EU (...). In such situation, the EU needs to act to protect the rule of law as a common value of the Union”.<sup>1</sup> The European Commission has therefore established a new EU Framework to safeguard the rule of law against systemic threats which is complementary to other existing mechanisms and seeks “to enable the

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<sup>1</sup> Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law. Brussels, 19.3.2014, COM(2014) 158 final/2, page 5.

Commission to find a solution with the Member State concerned in order to prevent the emerging of a systemic threat to the rule of law (...) that could develop into a “clear risk of a serious breach” within the meaning of Article 7 TEU”.<sup>2</sup>

In the attached document, we detail how EU principles and values are threatened in Spain as a result of legislative reforms, some of which have been adopted and others which are in the course of being approved, and how domestic rule of law safeguards have not been capable of containing such threats. In Annex I to the explanatory note, we have compiled statements of concern and recommendations on the situation of the rule of law in Spain, issued by international and regional human rights mechanisms, for your information. In Annex II we have compiled photographic evidence to exemplify the lack of resources and physical state of the Spanish court infrastructure as well as documents showing hearing dates to be set up to four years from now.

We therefore call on you to intensify the Commission’s scrutiny of the situation in Spain and undertake an assessment under the framework on the rule of law, as well as to take the following courses of action to prevent further erosion of the rule of law in Spain:

- With respect to the proposed Legal Aid Act: request the Spanish government to keep the reform in line with the right of access to justice.
- With respect to the Court Fees Act: request Spain to repeal the Act, as it is discriminatory.
- With respect to the proposed reforms to the Organic Law of the Judiciary and the Criminal Procedure Act: request the Spanish government to withdraw the bills because they are piecemeal instead of comprehensive reforms. The government should reopen the reforms to proper consultations with the aim of ensuring the reforms lead to an effective reorganization and modernization of the judicial system.
- Remind the Spanish government that its judiciary should be organized and resourced in such a way as to secure independence and to ensure the judiciary can secure the rule of law, including an adequate number of judges, proper facilities and resources, etc.
- Remind the Spanish government that political and executive interference with the judiciary is inconsistent with the requirement for an independent judiciary.
- With respect to the proposed reforms to the Citizen Security and Public Safety Act and the Criminal Code: request the Spanish government to repeal the laws as they infringe the principle of legal certainty and the freedoms of expression and assembly, fundamental rights in a democratic society governed by the rule of law.

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<sup>2</sup> *Ídem*, page 6.

- With respect to the new immigration law that legalizes summary returns: request the Spanish government to repeal the provision and ensure the law is in line with EU Asylum Procedures Directive, the Schengen Borders Code and the Return Directive.
- In general, the Spanish government should reopen the whole package of reforms to proper public consultation, carrying out and publishing impact assessments and ensuring cross-party consensus as far as possible as well as respect for the principle of legal certainty.

Please do not hesitate to contact us if you need further information or clarification.

Best regards,

Rights International Spain  
Jueces para la Democracia

# Systemic threats to the Rule of Law in Spain

## 1. Introduction: EU Framework to strengthen the Rule of Law

Human rights, justice and the rule of law are intrinsically linked and constitute core values on which the European Union is founded. Any attempt to attack these values undermines the mutual trust between the Member States required for the EU to function, as well as the commitments made by national governments and the Union towards its citizens. The European Commission has affirmed that “in cases where the mechanisms established at national level to secure the rule of law cease to operate effectively, there is a systemic threat to the rule of law and, hence, to the functioning of the EU (...). In such situation, the EU needs to act to protect the rule of law as a common value of the Union”.<sup>3</sup> To this end, the Commission set out a framework to safeguard the rule of law against systemic threats. This new framework is complementary to other existing mechanisms and seeks “to enable the Commission to find a solution with the Member State concerned in order to prevent the emerging of a systemic threat to the rule of law (...) that could develop into a “clear risk of a serious breach” within the meaning of Article 7 TEU”.<sup>4</sup>

The basic and guiding principles of the rule of law set out in the EU Framework to strengthen the Rule of Law include: (i) access to justice and independent and effective judicial review; (ii) non- discrimination and equality before the law; (iii) separation of powers and judicial independence; (iv) legal certainty and respect for human rights; and (v) a transparent, accountable, democratic and pluralistic process for enacting law.<sup>5</sup> Section 4 below, details how these EU principles and values are threatened in Spain, and how the ability of national mechanisms to secure the rule of law is being compromised.

## 2. Legislation at issue

Since 2012, the Spanish government has been introducing reforms that, taken collectively, would seriously weaken the rule of law. A Court Fees Act and an initial reform to the Organic Law of the Judiciary were passed in 2012; a law to reform the Judicial Council (*Consejo General del Poder Judicial*) was passed in 2013; and reforms to the Criminal Code and the Citizen Security and Public Safety Act have been passed in March 2015. Proposed reforms to the Legal Aid Act, the Criminal Procedure Act and additional reforms of the Organic Law of the Judiciary are still under discussion in parliament. Although some of the proposals have been adjusted in the face of challenges to their legality, and strong political and public

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<sup>3</sup> Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law. Brussels, 19.3.2014, COM(2014) 158 final/2, page 5.

<sup>4</sup> *Ídem*, page 6.

<sup>5</sup> Annexes to the Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law. Strasbourg, 11.3.2014, COM(2014) 158 final (Annexes 1 to 2).

opposition, they remain problematic.<sup>6</sup> Given the political majority of the governing party, it is expected that the reforms will largely be adopted in the form proposed by the government.

### 3. Social and political context

The financial crisis has seen an increase in people using freedom of assembly. The public has relied heavily on this fundamental right as a means of expressing its opposition to, or to call for, reforms. Demonstrations have been used to oppose: austerity measures, such as cuts in spending on health care and education; repossession of homes by banks and the sale of toxic financial products;<sup>7</sup> political corruption; and proposals to reform rules regulating abortion. Demonstrations have also been used to demand greater transparency and public participation in decision-making, and to oppose limitations on the rights to freedom of peaceful assembly and expression. These public protests have occurred, among other places, outside government buildings, officials' residences and banks, as well as in private homes to prevent evictions. The government initially attempted to restrict and deter the public from peaceful protest through the use of criminal sanctions as well as the imposition of administrative fines. However, individuals began to successfully challenge these measures through the courts. In reaction the government has taken measures to reduce the effectiveness and independence of the judiciary. With the financial crisis, more people have had to use the courts to defend their rights (to challenge fines for participating in demonstrations, to fight evictions and to recover investments in toxic financial products). However, the government has taken measures as well to create new financial barriers and other obstacles for individuals to use their right to access to justice.

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<sup>6</sup> For example, a number of measures that were included in the initial draft of the Criminal Code reform have been dropped during the legislative process before Congress, such as security and probation measures "*libertad vigilada*". With respect to the Criminal Code reform, see further, Rights International Spain, recommendations sent to Congress (October 2013) and recommendations to the Senate (February 2015), available here: <http://rightsinternationalspain.org/uploads/publicacion/e8601aae12cf5ac75bd4e6ad7240211020e46ec5.pdf>; <http://rightsinternationalspain.org/uploads/publicacion/4eeb2abaed0f5083131266b87fd8a3e3302f08c5.pdf>.

With respect to the Citizen Security and Public Safety Act, see further, Rights International Spain, Legal Brief (March 2014), and observations to Congress (October 2014): <http://rightsinternationalspain.org/uploads/publicacion/1615e270a19ef72e4fddced6a1d2810ec54ed1f5.pdf>; <http://rightsinternationalspain.org/uploads/publicacion/ef7a1a5fbde23fae2f794d95eca7754a82eff190.pdf>.

After more than two years in force, the government approved a law on 27 February 2015 partly modifying the Court Fees Act. With respect to the Organic Law of the Judiciary, the Council of Ministers approved the initial bill on April 2014 and the final bill sent to Congress dates 27 February 2015: available here [http://www.mjusticia.gob.es/cs/Satellite/Portal/1292427335891?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DAPLO\\_REFORMA\\_LOPJ\\_WEB.PDF.PDF](http://www.mjusticia.gob.es/cs/Satellite/Portal/1292427335891?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DAPLO_REFORMA_LOPJ_WEB.PDF.PDF).

<sup>7</sup> *Preferentes* shares sold by banks, in particular between 2009 and 2011. They are complex financial products involving a high financial risk. Banks were not transparent concerning their conditions. People who invested their savings have not been able to recover their money.

## 4. Impact on the rule of law in accordance with the EU Framework

### a) Access to justice and independent and effective judicial review

The right to effective judicial protection, as explained by the Court of Justice of the EU, is “one of the general principles of law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms”.<sup>8</sup> This right, integral to the concept of the rule of law is also protected by article 47 of the EU’s Charter of Fundamental Rights.

The European Court of Human Rights has affirmed that the Article 6 (1) guarantee of the right to a fair trial must be considered to include “the right of access to a court” and that litigants should not be “denied the opportunity to present his or her case effectively before the court”.<sup>9</sup> Legal aid is essential for the effective protection of fundamental rights, including the right to a fair trial, as recognized by article 47 of the EU Charter of Fundamental Rights. It is an essential element of a fair, equitable and effective justice system based on the rule of law. Access to legal counsel for individuals with insufficient resources is inherent to the right of access to justice.<sup>10</sup>

The proposed Legal Aid Act creates a barrier to access to justice by limiting the availability of free legal counsel.<sup>11</sup> Free legal counsel would be no longer available to an individual earning more than 1,065 Euros per month. For an individual who is a member of a family the cut-off point is slightly higher (1,331 Euros for households of 2 or 3 persons and 1,597 Euros for households of 4 or more). The median net salary for someone in employment in Spain stands at around 1,200 Euros per month.<sup>12</sup> Many people wishing to protect their rights against arbitrary or disproportionate administrative measures or decisions by, for example, contesting a fine for participating in a demonstration, will have to cover the costs of a lawyer and a court representative (*procurador*).

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<sup>8</sup> See, for example, Case C-550/09 E and F, [2010] ECR I-06213, para 44.

<sup>9</sup> See, for example, European Court of Human Rights, Case of Steel and Morris v. UK, Application N<sup>o</sup>. 68416/01, judgment of 15 February 2005, para. 59.

<sup>10</sup> European Court of Human Rights, Case of Airey v. Ireland, Application N<sup>o</sup> 6280/79, judgment of 9 October 1979.

<sup>11</sup> The text of the draft legislation currently being debated in the Congress is available here:

[http://www.congreso.es/public\\_oficiales/L10/CONG/BOCG/A/BOCG-10-A-84-1.PDF#page=1](http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-84-1.PDF#page=1)

A joint submission by Rights International Spain and the General Council of Spanish Lawyers to the UN Special Rapporteur on the independence of judges and lawyers concerning this bill is available here:

<http://www.rightsinternationalspain.org/uploads/publicacion/46fda387c945a7a85c831d81231d273fd1abc7b3.pdf> and <http://rightsinternationalspain.org/es/blog/58/ris-y-el-cgae-llevan-ante-naciones-unidas-la-reforma-de-la-ley-de-asistencia-juridica-gratuita>

<sup>12</sup> According to the National Statistical Institute, the median gross salary of Spaniards amounts to 22,899 Euros per year, which is equivalent to a net monthly salary of 1,285 Euros.

[http://www.ine.es/dyngs/INEbase/es/operacion.htm?c=Estadistica\\_C&cid=1254736061721&menu=ultiDatos&idp=1254735976596](http://www.ine.es/dyngs/INEbase/es/operacion.htm?c=Estadistica_C&cid=1254736061721&menu=ultiDatos&idp=1254735976596)

The new thresholds included in the proposed Legal Aid Act will have a deterrent effect for a considerable part of the population who will not be able to afford to go to the courts. The budget assigned to cover legal aid services is 34,15 million Euros (in 2013) and 34,94 million Euros (in 2014).<sup>13</sup> According to a Council of Europe report, Spain is among the countries in Europe that spends less on legal aid per inhabitant (0,80 Euros per capita of the annual public budget in 2012).<sup>14</sup> This is an extremely small budget in the context of the financial crisis where more people are seeking to benefit from legal aid services to protect their rights. The proposed Legal Aid Act will not solve this problem, but on the contrary, will hinder access to justice and judicial review, as fewer people will benefit from this right.

According to data from the Judicial Council, the number of contentious-administrative cases registered in 2013 has fallen by 15,5% and the number of civil cases has fallen by 9,2%, by comparison to previous years.<sup>15</sup> Access to the administrative court division is particularly important for citizens to keep public authorities in check, and in 2011 it was the administrative court division that held the highest number of contentious cases out of all the court divisions. The newly passed Citizen Security and Public Safety Act increases substantially the number of administrative infractions and imposes fines that can amount up to 300,000 Euros. This means that the administrative authority will both impose the fine and can automatically enforce it.<sup>16</sup> If individuals wish to contest the fine, and defend

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<sup>13</sup> Source of the information, Ministry of Justice, available here:

<http://www.mjusticia.gob.es/cs/Satellite/1292357701727?blobheader=application%2Fpdf&blobheadername1=Content->

[Disposition&blobheadervalue1=attachment%3B+filename%3D121001\\_Presupuestos\\_2013.pdf](Disposition&blobheadervalue1=attachment%3B+filename%3D121001_Presupuestos_2013.pdf)

and

<http://www.mjusticia.gob.es/cs/Satellite/1292421472917?blobheader=application%2Fpdf&blobheadername1=Content->

[Disposition&blobheadervalue1=attachment%3B+filename%3D%27Nota\\_de\\_Prensa\\_Presupuestos\\_2014.pdf%27](Disposition&blobheadervalue1=attachment%3B+filename%3D%27Nota_de_Prensa_Presupuestos_2014.pdf%27)

For further information see, report of the Observatory on Legal Aid of the Spanish General Council of Lawyers, 2010- 2013, available here:

<http://stat.pnj.cgpi.es/infoe2/11001E%20Informes%20del%20Observatorio%20de%20Justicia%20Gratu/A%C3%B1os%20Anteriores/Observatorio-Justicia-Gratuita%202013.pdf>

<sup>14</sup> Council of Europe, European Commission for the Efficiency of Justice (CEPEJ) Report on "European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice", available here: [http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport\\_2014\\_en.pdf](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf). The Ministry of Justice has not provided updated information for the Commission "2015 EU Justice Scoreboard" report on this matter. See: [http://ec.europa.eu/justice/effective-justice/files/justice\\_scoreboard\\_2015\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf)

<sup>15</sup> See statistical information from the *Consejo General del Poder Judicial* (General Council of the Judiciary) available here: <http://www.poderjudicial.es/cgpi/es/Poder-Judicial/En-Portada/Primera-valoracion-estadistica-de-la-modificacion-de-las-tasas-judiciales>.

However, professionals argue that the drop in cases since 2012 is higher. According to the *Consejo General de la Abogacía Española* (the General Council of Spanish Lawyers, which includes all of Spain's bar associations) between "25 and 35% of citizens have been deprived of the right of access to justice". Source of the information is an interview to the Chair of the General Council of Spanish Lawyers, available here: <http://www.diariojuridico.com/estamos-construyendo-una-nueva-administracion-de-justicia-sobre-bases-falsas-y-movedizas/> This has been partly due to the introduction of court fees.

<sup>16</sup> With respect to the increase of administrative infractions in the Citizen Security and Public Safety bill, see further, Rights International Spain: video interview with Elisa Veiga, former judge at the

themselves against and arbitrary or disproportionate administrative action, they will have to file a complaint before the courts.<sup>17</sup> The assistance of a lawyer as well as a court representative (*procurador*) are mandatory.

The civil court division has also been an important route through which citizens have litigated against corporations (for example, banks and insurance companies) to challenge enforcement of claims by financial institutions relating to toxic financial products (*preferentes*), the repossession of homes by banks and abusive terms in contracts (*cláusulas suelo*).<sup>18</sup> The proposed Legal Aid Act has been designed to prevent ordinary citizens from protecting their rights against the government and the business community.

Another obstacle to the realization of the right to access to justice is the existence of undue or unreasonable delays in the administration of justice. Delays erode public trust in the judicial process and undermine the effectiveness of the justice system. The European Court of Human Rights has reiterated that Article 6 (1) “imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time”.<sup>19</sup> The same view has also been taken by the EU Court of Justice: “The general principle of Community law that everyone is entitled to fair legal process, which is inspired by those fundamental rights (...) and in particular the right to legal process within a reasonable period”.<sup>20</sup>

An initial reform to the Judiciary Act (*Ley Orgánica del Poder Judicial*) in 2012 has already reduced the capacity of courts to handle complaints. Despite having a backlog of cases, the number of substitute judges has been cut by approximately 1,200, which constituted 20% of judges.<sup>21</sup> In addition to the decrease in the justice

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Contentious-Administrative Chamber of the National Court, available here:

[https://www.youtube.com/watch?v=nSpEYWP\\_MY4](https://www.youtube.com/watch?v=nSpEYWP_MY4)

<sup>17</sup> With the Court Fees Act in force from 2012 until 1 March 2015 anyone wishing to initiate litigation had to pay fees. Before 2012, no such fee existed for individuals (natural persons) wishing to litigate. For further information on the Court Fees Act, see Rights International Spain, legal brief on the Law introducing the Court Fees and the jurisprudence of the European Court of Human Rights, available here:

<http://www.rightsinternationalspain.org/uploads/publicacion/033a2695fe05451c854334c4d0c9c08b27330f7a.pdf>; and Rights International Spain: video interview with Verónica del Carpio, Civil law professor and lawyer on the impact of court fees, available here:

<http://www.rightsinternationalspain.org/es/blog/71/el-relator-sobre-la-tortura-de-onu-disconforme-con-la-reforma-espanola-en-materia-de-justicia-universal>

<sup>18</sup> See, for example, ECJ judgment in Case C-169/14, Juan Carlos Sánchez Morcillo, María del Carmen Abril García ./ Banco Bilbao Vizcaya Argentaria, of 17 July 2014 on the irregularity of the Spanish home repossession procedure.

<sup>19</sup> See, for example, European Court of Human Rights, Case of Wasserman v. Russia (No. 2), Application no. 21071/05, judgment of 10 April 2008, para 47.

<sup>20</sup> See, for example, Case C-185/95 P- Baustahlgewebe GmbH v Commission, ECLI:EU:C:1998:608, judgment of the Court of 17 December 1998, para. 21.

<sup>21</sup> According to data (September 2014) provided by the Inspection Service of the Judiciary Council (*Servicio de Inspección del Consejo General del Poder Judicial*), more than 40% of the courts and tribunals in Spain assume more than 150% of the recommended maximum workload and almost a 75% of the courts assume more than 100% of the recommended maximum workload. Source: <http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Consejo-General-del-Poder->



budget (4,21% in 2013 and 2,13% in 2014), this is having a negative impact on the right to have a case heard without undue delay. The threat to timely justice is so acute that legal professionals have launched a public campaign through the social media sharing images of the conditions of courts and documents showing hearing dates that are being set for two to three years in the future (in some cases, even four years).<sup>22</sup> The gap between the judiciary's workload, its budget, human resources and physical infrastructure clearly undermines the effectiveness of the justice system.<sup>23</sup>

The government is proposing two sets of reforms to address delays in access to justice that are owed to lack of resources, high workload and poor infrastructure. Firstly, the government has proposed further reforms to the Judiciary Act (2015) to address some of the resource problems faced by the justice system.<sup>24</sup> However, the proposed changes, such as specialization of judges and changes to rules on how cases are allocated to judges and tribunals, cannot resolve existing problems.<sup>25</sup> This is because the proposal does not include increases in human and material resources for the judiciary. The proposed Act does not include a financial plan to implement the changes.

The second measure is the proposed partial reform to the Criminal Procedure Act. One of the measures included in the reform, seeking to expedite the administration of justice, would be to limit the investigative phase (in criminal proceedings) to six months. Associations of prosecutors and judges have criticized this measure, arguing that such a goal cannot be achieved only by limiting time-periods, but requires other measures, such as providing adequate and sufficient resources to judges and tribunals.<sup>26</sup> The length of the preliminary or investigative phase (prior to the trial) depends on a number of factors and not simply on the timetable set by the courts. In particular: on the available means, effective cooperation with other

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[Judicial/Actividad-del-CGPJ/Estudios/Informe-organos-que-sobrepasan-el-150--de-la-carga-de-trabajo--Datos-a-31-12-2013](#)

<sup>22</sup> Professionals are sharing images of court documents through social media using the hashtag #JusticiaTardiaNoEsJusticia. Source of the information, available here:

[http://elpais.com/elpais/2015/02/11/inenglish/1423655476\\_007023.html](http://elpais.com/elpais/2015/02/11/inenglish/1423655476_007023.html)

<sup>23</sup> With the hashtag #JuzgadosAlBordeDelColapso, professionals are denouncing (through Twitter) the conditions of courts, with pictures of courts and documents with hearing dates. For more information, see further: <http://www.expansion.com/juridico/actualidad-tendencias/2015/03/13/550314b222601d04248b456d.html>

<sup>24</sup> See further, Rights International Spain, video interview with Joaquim Bosch, chair of *Jueces para la Democracia*, available here: <https://www.youtube.com/watch?v=eL8Xq8vcmfM>.

On 27 February 2015, the government sent the partial reform of the Judiciary Act to Congress. See footnote 4, above.

<sup>25</sup> See, Report by *Jueces para la Democracia* on the bill, available here:

<http://www.juecesdemocracia.es/pdf/InformeReformaLOPJ.pdf>

<sup>26</sup> For example, see article by a prosecutor, available here:

<https://labrigadatuitera.wordpress.com/2014/12/15/informe-reforma-lecrim/>

Joint statement by *Jueces para la Democracia* and *Unión Progresista de Fiscales*, available here:

<http://www.attac.es/2014/12/13/comunicado-sobre-la-reforma-de-la-ley-de-enjuiciamiento-criminal/> ; comments to the partial bill by *Jueces para la Democracia*, available here:

<http://www.juecesdemocracia.es/pdf/InformeprovAPrefLecrim.pdf> ; statement by Unión

Progresista de Fiscales, available here: <http://www.upfiscales.com/2014/12/comunicado-u-p-f-sobre-reforma-de-la-ley-de-enjuiciamiento-criminal/>

bodies that assist the courts, and the complexity of the offence. Prosecutors, judges and legal professionals have argued that this measure will in practice contribute to higher rates of impunity, particularly in cases of political corruption, and thus increase the lack of confidence in the courts, and that the law applies equally to everyone.<sup>27</sup> In cases of political corruption, prosecutors and judges have requested greater means and resources with which to effectively investigate cases in a timely manner.<sup>28</sup> The highest consultative body of the State (*Consejo de Estado*) has expressed concern over this measure. According to the State Council, the proposed measures will not achieve its aim without allocating adequate budgetary resources.<sup>29</sup> However, the government has decided to go ahead with the reform and has sent the bill to Congress.<sup>30</sup>

In sum, judges, prosecutors and legal professionals have criticized these reforms as insufficient for their piecemeal approach, when the structural reorganization and modernization of the judiciary requires comprehensive, well-thought out measures as well as adequate resourcing.<sup>31</sup>

The above analysis demonstrates that there is a systemic threat to the rule of law in Spain, given that access to justice is an integral part of this value on which the EU is founded.

### **Specific breaches of EU secondary law**

The emerging barriers to access to justice explained above make it more difficult for individuals to enforce rights derived from EU law. For example, workers on average income will find it very difficult to challenge a claim for unlawful dismissal or claim for unpaid salary or compensation. Under the proposed Legal Aid Act, workers would not qualify for legal aid if they wish to appeal (*recurso de casación*). Consumers will also find it equally difficult to challenge abusive terms in contracts, for example, mortgage agreements. The Court of Justice of the EU has concluded that the Spanish mortgage procedure is in breach of Directive 93/13/EEC, on unfair terms in consumer contracts, and infringes Article 47 of the EU Charter of Fundamental rights since mortgage debtors receive less protection than

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<sup>27</sup> The investigation of political corruption cases involving the governing party, Partido Popular (Gürtel case) is ongoing after more than six years; another case involving the opposition party PSOE, (ERE case), is ongoing after more than five years.

<sup>28</sup> Source of information, available here: <http://www.rtve.es/noticias/20130206/jueces-decanos-toda-espana-pidenrefuerzos-para-investigar-casos-corrupcion/606835.shtml> and <http://www.lne.es/espana/2013/02/13/torres-dulce-pide-refuerzos-casoscorrupcion/1368169.html>

<sup>29</sup> Source of the information, available here: <http://www.elmundo.es/espana/2015/03/09/54fcaee22601dfe1a8b457e.html>

<sup>30</sup> Source of the information, available here: <http://www.mjusticia.gob.es/cs/Satellite/Portal/es/gabinete-comunicacion/noticias-ministerio/gobierno-modifica-lecrim-para>

<sup>31</sup> Statement published by an association of court clerks, SISEJ (*Sindicato de Secretarios Judiciales*), available here: <http://www.sisej.com/actividad-sindical/area-publica-actividad-sindical/1727-el-ministerio-de-justicia-presenta-un-decepcionante-proyecto-de-ley-organica-del-poder-judicial>

creditors.<sup>32</sup> The mortgage procedure in place (which has not yet been changed) thus affects mortgage debtors' right to an effective remedy.

Specific provisions of the Legal Aid Act are also likely to violate EU law rights of certain categories of individuals. For example, victims of crimes may benefit from legal aid, regardless of their economic situation (without having to prove insufficient economic resources to afford to litigate), but only in relation to specific offenses. This conflicts with articles 13 and 14 of Directive 2012/29 on victims of crime, which refers to (any) "victims" having "status of parties" in criminal proceedings. The proposed Legal Aid Act presumes an "abuse of the right" to legal aid if a person applies for legal aid more than three times in a year. However, it does not specify how the "abuse" procedure would work.<sup>33</sup> The absence of a clear procedure also undermines the principle of legal certainty. Access to justice is fundamental for democratic governance. Introducing a presumption of abuse is in itself a violation of this fundamental right. An individual who is fined on several occasions for participating and exercising his or her rights in a protest would be presumed to be abusing the system.

The proposal for a Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings states that suspects or accused persons should have access to this right at the early stages of criminal proceedings and without delay, before questioning takes place and that Member States should make legal aid available until a decision on eligibility has been taken. However, the earliest moment the proposed Legal Aid Act ensures this right is available is at the moment an individual is arrested and in police custody and charges have been made or for the first appearance before a judge. Furthermore, if the individual is not subsequently granted legal aid, the legal aid lawyer who provided the initial service would have to reimburse the State the amounts received. This would have a negative impact on the delivery of the service and, more importantly, on the right to a fair trial.

Finally, newly passed changes to the Spanish immigration law to formalize summary expulsions to Morocco from Spain's enclaves in North Africa are also likely to violate EU law, in particular the Asylum Procedures Directive, the Schengen Borders Code, the Return Directive and the Charter of Fundamental Rights of the European Union. This new amendment will deprive asylum seekers of access to international protection, access to a lawyer and legal aid.<sup>34</sup>

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<sup>32</sup> ECJ judgment in Case C-169/14, Juan Carlos Sánchez Morcillo, María del Carmen Abril García ./ Banco Bilbao Vizcaya Argentaria , of 17 July 2014.

<sup>33</sup> See further, Rights International Spain, video-interview with Concha Gómez Bermúdez, legal aid lawyer and member of the Justice Observatory of the Madrid Bar Association, available here: <https://www.youtube.com/watch?v=QDztpnDnK10>

<sup>34</sup> First Final Provision to the Act (page 27), available here:

<https://www.boe.es/boe/dias/2015/03/31/pdfs/BOE-A-2015-3442.pdf>

For further analysis, see joint letter sent by Rights International Spain and partners to Dimitris Avramopoulos, Commissioner for Migration and Home Affairs of the EU, available here: <http://rightsinternationalspain.org/uploads/publicacion/6f19556504f1727cb940b5ebedac320bce65712b.pdf>; joint letter to Mr. Crépeau, UN Special Rapporteur on the rights of migrants (<http://rightsinternationalspain.org/uploads/publicacion/23411dc934a48fb49c46ef979db7230a8a441bc1.pdf>); and joint letter to Mr. Nils Muižnieks Commissioner for Human Rights of the Council

## b) Non-discrimination and equality before the law

Non-discrimination and equality before the law are basic principles that are also at risk. The Court of Justice has affirmed that “equal treatment is a general principle of EU law”.<sup>35</sup> Furthermore, there is a general principle under EU law that legal and natural persons must be able to enforce their EU law rights in national courts through procedures that are ‘effective’.<sup>36</sup>

A Court Fees Act was adopted in December 2012. On 27 February 2015, the Minister of Justice announced a partial reform to the Court Fees Act due to, amongst other reasons, the improvement in the State’s capacity for revenue collection and stiff social opposition to the legislation.<sup>37</sup> Although a new law, in force since 1 March 2015, exempts natural persons from paying court fees in all jurisdictional orders, in some cases, individuals will continue to pay (indirectly) court fees. For example, if a legal entity files a lawsuit against an individual (for non-payment of a credit) and the individual loses the case and is ordered to pay the expenses and costs of the complainant, these costs will include the court fees paid by the legal entity. Even though the legal entity can deduce the payment of the court fee –as an expense-, such cost can still be passed on to the individual (as part of the expenses and costs of the proceeding).

Therefore, the partial reform to the Court Fees Act does not solve the problem created by the introduction of court fees, discussed in the previous sections. Furthermore, court fees continue to be in force for small and medium companies as well as for big corporations.<sup>38</sup> Small and medium companies (*PYMES, pequeñas y medianas empresas*) constitute approximately 99% of the total number of companies in Spain and they contribute to a large extent to the creation of employment (63% of workers).<sup>39</sup> However, all legal persons (whether small or big corporations) have to pay the same level of fees, regardless of their size or resources. This has a disproportionate impact on smaller companies and their capacity to effectively enforce their EU law rights.

A large part of self-employed professionals operate through small companies. Natural persons acting through these small companies will still have to pay court fees (indirectly), if they wish to file a complaint in the name of their company (for example, to claim an unpaid invoice) or appeal a court decision. Furthermore, legal

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(<http://rightsinternationalspain.org/uploads/publicacion/875392688ebfa453ff274395dfafc88a63668a2c.pdf>).

<sup>35</sup> See, for example, Case C-550/07 P Akzo Nobel Chemicals and Akros Chemicals v. Commission [2010] ECR I-08301, para. 54.

<sup>36</sup> See, for example, Case C-432/05 Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern [2007] I-02271, judgment of the Court (Grand Chamber), para. 43.

<sup>37</sup> The text of the law is available here (article 11):

[https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2015-2109](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-2109)

<sup>38</sup> The administration is exempted from paying court fees when it litigates.

<sup>39</sup> Source of information: Retrato de las PYME (Ministry of Industry, Energy and Tourism), available here: [http://www.ipyme.org/Publicaciones/Retrato\\_PYME\\_2014.pdf](http://www.ipyme.org/Publicaciones/Retrato_PYME_2014.pdf)

entities (associations) that do not qualify for legal aid will not be exempt and will also have to pay court fees. The proposed Legal Aid Act includes a limited number of legal entities that may benefit from legal aid, regardless of their economic situation (without having to prove insufficient economic resources to afford to litigate). Therefore, similar legal entities will not be treated equally. The Court Fees Act and the proposed Legal Aid Act combined will make it harder for a number of legal entities to enforce their EU law rights.

As stated above, lowering the income eligibility threshold in the proposed Legal Aid Act, will have a deterrent effect for individuals from filing lawsuits against banks or insurance companies and challenging or contesting arbitrary acts of the administration. The proposed Legal Aid Act will place individuals in a situation of greater disadvantage and defenselessness vis-à-vis corporations and the administration.

### c) Separation of powers and judicial independence

Cuts in the justice budget have an impact on the capacity of the courts and tribunals to exercise the necessary institutional control over the executive and legislative branches, inherent to the judicial power. Institutional independence also depends on sufficient and adequate resources. As noted above, the judiciary's workload, an insufficient budget and lack of personnel and material needs to perform duties, are key problems affecting judicial independence, thus weakening the capacity of the judiciary to balance the powers of the executive and legislative branches. According to a Council of Europe report, Spain is among the European countries with the lowest number of judges per inhabitant as well as the lowest public expenditure allocated to the justice system.<sup>40</sup> According to the Commission 2015 EU Justice Scoreboard, Spain scores poorly on perceived judicial independence.<sup>41</sup> Weakening the judiciary also reduces the capacity to stem corruption. It will be more difficult for Spanish courts and tribunals to investigate in an effective and independent manner the hundreds of open corruption cases if they do not have sufficient and adequate resources.<sup>42</sup>

According to associations of judges, a 2013 reform to the Law on the General Council of the Judiciary Power is also likely to lead to greater control over the judiciary, and therefore, undermine judicial independence.<sup>43</sup> Associations of judges

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<sup>40</sup> Council of Europe, European Commission for the Efficiency of Justice (CEPEJ) Report on "European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice", available here: [http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport\\_2014\\_en.pdf](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf). The Ministry of Justice has not provided updated information since 2012. See also European Commission 2015 EU Justice Scoreboard, available here: [http://ec.europa.eu/justice/effective-justice/files/justice\\_scoreboard\\_2015\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf)

<sup>41</sup> European Commission 2015 EU Justice Scoreboard, available here: [http://ec.europa.eu/justice/effective-justice/files/justice\\_scoreboard\\_2015\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf)

<sup>42</sup> For further information on corruption cases in Spain, see, for example: <http://www.newsweek.com/spains-judges-begin-work-backlog-corruption-cases-involving-2000-people-296323> and [http://elpais.com/elpais/2013/08/14/inenglish/1376481311\\_929795.html](http://elpais.com/elpais/2013/08/14/inenglish/1376481311_929795.html)

<sup>43</sup> Rights International Spain, jointly with the main associations of judges in Spain submitted a communication to the UN Special Rapporteur on the independence of judges and lawyers, concerning attacks on judicial independence and requesting an official visit to Spain. The letter is



have voiced their opposition to the reform.<sup>44</sup> Under this reform, members of the Judicial Council have been elected based on an arrangement among the main political parties.<sup>45</sup> The Judicial Council is the body that should ensure the independence of the judiciary and manages sensitive issues such as the disciplinary regime of judges as well as career promotions. This close link between the Judicial Council and political powers poses a risk to, and compromises, judicial independence. For example, the Council recently denied a request for protection made by three judges (in a highly sensitive case) against interference by the executive, which the judges considered threatened their independence.<sup>46</sup> Three judges from the National Court (*Audiencia Nacional*), in accordance with Council Framework Decision 2008/675/JAI, had taken into account a previous conviction handed down in France in a terrorism case and thus ordered the release of a person convicted of terrorism. The Vice-president of the government, the Minister of Interior and other politicians harshly criticized the decision. The three judges alleged that such statements suggested that they had deliberately handed down an unfair decision in breach of the law.

Political interference while judges are performing their duties is another matter of concern. Pressure exerted on judges through attacks on their professional competence by politicians, including some members of the government, has become common, particularly, concerning highly sensitive cases, such as protests, corruption and terrorism.<sup>47</sup> For example, 13 out of 18 judges of the Supreme Court sent a letter to the President of the Court (and president of the Judicial Council as well) protesting against political interference.<sup>48</sup> These attacks seek to influence judges to change their decisions or the course of investigations. Those judges who are targeted could potentially suffer disciplinary proceedings by the Judicial Council or constraints affecting their career advancement.<sup>49</sup>

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available here:

<http://www.rightsinternationalspain.org/uploads/prensa/c8e4b4a48f7a181f25b1fbee3517066d0015ce8.pdf>.

<sup>44</sup> Actions and statements by Association *Francisco de Vitoria* and *Jueces para la Democracia*, available here:

[http://politica.elpais.com/politica/2014/01/31/actualidad/1391168471\\_227338.html](http://politica.elpais.com/politica/2014/01/31/actualidad/1391168471_227338.html) and <http://www.juecesdemocracia.es/pdf/INFORMEREFORMACGPJMarz13.pdf>

<sup>45</sup> See manifesto against the reform of the Judiciary Council, available here:

[https://docs.google.com/forms/d/1wit1E\\_rqU9yEYUqDJ\\_vmtZpTzywZQYgtg5fLH7AT1-g/viewform?edit\\_requested=true&pli=1](https://docs.google.com/forms/d/1wit1E_rqU9yEYUqDJ_vmtZpTzywZQYgtg5fLH7AT1-g/viewform?edit_requested=true&pli=1)

<sup>46</sup> Source of the information, available here:

[http://politica.elpais.com/politica/2015/01/19/actualidad/1421698998\\_597773.html](http://politica.elpais.com/politica/2015/01/19/actualidad/1421698998_597773.html) and [http://politica.elpais.com/politica/2015/01/27/actualidad/1422360366\\_335896.html](http://politica.elpais.com/politica/2015/01/27/actualidad/1422360366_335896.html)

<sup>47</sup> Examples of such attacks are available here:

<http://www.juecesdemocracia.es/txtComunicados/2014/10dici14.htm> ; <http://www.elconfidencial.com/espana/2012/10/05/politicos-de-todos-los-colores-se-revuelven-contra-los-ataques-del-lidquoopijo-acratardquo-pedraz-106728>; [http://www.infolibre.es/noticias/politica/2014/02/06/jueces\\_para\\_democracia\\_pide\\_que\\_deje\\_de\\_scalificar\\_jueza\\_que\\_fallo\\_favor\\_los\\_escraches\\_13248\\_1012.html](http://www.infolibre.es/noticias/politica/2014/02/06/jueces_para_democracia_pide_que_deje_de_scalificar_jueza_que_fallo_favor_los_escraches_13248_1012.html)

<sup>48</sup> Source of the information, available here:

[http://politica.elpais.com/politica/2014/12/18/actualidad/1418909614\\_978651.html](http://politica.elpais.com/politica/2014/12/18/actualidad/1418909614_978651.html) and [http://politica.elpais.com/politica/2014/12/18/actualidad/1418935342\\_070700.html](http://politica.elpais.com/politica/2014/12/18/actualidad/1418935342_070700.html)

<sup>49</sup> This aspect was particularly raised in the submission to the UN Special Rapporteur on the Independence of judges and lawyers, available here:

#### d) Legal certainty and respect for fundamental rights, in particular freedoms of expression and assembly

Respect for human rights is another fundamental value on which the European Union is founded and which the rule of law aims to protect. As stated by the European Commission, “respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa”.<sup>50</sup>

Human rights are guaranteed through the principles stemming from the rule of law. A fundamental and first obligation is the requirement that any restriction or interference with rights must have a clear legal basis. A clear and predictable set of rules prevents arbitrariness and excessive discretion of the authorities. The principle of legal certainty is thus key for ensuring compliance with, and respect for, human rights.

The rights to freedom of expression and freedom of assembly are essential pillars of a democratic and pluralistic society. The European Court of Human Rights has reiterated “the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society”.<sup>51</sup> The proposed reforms to the Citizen Security and Public Safety Act and the Criminal Code put at risk these fundamental rights, clash with the principle of legal certainty and constitute arbitrary and disproportionate interferences with such rights.

The newly passed Citizen Security and Public Safety Act includes vague provisions that could grant an excessively wide margin of discretion to the authorities and lead to arbitrary interpretations. For example, article 37.7 of the Act would make, among others, an administrative offence punishable by a fine of up to 600 Euros: “the occupation of any property, house or building, or staying in such premises, in any case, against the will of the owner, the tenant or the bearer of any other right over such properties, where the conduct does not amount to a criminal offence. Also, the occupation of streets in breach of legal provisions or against the decision of the competent authority, including the occupation of streets with purposes of street selling will fall under the scope of this provision.” The concept of “occupation” is excessively broad to be sufficiently “foreseeable” for the persons concerned to know what consequences their acts would entail. Occupation could be the mere physical presence or a peaceful gathering with mere expressive purposes, and thus conflicts with the right to freedom of peaceful assembly. The provision does not specify what “legal provisions” may be breached by the said occupation.

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<http://www.rightsinternationalspain.org/uploads/prensa/c8e4b4a48f7a181f25b1fbee3517066d0015ce8.pdf>.

<sup>50</sup> Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law. Brussels, 19.3.2014, COM(2014) 158 final/2, page 4.

<sup>51</sup> European Court of Human Rights, case of Promo Lex and Others v. The Republic of Moldova, Judgment of 24 February 2015, par. 21.

According to new article 36.26 of the Citizen Security and Public Safety Act, the “unauthorized use of images or personal data personal of professional authorities or members of State security forces that may endanger the personal safety or that of agents’ families, the protected premises or put at risk the success of an operation, respecting the fundamental right to information” shall be a serious infraction. This provision conflicts with legal certainty insofar as the Spanish legal system already provides sufficient and solid legal basis (in fact, two different laws) for the protection of law enforcement officials in such cases. According to article 504(2) of the Criminal Code “those who seriously insult or threaten members of the army or security forces shall be punished with a fine of 12 to 18 months”. Furthermore, a civil case is available pursuant to the Organic Law 1/1982 for the protection of civil right to honor, personal and family privacy and image. Therefore, the new provision of the Citizen Security and Public Safety Act constitutes the third and different law to regulate this matter. Moreover, it will not be a court but rather the Administration (through an administrative proceeding) that will determine whether the security of an agent, premises or operation is at risk. This is a matter that in any case should be resolved by the courts.

The Citizen Security and Public Safety Act runs in parallel to a new reform of the Criminal Code (both laws have been passed on the same day<sup>52</sup>), which introduces new, and modifies existing, “crimes against public order”. There are a number of vaguely worded provisions in the newly passed Criminal Code reform, which are likely to lead to arbitrary use of power, which is against legal certainty.<sup>53</sup> The most problematic provisions are the following:

The new text of article 550(1) of the Criminal Code reads: “Conviction for assault shall befall those who assault or, with serious intimidation or violence, resist the authority, its agents or civil servants, or attack them, when they are carrying out their duties of office, or on occasion thereof”. A key change is the omission of the adjective “active” linked to “resistance”. The new wording thus leaves wide discretionary powers, enabling a broad interpretation, to include passive resistance (such as sit-ins, or the formation of human chains) within the scope of the offence.

The new text of article 557(1) reads as follows: “Those who, acting as a group, or individually but sheltered in the group, disturb public peace, perform acts of violence on persons or things, or threaten others with doing so, shall be punished with a sentence of imprisonment of six to three years”. This provision includes vague and ambiguous expressions (such as “acts of violence” or “sheltered in a

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<sup>52</sup> On 26 March 2015, Congress passed the Citizen Security and Public Safety Act (available here: <http://www.boe.es/boe/dias/2015/03/31/pdfs/BOE-A-2015-3442.pdf>) and the Criminal Code reform (including the chapter on terrorism offences, available here: <http://boe.es/boe/dias/2015/03/31/pdfs/BOE-A-2015-3439.pdf> and <https://www.boe.es/boe/dias/2015/03/31/pdfs/BOE-A-2015-3440.pdf>). These laws will enter into force the 1st of July 2015.

<sup>53</sup> For further analysis, see Rights International Spain (legal brief), available here: <http://rightsinternationalspain.org/uploads/publicacion/eeacc6f70f85b809b5b3041cd1506b8892ef7d8b.pdf>



group”), which are not defined at all. People would not be able to foresee the consequences of their actions and authorities would have broad discretionary powers, leaving too much room for arbitrary decisions. In addition, the fact that the new provision would not require specific results (injuries or damages), compounds the difficulty of foreseeing what conducts amount to “acts of violence”. Finally, the provision criminalizes “threats” (equating threats to the actual commission of dangerous or damaging acts). This wording is extremely imprecise. There is a risk that the use of provocative slogans could be considered a crime. The restrictions on the rights to freedom of assembly and expression would be too broad and thus could interfere with these fundamental rights. The new article 557(2) is equally drafted in vague and imprecise expressions, such as “influence the group or its members, inciting them to carry out acts of violence or reinforcing them in their intention to do so”. This clearly conflicts with the principle of legal certainty.

The Criminal Code introduces an aggravated offence (article 557bis (3)) if the disorder is committed during or within a demonstration. This provision is worded so vaguely that citizens participating in demonstrations will no longer be able to determine if their actions or slogans will fall within the scope of this offence. This leaves a broad discretion for the authorities, enabling excessively wide interpretations.

The Criminal Code introduces a new provision (new article 559): “The distribution or public spreading, by any means, of messages or slogans that incite to the commission of any of the offences of public disorders provided in article 557bis of the Criminal Code, or that are likely to reinforce the decision to commit such acts” will also constitute a criminal offence. Its vagueness leaves an excessively wide margin of discretion to the authorities which conflicts with the principle of legal certainty inherent to the rule of law. Citizens will find it difficult to determine what messages and slogans could fall within the scope of this offence. This provision could interfere with legitimate expression.

The Criminal Code includes a new definition of terrorism based on the EU Framework Decision of 13 June 2002 on combating terrorism. However, the definition included in article 573 goes far beyond the scope of the Framework Agreement, extensively expanding the range of crimes considered as terrorist.<sup>54</sup> An assault on the authorities that have the aim of seriously “altering public peace” could be considered a crime of terrorism. The provision is phrased in such a broad way it could easily cover public protest.<sup>55</sup>

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<sup>54</sup> For further analysis, see Rights International Spain - Communications sent to the Minister of Interior, Minister of Justice and chair of the Socialist Parliamentary Group in Congress, available here:

<http://rightsinternationalspain.org/uploads/publicacion/6d75bf18a14a64cd0cc36d7612d4b90b02123a61.pdf> ;

Communication sent to Parliamentary Groups in Senate, available here:

<http://rightsinternationalspain.org/uploads/publicacion/4958abf734404761f1ca43aca613334f1001ee5e.pdf>

<sup>55</sup> See also article 573 bis (4).

The new text of article 575(2) of the Criminal Code reads as follows: “who, to this end [self-indoctrination], has access on a regular basis to one or more communication services accessible to the public online or to content available through the Internet or an electronic communications service whose contents are directed or are suitable to encourage the incorporation to an organization or terrorist group, or to cooperate with any of them or their purposes”. The wording of this provision is extremely confusing and vague, including many imprecise terms (such as “suitability” (*idoneidad*)). Individuals, even with the assistance of a lawyer, would not be able to determine what actions could fall under the scope of this provision, thus threatening the right to freedom of expression and information. Changes to articles 578(2) and 579(1) also include punishing the distribution or diffusion of messages or slogans through any media or procedure “if their content is suitable to incite others to commit” terrorism crimes. These provisions are excessively vague and could lead to arbitrary interpretations. Individuals will not be able to regulate their conduct in accordance with the law. Therefore, they do not comply with the requirements of precision and certainty of the law, as inherent in the rule of law.

### e) Adequate democratic process

The process through which the package of reform proposals is being adopted conflicts with another basic value inherent in the rule of law: that is, “a transparent, accountable, democratic and pluralistic legislative process”.<sup>56</sup> First, despite the depth of reforms, the government has not engaged in adequate consultation with stakeholders including civil society organizations, constitutional and human rights experts, nor given due consideration to the views of the judiciary, public prosecutors and the legal profession, which have voiced serious concerns with the proposals.<sup>57</sup> Second, when introducing restrictions on fundamental rights, governments have the obligation to justify their actions by establishing that the purpose of the restriction is legitimate and that the action taken is necessary or proportionate to achieving this legitimate aim, in the context of a democratic society.<sup>58</sup> A way to assess “the pressing social need” is by

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<sup>56</sup> Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law. Brussels, 19.3.2014, COM(2014) 158 final/2, page 1.

<sup>57</sup> See joint statement *Unión Progresista de Fiscales and Jueces para Democracia* on freedom of expression, available here: <http://www.upfiscales.com/2013/07/el-derecho-a-la-libertad-de-expresion-comunicado-upf-y-jpd/>;

joint statement *Unión Progresista de Fiscales, Jueces para Democracia and SISEJ* against court fees, available here: <http://www.upfiscales.com/2012/10/758/>;

statement by UPF concerning the Criminal Procedure Code reform, available here:

<http://www.upfiscales.com/2014/12/comunicado-u-p-f-sobre-reforma-de-la-ley-de-enjuiciamiento-criminal/>;

manifesto signed by bar associations against the Legal Aid reform, available here:

<http://www.abogacia.es/2014/07/31/manifiesto-en-defensa-de-la-justicia-gratuita-unete/>;

Video interview with Carlos Carnicer, chair of the council of bar associations demanding derogation of court fees: <http://www.abogacia.es/2014/12/02/carlos-carnicer-la-ley-de-tasas-va-en-contra-de-la-tutela-judicial-efectiva/>

<sup>58</sup> In the case *Handyside v. UK* (7 December 1976) the European Court of Human Rights ruled that the word “necessary” meant that there must be a “pressing social need” for the interference (restriction or penalty). The States have a margin of appreciation but an unlimited power of appreciation, paras. 48-49. See also “the Court must examine whether there existed a pressing

producing background studies or impact assessments on which the reforms must be based in order to justify or explain their need. The government has failed to do so. Thirdly, the government is promoting overlapping reforms that affect the same laws. That is, in a number of cases the government is using several distinct bills to reform a single piece of legislation. For example, the Criminal Code has been reformed through two parallel bills. The Criminal Procedure Code is also being reformed through three different bills. This makes it particularly difficult for citizens to keep track of proposals and new laws. Legal reforms as important as these have an impact on legal certainty and citizens' ability to adapt their conduct to the new legal order that has been so heavily amended. The rule of law must have at its foundation clear and accessible laws so that individuals can regulate their conduct in accordance with the law and so that authorities' power is clearly circumscribed. However, many of the proposed reforms outlined above are formulated in overly vague and broad terms thus permitting too much unpredictability in their interpretation. This undermines the principle of legality which requires rules to be accessible, foreseeable and sufficiently precise to prevent arbitrary use of authorities' discretion when exercising public power.

## 5. Conclusion

The legal reforms proposed and undertaken by the Spanish government since 2012, taken collectively, threaten the rule of law. The proposed Legal Aid Act hinders access to justice and effective judicial review, as fewer people will benefit from this right. The Court Fees Act, in force since 2012, is discriminatory because it has a disproportionate impact on smaller legal entities in comparison to big corporations. Furthermore, the Court Fees Act and the proposed Legal Aid Act combined will also make it harder for a number of legal entities to enforce their EU law rights. The justice system is overwhelmed and under-resourced, which further undermines the right of access to justice because it is leading to long delays. The lack of resources also weakens the capacity of the judiciary to balance the powers of the executive and legislative branches. A 2013 reform of the Law on the General Council of the Judiciary Power combined with a practice of political interference further threatens judicial independence. The newly passed Citizen Security and Public Safety Act and Criminal Code reform include overly broad and vague provisions that could grant an excessively wide margin of discretion to the authorities and lead to arbitrary application of criminal and administrative sanctions. These laws threaten the rights to freedom of peaceful assembly and expression. Finally, the process through which the package of reform proposals is being adopted conflicts with the principle of legality.

National rule of law safeguards appear not to be capable of effectively addressing these threats. For this reason, the European Commission should intensify scrutiny of the situation in Spain and undertake an assessment under its framework on the rule of law. In addition, the Commission should consider the following courses of action to prevent further erosion of the rule of law in Spain:

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social need for the measure in question and, in particular, whether the interference was proportionate to the legitimate aim pursued, regard being had to the fair balance which has to be struck between the relevant competing interests in respect of which the State enjoys a margin of appreciation", case *A, B and C. v Ireland* (16 December 2010).

- With respect to the proposed Legal Aid Act: request the Spanish government to keep the reform in line with the right of access to justice.
- With respect to the Court Fees Act: request Spain to repeal the Act, as it is discriminatory.
- With respect to the proposed reforms to the Organic Law of the Judiciary and the Criminal Procedure Act: request the Spanish government to withdraw the bills because they are piecemeal instead of comprehensive reforms. The government should reopen the reforms to proper consultations with the aim of ensuring the reforms lead to an effective reorganization and modernization of the judicial system.
- Remind the Spanish government that its judiciary should be organized and resourced in such a way to secure judicial independence and to ensure the judiciary can secure the rule of law, including an adequate number of judges, proper facilities and resources, etc.
- Remind the Spanish government that political and executive interference with the judiciary is inconsistent with the requirement of an independent judiciary.
- With respect to the Citizen Security and Public Safety Act and the Criminal Code: request the Spanish government to repeal the laws as they the infringe the principle of legal certainty and the freedoms of expression and assembly, fundamental rights in a democratic society governed by the rule of law.
- With respect to the new immigration law that legalizes summary returns: request the Spanish government to repeal the provision and ensure the law is in line with EU Asylum Procedures Directive, the Schengen Borders Code and the Return Directive.
- In general, the Spanish government should reopen the whole package of reforms to proper public consultation, carrying out and publishing impact assessments and ensuring cross-party consensus as far as possible as well as respect for the principle of legal certainty.