Parliamentary Assembly
Assemblée parlementaire
https://pace.coe.int

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Doc. 15307
07 June 2021

Should politicians be prosecuted for statements made in the exercise of their mandate?

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Boriss CILEVIČS, Latvia, Socialists, Democrats and Greens Group

Summary

The Committee on Legal Affairs and Human Rights stresses the crucial importance, in a living democracy, of politicians being able to freely exercise their mandates. However, freedom of speech is not unlimited. The committee recalls the case law of the European Court of Human Rights on this matter, which stresses the principle of proportionality, as well as the Assembly's previous work, including Resolution 1900 (2012) on the definition of political prisoners. All Member States of the Council of Europe are invited to uphold the freedom of speech and assembly of politicians so as to protect democratic dialogue.

As regards Turkey, the committee notes that numerous politicians are incarcerated for statements they made in the exercise of their political mandates. Some have been found guilty of support for terrorist organisations for merely criticising the actions of the security forces, others have been prosecuted for insult to the President, or to other representatives of the State, for merely criticising, as opposition politicians, the policies pursued by the government.

As regards Spain, the committee recognises that Spain is a living democracy, with a culture of free and open public debate, and that the mere expression of pro-independence views is not a ground for criminal prosecution. Nevertheless, several senior Catalan politicians were prosecuted and eventually convicted to long prison terms for sedition and other crimes, *inter alia* for statements made in the exercise of their political mandates, in support of the unconstitutional referendum on the independence of Catalonia in October 2017.

The committee calls on the Turkish authorities, *inter alia*, to urgently release Selahattin Demirtaş, to take urgent steps to restore the independence of the judiciary, and refrain from prosecuting politicians for terrorism-related offenses whenever they refer to the Kurdish people or region as such or criticise the actions of the security forces in this region.

It calls on the Spanish authorities, *inter alia*, to reform the criminal provisions on rebellion and sedition in such a way that they cannot be interpreted so as to undo the decriminalisation of the organisation of an illegal referendum in 2005, or lead to disproportionate sanctions for non-violent transgressions; to consider pardoning or otherwise release from prison the Catalan politicians convicted for their role in the organisation of the October 2017 unconstitutional referendum and consider dropping extradition proceedings against Catalan politicians living abroad; to drop the remaining prosecutions also of the lower-ranking officials and finally to enter into an open, constructive dialogue with all political forces in Catalonia.

1. Reference to committee: Doc. 14802, Reference 4428 of 1 March 2019.

Contents **Page**

A. Draft resolution 3
B. Explanatory memorandum by Mr Boriss Cilevics, rapporteur 7
1. Introduction 7
2. The Council of Europe's acquis on freedom of speech of politicians 7
3. Examples of alleged improper prosecution of politicians for their political activities 16
4. Conclusions 26
Appendix 1 29
Appendix 2 – Dissenting opinion presented by Mr Ziya Altunyaldiz (Turkey, NR) member of the Committee on Legal Affairs and Human Rights, pursuant to Rule 50.4 of the Rules of Procedure 33
Appendix 3 – Dissenting Opinion by Mr Antonio Gutiérrez, Mr Sergio Gutiérrez, Mr Marc Lamuà and Ms María Fernández (Spain, SOC), members of the Committee on Legal Affairs and Human Rights, pursuant to Rule 50.4 of the Rules of Procedure, with which Mr Omar Anguita, Ms María Luisa Bustinduy, Mr Héctor Gómez, Mr Manuel Miranda, Ms Esther Peña, Ms Susana Sumelzo and Mr Salvador Vidal (Spain, SOC), members of the Spanish delegation, have associated themselves 34
Appendix 4 – Dissenting Opinion by Ms Marta González Vázquez (Spain, EPP/CD) and Ms María Teresa Jiménez-Becerril Barrio (Spain, EPP/CD), members of the Committee on Legal Affairs and Human Rights, pursuant to Rule 50.4 of the Rules of Procedure, with which Ms María del Carmen Leyte Coelho, Mr Javier Maroto Aranzábal, Ms María Valentina Martínez Ferro, Ms Margarita Prohens Rico and Mr Gonzalo Robles Orozco (Spain, EPP/CD), members of the Spanish delegation, have associated themselves 35

A. Draft resolution[2]

1. The Parliamentary Assembly stresses the crucial importance, in a living democracy, of politicians being able to freely exercise their mandates. This requires a particularly high level of protection of politicians' freedom of speech and freedom of assembly, both in parliament and when speaking to their constituents in public meetings or through the media.

2. The European Convention on Human Rights (ETS No. 5, "the Convention") protects everyone's freedom of speech, including the right to make statements that "shock or disturb" those who do not share the same opinions, as established in the case law of the European Court of Human Rights ("the Court").

3. The Assembly also notes that freedom of speech is not unlimited. Hate speech condoning violence against certain persons or groups of persons on the grounds of race, origin, religion or political opinions, as well as calls for the violent overthrow of democratic institutions are not protected. Politicians even have a special responsibility, due to their high visibility, to refrain from such abuses.

4. Everyone, and in particular politicians, has the right to make proposals whose implementation would require changes of the constitution, provided the means advocated are peaceful and legal and the objectives do not run contrary to the fundamental principles of democracy and human rights.

5. This includes calls to change a centralist constitution into a federal or confederal one, or vice versa, or to change the legal status and powers of territorial (local and regional) entities, including to grant them a high degree of autonomy or even independence.

6. The Assembly recalls its Resolution 1900 (2012) "The definition of political prisoners". It considers that any politicians who are detained for having made statements in the exercise of their political mandates that respect the limits of freedom of speech recalled above fall under the said definition and should be released without delay.

7. Concerning more specifically Turkey, the Assembly recalls its Resolution 2156 (2017) and Resolution 2376 (2021) "The functioning of democratic institutions in Turkey" and notes that numerous politicians are incarcerated for statements they made in the exercise of their political mandates.

7.1. Some stand accused or have even been convicted and handed long prison terms on the basis of criminal provisions penalising links to and support for terrorist organisations for merely referring to the inhabitants of the south-eastern region of Turkey as "Kurds", or to the region in question as the "Kurdish region", or for advocating greater autonomy for this region, or for criticising the actions of the security forces in this region, or even merely requesting information on these actions in the form of parliamentary questions.

7.2. Others have been prosecuted for insult to the President, or to other representatives of the State, for merely criticising, as opposition politicians, the policies pursued by the government in different fields, including the management of the economy and the fight against corruption.

7.3. These cases are particularly egregious as they have arisen after numerous findings by the Court of violations of freedom of speech in similar circumstances. In the case of Mr Demirtaş, the president of one of the main opposition parties, the authorities openly defy a judgment by the Court, which ordered Mr Demirtaş' immediate release. Also, the incriminated political statements often date back several years, to when the position of the government was more tolerant with regard to the Kurdish issue and the politicians in question could not predict that their statements would one day be considered as criminal. Typically, these prosecutions take many years, during which the accused politicians are either in pre-trial detention, or otherwise prevented from exercising their political mandates.

7.4. While reiterating its unequivocal condemnation of PKK terrorism, as much within as outside Turkey, in line with Recommendation 1266 (1995), Resolution 1754 (2010), Resolution 1925 (2013) and Resolution 2156 (2017), the Assembly notes that the unclear wording and overly broad interpretation of Turkish legislation concerning the fight against terrorism, and the harsh penalties, including prison terms, handed down in actual practice for insult or defamation by criminal courts appear to violate the Convention as interpreted by the Court.

2. Draft resolution adopted by the committee on 3 June 2021.

7.5. The Assembly notes that the independence of the Turkish courts has been put more and more into doubt. Instances of public accusations made by senior officials that were soon followed by the arrest and prosecution of the individuals concerned confirm the perception of the judiciary's lack of independence.

7.6. The Assembly recalls that the parliamentary immunity of 139 mainly opposition members of parliament was withdrawn in 2016 in a collective procedure not allowing for individual members to defend themselves. To achieve this, the parliament even adopted an ad hoc temporary change of the constitution suspending the normal protections to the detriment of this group of parliamentarians.

7.7. The Assembly finally notes that politicians belonging to opposition parties, journalists and civil society activists were excluded *de facto* from extraordinary pardons and reductions of prison terms motivated by the need to reduce prison overcrowding in the face of the Covid-19 pandemic.

8. As regards more specifically Spain, the Assembly recognises that Spain is a living democracy, with a culture of free and open public debate, and that the mere expression of pro-independence views is not a ground for criminal prosecution. The Assembly fully respects the constitutional order of Spain. Nevertheless, several senior Catalan politicians were prosecuted and eventually convicted to long prison terms for sedition and other crimes, *inter alia* for statements made in the exercise of their political mandates, in support of the unconstitutional referendum on the independence of Catalonia in October 2017 – organised by application of the "disconnection laws" approved by the Parliament of Catalonia in September 2017 and found to be unconstitutional by the Spanish Constitutional Court – and calling for participation in the mass protests surrounding this event.

8.1. Incriminatory statements included public speeches supporting the unconstitutional referendum in October 2017 on the independence of Catalonia and calling for participation in several demonstrations, as well as votes in the Catalan Parliament expressing the same support or allowing debates on this topic to be included in the agenda of parliament. The Assembly notes that the referendum had previously been ruled unconstitutional by the Spanish Constitutional Court, which had also warned the politicians in question against organising it.

8.2. Some of the politicians in question were also found guilty of abusing public funds and other resources, in particular by allowing public buildings to be used as polling stations.

8.3. The Assembly notes that the crime of organising an illegal referendum, punishable by up to 5 years in prison, was abrogated by the Spanish legislature in 2005. In this reform of the Criminal Code, the crime of sedition, punishable by up to 15 years in prison, which requires an element of violence ("tumultuous uprising") remained unchanged. The organisers of the illegal referendum on 1 October 2017 were convicted of sedition.

8.4. It is undisputed that none of the politicians in question called for violence. To the contrary, it is recognised, also by the prosecution, that they called on demonstrators to refrain from any violent acts. Indeed, on several occasions, hundreds of thousands of demonstrators turned out without there being any violent incidents, thanks also to the restraint exercised most of the time by the Catalan and Spanish security forces, who were also deployed in large numbers.

8.5. The Assembly warmly welcomes the fact that the criminal provisions on rebellion and sedition have become subject to intense debate in the political and legal spheres in Spain. They were enacted in response to the frequent attempts at military takeover in the past. Doubts were therefore expressed as to their application to the organisers of peaceful demonstrations. This required novel interpretations such as the notion of "violence without violence" developed by the prosecution, according to which the sheer number of demonstrators exercised psychological coercion on the police officers facing them, and a very wide meaning given to the term of "tumultuous uprising" required for the crime of sedition.

8.6. The Assembly further notes that, even after the conviction of the leading Catalan politicians involved in the 2017 unconstitutional referendum, the Spanish judicial authorities have also prosecuted the next set of Catalan leaders and a number of lower-ranking Catalan officials involved in the events in 2017. The Spanish authorities also continue to pursue the extradition of Catalan politicians living in other European countries, despite several setbacks in German, Belgian and United Kingdom courts. It finally notes on a positive note that several high-profile prosecutions, of the head of the Catalan police force and of members of the Catalan election commission, recently ended in acquittals.

8.7. Reportedly, the Spanish authorities have made the application of the milder prison regime usually applied to non-violent offenders or the consideration of a pardon subject to the prisoners expressing regrets for their actions and/or an undertaking not to commit further crimes, as is the case for all convicts under Spanish law. The prisoners in question consider that they cannot be obliged to disown their deeply held political convictions.

8.8. The Assembly finally respects the independence of the Spanish tribunals to solve pending appeals, respecting as well the right to appeal to the European Court of Human Rights in due course.

9. In view of the above, the Assembly invites:

9.1. all member States of the Council of Europe to:

9.1.1. ensure that everyone, including politicians, enjoy freedom of speech and assembly in law and practice and refrain from imposing any restrictions not covered by the Convention as interpreted by the Court;

9.1.2. notably examine their relevant criminal provisions and their application in practice, in light of the judgments and decisions of the Court also vis-à-vis other countries, to ensure that their provisions are drafted sufficiently clearly and narrowly and that they do not lead to disproportionate penalties;

9.1.3. free without delay any and all politicians who fulfil the Assembly's definition of political prisoners in line with Resolution 1900 (2012);

9.2. the Turkish authorities to:

9.2.1. urgently release Mr Selahattin Demirtaş, thereby implementing the European Court of Human Rights' judgment and the decision of the Committee of Ministers;

9.2.2. take urgent steps to restore the independence of the judiciary, and in particular of the criminal courts, and refrain from making public allegations that could be interpreted as instructions to the courts by senior officials;

9.2.3. refrain from systematically prosecuting politicians for terrorism-related offenses whenever they refer to the Kurdish people or the Kurdish region as such or criticise the actions of the security forces in this region;

9.2.4. re-examine all cases of politicians prosecuted or even convicted because of statements they made in the exercise of their political mandate; and to terminate any prosecutions and release those detained on such grounds, provided the politicians' statements concerned did not call for or condone violence or the overthrow of democracy and human rights;

9.2.5. uphold and strengthen the privileges and immunities of members of parliament in the face of politically motivated prosecutions, in particular when they concern statements made by politicians in the exercise of their political mandate;

9.2.6. refrain from discriminating against political opponents in deciding on early releases from detention prompted by the need to reduce prison overcrowding due to the Covid-19 pandemic;

9.2.7. promote a culture of open debate in the political sphere, on all issues, including sensitive ones, without the use or threat of criminal sanctions against politicians who are peacefully exercising their political mandates and to treat even fundamental opposition as a necessary and welcome part of a living democracy;

9.3. the Spanish authorities to:

9.3.1. reform the criminal provisions on rebellion and sedition in such a way that they cannot be interpreted so as to undo the decriminalisation of the organisation of an illegal referendum, intended by the legislature when it abolished this specific crime in 2005, or lead to disproportionate sanctions for non-violent transgressions;

9.3.2. consider pardoning or otherwise release from prison the Catalan politicians convicted for their role in the organisation of the October 2017 unconstitutional referendum and the related peaceful mass demonstrations, and consider dropping extradition proceedings against Catalan politicians living abroad who are wanted on the same grounds;

9.3.3. drop the remaining prosecutions also of the lower-ranking officials involved in the 2017 unconstitutional referendum and refrain from sanctioning the successors of the imprisoned politicians for symbolic actions merely expressing their solidarity with those in detention;

9.3.4. ensure that the criminal provision on misappropriation of public funds is applied in such a way that liability arises only when actual, quantified losses to the State budget or assets can be established;

9.3.5. refrain from requiring the detained Catalan politicians to disown their deeply held political opinions in exchange for a more favourable prison regime or a chance of pardon; they may however be required to undertake to pursue their political objectives without recourse to illegal means;

9.3.6. enter into an open, constructive dialogue with all political forces in Catalonia, including those opposing independence, in order to strengthen the quality of Spanish democracy, one of the most ancient States of Europe, through the authority of the rule of law, good governance and total respect of human rights, without recourse to criminal law, but in full respect of the constitutional order of Spain.

B. Explanatory memorandum by Mr Boriss Cilevics, rapporteur

1. Introduction

1. The authors of the motion underlying this report were "concerned about the growing number of national, regional and local politicians prosecuted for statements made in the exercise of their mandate, in particular in Spain and Turkey." They recalled Resolution 1900 (2012) "Definition of political prisoners" and Resolution 1950 (2013) "Keeping political and criminal responsibility separate". The motion also refers to the view of the European Commission for Democracy through Law (Venice Commission) that "the primary purpose of parliamentary immunity lies in the fundamental protection of the parliamentary institution and in the equally fundamental guarantee of the independence of elected representatives, which is necessary for them to exercise their democratic functions effectively without fear of interference from the executive or judiciary." According to the Venice Commission, parliamentarians' freedom of speech must be a wide one and should be protected also when they speak outside parliament. "This applies also, and especially, to parliamentarians who belong to the opposition and whose ideas differ strongly from those of the majority."[3] At the same time, the motion insists that "hate speech and calls for violence cannot be tolerated, also from politicians." The stated purpose of the motion is for the Assembly "to examine, from a legal and human rights perspective, the situation of politicians imprisoned for exercising their freedom of speech, in light of the principles upheld by the Council of Europe and, in particular, of the European Convention on Human Rights." This report deals exclusively with the specific issues raised by this motion and *not* with more general legal or political issues such as the conditions under which secession is or should be possible.[4]

2. In the introductory memorandum (AS/Jur (2019) 35 of 1 October 2019), I presented the Council of Europe's *acquis* as regards politicians' freedom of speech and the limits that it can legally be subjected to and I referred to some concrete cases of politicians in Spain and Turkey, the two countries in Europe where the highest number of elected politicians are prosecuted and imprisoned. I indicated that I would be open to refer in my final report also to examples from other States, but no concrete cases from other countries were submitted to me. The Russian case of Alexey Navalny is covered by a separate report prepared by Mr Jacques Maire.

3. In this report, I will first briefly sum up the Parliamentary Assembly's and other Council of Europe bodies' earlier work in this field and present relevant case law of the European Court of Human Rights. Then I will present a few examples of cases where politicians are allegedly being prosecuted or were even convicted for political statements covered by their freedom of speech. As in previous reports commenting on individual cases, by way of example, this report is not intended in any way to interfere with the independence of the national courts or the European Court of Human Rights which may be required to adjudicate the one or other case in future.

2. The Council of Europe's acquis on freedom of speech of politicians

2.1. Parliamentary Assembly

4. Two earlier texts of the Assembly are especially relevant to the issue at hand: Resolution 1900 (2012) "The definition of political prisoner";[5] and Resolution 1950 (2013) "Keeping political and criminal responsibility separate".[6]

2.1.1. Resolution 1900 (2012) "Definition of political prisoners"

5. Resolution 1900 (2012) has reconfirmed, in non-country specific terms, the definition of political prisoner developed by the independent experts tasked by the Secretary General of the Council of Europe with assessing the status of alleged political prisoners in Armenia and Azerbaijan, at the time of their accession to

3. Venice Commission, Turkey, "Opinion on the suspension of the second paragraph of Article 83 of the Constitution (Parliamentary Inviolability)", adopted by the Venice Commission at its 108th Plenary Session, Venice, 14-15 October 2016, Opinion No. 858/2016.
4. See on this topic the reports by Marina Schuster (Germany, ALDE) "National sovereignty and statehood in contemporary international law: the need for clarification" (Doc. 12689 of 12 July 2011) and the Information Report by the Committee on Legal Affairs and Human Rights: "Towards a democratic approach to the issues of self-determination and secession" (Doc. 14390 of 4 September 2017).
5. Doc. 13011 (Rapporteur: Mr Christoph Strässer, Germany, SOC).
6. Doc. 13214 (Rapporteur: Mr Pieter Omtzigt, Netherlands, EPP/CD).

the Council of Europe. The criteria by which the independent experts assessed and resolved well over 700 cases had been agreed by all relevant Council of Europe bodies, including the Committee of Ministers.[7] Resolution 1900 (2012), which simply reconfirmed these criteria in the context of an ongoing inquiry into cases of alleged political prisoners in Azerbaijan, has since become the "gold standard" used by numerous non-governmental organisations for assessing the political nature of the prosecution of politicians, civil society activists and journalists in many countries, even beyond the Council of Europe's geographical remit.

6. The definition of political prisoner is summed up in paragraph 3 of Resolution 1900 (2012). The most relevant criteria for politicians detained for political statements are the following:

– "if the detention has been imposed in violation of […] freedom of expression and information, freedom of assembly and association"; […]

– if, for political motives, the length of the detention or its conditions are clearly out of proportion to the offense the person has been found guilty of or is suspected of; or […]

– if the detention is the result of proceedings which were clearly unfair and this appears to be connected with political motives of the authorities."

7. The explanatory memorandum of Christoph Strässer's report stresses that persons prosecuted or convicted for "purely political offences" are often, though not always, "political prisoners". The test is whether the detention would be regarded as lawful under Article 5 (1) of the European Convention on Human Rights (ETS No. 5, "the Convention") as interpreted by the European Court of Human Rights ("the Court"). "Purely political offences" are offences which only affect the political organisation of the State, including attempts to change the State's territorial makeup or its constitutional order or simply the "defamation" of its authorities. As a rule, "political" speech, even very critical of the State and the powers in place, is protected by Article 10 – there is no "pressing social need" in a "democratic society", in the terms of Article 10, to suppress such speech.

8. But there are cases in which political speech exceeds the limits set by the Convention, for example when it incites violence, racism or xenophobia. A key question is whether the prohibition of calls for peaceful, non-violent, but otherwise "radical" constitutional change is "necessary in a democratic society". It should also be noted that in the rare cases where the Court has found the repression of such speech acceptable under the Convention, the penalties handed down by the national courts were largely symbolic and did mostly not involve deprivation of liberty. Criminal sanctions for political speech that is not protected by Article 10 can still be a violation of the Convention when the punishment meted out is disproportionate, discriminatory or the result of an unfair trial. The analysis of the Court's case law on these issues (below) is therefore of paramount importance.

2.1.2. Resolution 1950 (2013) "Keeping political and criminal responsibility separate"

9. In its Resolution 1950 (2013), the Assembly urged "governing majorities in member States to refrain from abusing the criminal justice system for the persecution of political opponents." The resolution was based on a report by our colleague Pieter Omtzigt establishing guiding principles designed to protect politicians from being held to account for their political activities in the criminal courts. Instead, politicians shall be held to account by their voters. At the same time, politicians should not enjoy impunity for crimes committed outside the political sphere or by abusing their elected office. The "guiding principles" proposed in this report are intended to help distinguish the one from the other. The legal expert[8] at the hearing on this issue before the committee drew a parallel with sports. A football player is subject to sanctions under the rules of the game in case of foul play and thus escapes ordinary criminal responsibility for causing bodily harm. His opponent will be compensated with a free kick, or even a penalty, but the perpetrator of the foul will not be prosecuted criminally – unless he committed such an outrageous attack on the opposing player that the presumed waiver of criminal responsibility applicable to "normal" fouls does not apply. Similarly, a politician (or his or her "team" (party) will lose votes at the next elections if he or she makes a political mistake, even one that looks particularly bad. But criminal responsibility should come into play only if and when the politician's acts, omissions or statements fall clearly outside the perimeter of normal political activities.

7. SG/Inf (2001)34, paragraph 10.
8. Professor Bernd Satzger, University of Munich.

10. Whilst Resolution 1950 (2013) dealt specifically with politicians' acts or omissions (for example not preventing the banking crisis in Iceland, or a Ukrainian Prime Minister signing an allegedly disadvantageous gas treaty with Russia), the guiding principles developed in this report should also apply to political statements made by politicians or during peaceful assemblies in which they participate, as part of their job as elected representatives of the people.

2.1.3. Resolution 2127 (2016) "Parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly"

11. In its Resolution 2127 (2016), the Assembly laid down a number of general principles for parliamentary immunity. Most importantly, for the purposes of this report, it stressed that:

> *"immunity is a fundamental democratic safeguard born of the need to preserve the integrity and independence of parliaments […]. Parliamentary immunity protects the free exercise of the parliamentary mandate […] account must be taken of the crucial need to preserve the rights and integrity of members of the political minority […]; freedom of speech is an intrinsic part of parliamentary work and elected politicians must be able to debate, without fear, many different issues of public interest, including controversial or divisive subjects or matters relating to the operation of the executive or the judiciary; however, remarks and statements inciting hatred, violence or the destruction of democratic rights and freedoms can be excluded from the scope of non-liability".*[9]

12. In its Resolution 2376 (2021) adopted after the urgent debate on the functioning of democratic institutions in Turkey during the April 2021 part-session, the Assembly expressed its concern

> *"that opposition parliamentarians seem to be subject to a possible stripping of immunity on a routine basis for their statements or publications. The Assembly notes with great concern that one third of the parliamentarians, including the leaders of the two main opposition parties in parliament, are subject to such procedures. This is highly problematic and creates prejudice to ensuring the sound functioning of a parliament. In addition, it has a chilling effect discouraging dynamic debate, which is essential for a properly functioning democracy. The Assembly therefore urges the Turkish authorities to put an end to the judicial harassment of parliamentarians and refrain from submitting numerous summaries of proceedings seeking the undue lifting of their immunity which gravely impedes the exercise of their political mandate. […] The Assembly cannot but reiterate its concerns about restrictions to freedom of expression, which impedes the exercise of political mandates. It regrets that no progress was made regarding the interpretation of the anti-terrorism legislation which is not in line with the case-law of the European Court of Human Rights. As a result, a high number of convictions are pronounced based on a too wide interpretation of this legislation or of controversial provisions of the Criminal Code. The Assembly urges the Turkish authorities to address the "pervasive problems regarding [the] independence and impartiality" of the judiciary system noted by the Committee of Ministers in March 2021 – and prevent politically motivated rulings that contradict Council of Europe standards." (paragraphs 13 and 14)*

13. The Assembly has thus taken a firm stand on freedom of speech of parliamentarians, for the sake of the functioning of democracy.[10]

2.2. European Commission for Democracy through Law (Venice Commission)

14. In December 1999, the Venice Commission adopted a report on "Self-Determination and Secession in Constitutional Law"[11]. As explained above, the issue of self-determination, territorial integrity and the right of secession does *not* fall within my rapporteur mandate. The Venice Commission's views are nevertheless of interest for this report. Its comparative analysis shows that numerous member States outlaw secession and have constitutional provisions which clearly render any activities aimed at secession or independence unconstitutional. This report also lists many examples of countries basing restrictions of fundamental rights on the need to protect their territorial integrity. Political parties which, by their aims, militate against territorial integrity (in the Republic of Moldova, Romania, the Russian Federation, Georgia, Ukraine, Portugal, Bulgaria,

9. Resolution 2127 (2016), para. 12.
10. Another report on parliamentary immunity is currently under preparation by the Committee on Rules of Procedure, Immunities and Institutional Affairs.
11. Venice Commission, Report on "Self-Determination and Secession in Constitutional Law", Document CDL-INF(2000)2 of 12 January 2000.

Croatia, Greece, Slovakia, Turkey) are denied freedom of association. Threats to territorial integrity may also prompt emergency measures that restrict certain freedoms (Croatia, France; and Lithuania, where the threat must be of external origin).[12]

15. In the Turkish constitution, the first ground for restrictions to fundamental rights mentioned in the general constitutional provision dealing with such restrictions is that of safeguarding the "indivisible integrity of the State with its territory and nation." The constitution itself provides that infringements of this prohibition are punishable by law. Political parties are forbidden to proclaim themselves in favour of the self-determination of the Kurdish people and even of a federal system. The unitary form of the State is thus not open to challenge by political parties. As the Venice Commission points out, the European Court of Human Rights has set some limits for restrictions of fundamental rights in defence of territorial integrity, despite the fact that Article 10 (2) of the Convention explicitly refers to "territorial integrity" as one of the interests for the protection of which freedom of expression may be restricted.

16. Upon request by the Assembly (in Resolution 2127 (2016), above), the Venice Commission also gave an important Opinion[13] on the temporary amendment of the Turkish Constitution allowing for the wholesale lifting of parliamentary immunity for a large number of opposition parliamentarians (see below).

17. Last but not least, the Venice Commission, on the specific request of our committee in the framework of this report, adopted at its (online) plenary session in October 2020 its report on "Criminal liability for peaceful calls for radical constitutional change from the standpoint of the European Convention on Human Rights" (henceforth referred to as "VC 2020 report").[14]

18. The Venice Commission rests its conclusions on a detailed analysis of the case law of the Court, referring to most the cases I summed up in the next chapter, and many more. Whilst finding generally unproblematic the conditions that restrictions to freedom of speech must be "prescribed by law" (which must be sufficiently clear and foreseeable) and serve a "legitimate aim" (such as public order, national security and territorial integrity), the Venice Commission stresses the importance of the last prong of the test, where the Court has to assess:

> *"whether the interference in question was 'necessary in a democratic society'. This part of the test is often called 'proportionality analysis'. In assessing whether the interference with the applicant's freedom of expression was proportionate to the legitimate aim(s) it pursued, the Court has to examine all factors it deems relevant, such as the content, the form and the intensity of the speech, the position of the speaker, the intention of the speaker, the medium used and the audience it is addressed to, possible impact of the speech, severity of the sanctions imposed on the speaker etc. The proportionality analysis is contextual. The Court analyses the language of the speech and the effects it may have in the light of cultural traditions of a given country, the current political situation, the public standing of the speaker, etc." (VC 2020 report, paragraph 16, footnotes omitted).*

19. In line with the Court, the Venice Commission stresses that:

> *"freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention" and that "one of the principal characteristics of democracy is the possibility to resolve a country's problems through dialogue, without recourse to violence, even when those problems are irksome. Democratic dialogue cannot exist without pluralism, broadmindedness and tolerance. Political debate should be tolerated even when it is provocative and divisive, and even when it promotes "ideas that offend, shock or disturb". (VC 2020 report, paragraphs 17-19).*

20. In sum, the Venice Commission concludes that:

> *"when political debate ('calls for radical constitutional change') is concerned, there is a very strong presumption in favor of the freedom of expression. In the specific context of the present Report, the 'radical' character of the constitutional changes advocated by the speaker cannot justify any restrictions, let alone criminal sanctions" (VC 2020 report, paragraph 24).*

21. Regarding the specific situation of politicians, the Venice Commission stresses their crucial role in the democratic process, but also their special responsibility as community leaders and role models when it comes to avoiding hate speech and incitement to violence, which are generally accepted exceptions from the protection of political speech by Article 10. (VC 2020 report, paragraphs 49 and 50)

---

12. Venice Commission opinion, ibid., pages 5-6.
13. Venice Commission opinion, No. 858/2016 op. cit.
14. Venice Commission opinion, No. 917/2019 of 8 October 2020, CDL-AD(2020)028.

22. The Venice Commission notes that calls for violence can also be implicit and that the notion of hate speech would include condoning or otherwise applauding acts of terrorism. In the words of the Venice Commission:

> *"What counts, thus, is the likelihood with which a statement, which is peaceful on the face, could lead to violence, when seen in context, in particular in light of an "explosive" political situation. Still, even against the background of an ongoing violent conflict, advocacy for 'radical constitutional change', including 'independence or far-reaching autonomy', cannot be automatically considered to contribute to this violence. For instance, the Court concluded in Özgür Gündem v. Turkey that 'the Court is not convinced that, even against the background of serious disturbances in the region, expressions which appear to support the idea of a separate Kurdish entity must be regarded as inevitably exacerbating the situation'. It follows that, as a rule, a concrete danger that advocacy for radical change will exacerbate ongoing violence has to be proven. Another group of cases concerns the apology or justification of unlawful violence, in particular terrorism. The Court often qualifies these criminal convictions as justified under Article 10 § 2 – see, for example, Resul Taşdemir v. Turkey, or, in the Russian context, Stomakhin v. Russia, where the applicant was convicted inter alia for "glorification of the Chechen separatists' insurgence and armed resistance as well as the violent methods used by them. Again, in these cases the Court has to examine the true purport of the speech in the overall context: not everyone who criticises the Government from the same positions as a terrorist organisation is supporting the latter's violent methods." (VC 2020 report, paragraphs 36-37).*

23. The Venice Commission further carried out a comparative analysis, which reached the same result as the request for information which our committee addressed to the European Centre for Parliamentary Research and Documentation (ECPRD), namely that the vast majority of European countries do not criminalise separatist speech without calls for violence.[15] The notable exceptions are Russia, Turkey, Ukraine and my own country, Latvia. The notable exceptions are Russia, Turkey, Ukraine and my own country, Latvia – but I should like to add that I am aware of only one actual conviction, of a campaigner who advocated in a farcical petition on internet that Latvia should join Russia (original conviction for six months imprisonment delivered in 2016 was replaced in 2018 with 140 hours of community service).[16]

In sum, the Venice Commission found that:

> *"while many European criminal codes mention force, violence or threat of violence as a constituent element of the crime of separatist propaganda (or seditious speech more generally), there are some examples to the contrary, where any advocacy of secession, even achieved by peaceful means, is criminally punishable, as a matter of law or practice. Consequently, it may be difficult to detect a clear European consensus on this matter." (VC 2020 report, paragraph 43).*

---

15. I made available the 30 replies received following this request to the Venice Commission, which also had much information of its own on the situation in member states, including ones who did not respond to the ECPRD request. The replies received through the ECPRD can be divided into three groups:
   – 19 replies that confirm unambiguously that *peaceful* calls for changes of the constitution, even calls for the independence or far-reaching autonomy for parts of the national territory, are not criminal offenses. A number of these replies specify that such acts are defined of criminal offenses when they involve violence, threats of violence or imply collusion with foreign powers (treason): Austria, Belgium, Canada, Czech Republic, Estonia, Finland, France, Germany, Greece, Israel, Lithuania, Luxembourg, Montenegro, Netherlands, San Marino, Slovakia, Slovenia, Sweden, United Kingdom.
   – 4 replies that confirm unambiguously that acts against the country's territorial integrity (even peaceful ones without collusion with foreign powers) are criminal offenses: Cyprus, Latvia, Poland, Turkey.
   – 7 replies that are somewhat ambiguous, in particular in the description of the exceptions from the rule that peaceful proposals for radical changes to the constitution, even those affecting territorial integrity can be criminalised: Azerbaijan, Bulgaria, Hungary, Norway (unclear whether "illegal means" can also be non-violent ones), *Portugal* (unclear whether "usurpation or abuse of sovereign functions" includes non-violent actions), Romania, Spain (separatist political speech legal, except by de facto coercion to obstruct enforcement of laws and judicial decisions).

16. See the excellent analysis by Alexejs Dimitrovs at: https://verfassungsblog.de/eurofederalists-under-threat-the-latvian-supreme-courts-ruling-on-independence/).

24. The Venice Commission also raises the highly relevant question of whether political speech calling for non-violent, but nevertheless unlawful actions can be sanctioned. The Court, in its admissibility decision in *Forcadell I Luis and others v. Spain*[17] stated that "while a political party is entitled to campaign for a change in the State's legislation or legal or constitutional structures, the party in question may only do so if the means used are absolutely lawful and democratic". According to the Venice Commission, it appears from this that:

> *"campaigning for unlawful actions may call for sanctions. The nature and severity of permissible sanction (imprisonment, fine, or sanctions of non-criminal-law character) is not specified in the case-law. The proportionality of the sanction should be evaluated in each particular case depending on the context, and in particular of the kind of the unlawful action which was advocated by the speaker."*

25. The issue of proportionality is indeed crucial for the Venice Commission. The careful balancing required of the authorities and the national courts must take account of many different factors, which vary from case to case and makes outcomes in individual cases hard to predict. The Venice Commission (2020 Report, paragraph 51) refers to a "rule of thumb", according to which the imposition of a custodial sentence (even a suspended one) will be compatible with freedom of expression only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence. Of course, I fully agree with the Venice Commission.

2.3. Case law of the European Court of Human Rights

26. The European Court of Human Rights has always attached high importance to freedom of expression and freedom of association, including, and especially, for politicians.

2.3.1. Freedom of expression for political statements, in particular by politicians

27. A leading case on freedom of expression (not only) of politicians is the 1992 judgment of *Castells v. Spain.*[18] The Court dealt with the case of a senator elected on the list of Herri Batasuna, a political party supporting independence for the Basque Country. He had made harsh statements in public accusing the Spanish Government of tolerating killings of Basque activists by paramilitaries. He was sentenced to a prison term. When discussing the "necessity" of the interference with his freedom of speech, the Court recalled that freedom of expression:

> *"constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress […] it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". […] While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court." (paragraph 42).*

28. In my research of the Court's case law on freedom of expression of politicians, I came across a number of recent Turkish cases in which politicians were given criminal sanctions for offences such as insult to the President or the Prime Minister, denigration of Turkishness, or spreading of terrorist propaganda (for example several cases brought by HDP Co-Chair *Selahattin Demirtaş*; and that of *Uzan v. Turkey*, 2018). In each case, the Court reiterated the importance it attaches to freedom of expression of politicians for the functioning of democracy and the need for the national courts to carefully analyse the meaning of the impugned statement in its political context. In the 2020 Grand Chamber judgment in the *Demirtaş* case, the Court ordered the immediate release of the applicant, whose detention also violated Article 18 of the Convention (namely had a political motive). Regrettably, the judgment has still not been executed, despite the Committee of Ministers' call to release him.

29. In these cases, as well as in a series of Article 10 cases brought not by politicians, but by journalists (for example *Önal v. Turkey* (no. 2); *Fatih Tas v. Turkey* (no. 5, 2018); *Sahin Alpay v. Turkey*, 2018; *Saygili and Karatas v. Turkey*, 2018, *Ali Gürbüz v. Turkey*, 2019; *Gürbüz and Bayar v. Turkey*, 2019), the determining factor for the Court was whether the impugned statement constituted a call for violence. When this was not the case, the Court found violations of Article 10. When a call for violence was made, even if it was merely indirect or implied, it found no violation of the Convention – as in the case of *Gürbüz and Bayar v. Turkey*, in

17. Appl. no. 75147/17, para. 37, inadmissibiity decision of 7 May 2019.
18. *Castells v. Spain*, appl. no. 11798/85, judgment of 23 April 1992.

which a newspaper published statements by PKK leaders relating to a ceasefire proposal. The Court found that the statement by a PKK leader that if a dialogue was not established, then 2005 would become a year of transition to guerilla warfare could be considered a public provocation to commit terrorist acts and thus incitement to violence. Even though the applicants were not personally associated with the PKK or the statements of their leaders, they had provided a forum for them to be disseminated.

30. In *Sahin Alpay v. Turkey*, the Court provides a definition of what it understands by "incitement of violence", namely words that:

> *"advocate recourse to violent actions or bloody revenge, justify the commission of terrorist acts in pursuit of their supporters' goals and can be interpreted as likely to encourage violence by instilling deep-seated and irrational hatred towards specific individuals." (paragraph 179).*

31. In *Stern Taulats and Roura Capellera v. Spain* (2018), the Court specified that in the case of political speech a prison sentence is only compatible with Article 10 in exceptional circumstances and that the essential element to consider is whether the speech incites violence or constitutes hate speech.[19]

32. Let us go back to cases directly concerning politicians' freedom of expression, concerning very different sets of facts. In its Grand Chamber judgment in the case of *Karacsony and Others v. Hungary,*[20] the Court found that a fine imposed on opposition MPs for showing billboards and using a megaphone during parliamentary votes violated the MP's freedom of expression. The Court stressed that speech in parliament enjoys an elevated level of protection which is reflected by the rule of parliamentary immunity. It also acknowledged that some regulation may be considered as necessary to prevent forms of expression such as direct or indirect calls for violence.

33. In *Uzan v. Turkey,*[21] the applicant, the leader of an opposition party and majority shareholder in two companies targeted by government measures, was sentenced to eight months imprisonment and fined for publicly insulting the Prime Minister and attacking his honour and reputation (using terms such as "treacherous", "looter", "insolent" and "godless one"). Although the prison sentence was later deferred on condition of submitting to judicial supervision for five years, the Court found that the domestic courts had failed to properly assess the proportionality of the penalty, and to take into account the (political) context in which the impugned remarks were made.

34. In *Roland Dumas v. France,*[22] the applicant was a politician, formerly government minister and President of the Constitutional Council. In 2003, he was acquitted of aiding and abetting the misappropriation of company assets and handling misappropriated assets. Shortly afterwards, he published a book including an account of an incident at a court hearing in 2001 when he said that during the war, the public prosecutor could have sat in the "Special Sections" (set up during the Nazi occupation). The applicant was ordered to pay fines and damages for having defamed a member of the judiciary. The Court found that this violated his freedom of expression. The relevant passages of the book concerned an affair of State that had attracted wide-spread media coverage and the applicant's book amounted to a form of political expression. Therefore Article 10 called for a high degree of protection; and the authorities had a particularly limited margin of appreciation in assessing whether the measure in question had been "necessary in a democratic society".

35. By contrast, the Court declared inadmissible, as manifestly ill-founded, another application against France in which a politician severely criticised a judge. The applicant, an MP who spoke at a political rally before an election, called the judge investigating a complaint of electoral fraud against him a "political commissar", who had acted *ultra vires* and "sullied the judiciary". He was fined € 1 000 for contempt of court. The Court accepted the reasoning of the domestic court according to which the comments of the applicant had come down to his personal dispute with the investigating judge, whom he had already attempted to disparage by publishing tracts a few months previously. Therefore, in the absence of any wider debate which could have been useful in terms of public information, it had not been unreasonable to conclude that the comments and statements amounted to a gratuitous personal attack.

---

19. The applicants, at an anti-monarchist rally, had publicly set fire to a photograph of the royal couple. They were convicted of insulting the Crown and sentenced to 15 months in prison in case they could not pay their fine of € 2 700 each. The Court found a violation of Article 10, arguing that the intention of the applicants was not to incite violence against the King but rather considered the burning of the photo as a symbolic act of protest and dissatisfaction.
20. *Karacsony and Others v. Hungary* [GC], appl. nos. 42461/13 and 44357/13, judgment of 17 May 2016.
21. *Uzan v. Turkey*, appl. no. 30569/09, judgment of 20 March 2018.
22. *Roland Dumas v. France*, appl. no. 34875/07, judgment of 15 July 2010

36. In *Makraduli v. "The former Yugoslav Republic of Macedonia"*[23], the Court found a violation of Article 10 after an opposition MP was convicted for libel for accusing the head of the Security and Counter Intelligence Agency and later the Prime Minister of corrupt actions.

37. Regarding, specifically, politicians punished or otherwise sanctioned for "secessionist speech", I found only two directly relevant cases. The first is that of *Piermont v. France.*[24] In this case, France expelled a German member of the European Parliament from New Caledonia and prohibited her from re-entering. She had spoken at a pro-independence and anti-nuclear rally in French Polynesia. The Court found that this interference with her freedom of speech (even without criminal sanctions) was not "necessary in a democratic society" and thus a violation of Article 10 because the statements held against her were made at a peaceful, authorised demonstration and contributed to democratic debate in French Polynesia. There had been no call for violence and the demonstration had not been followed by any disorder.

38. In the other case – *Ahmet Sadik v. Greece* – the application was declared inadmissible for failure to exhaust domestic remedies. But the European Commission on Human Rights had considered that the conviction of the applicant for having publicly (during an electoral meeting) addressed members of the Islamic minority of Western Thrace as "Turks" violated the applicant's freedom of speech.[25]

39. Separatist speech was protected by the Court in in the Turkish context when the Court observed in *Özgür Gündem v. Turkey*[26] that convictions for separatist propaganda were contrary to Article 10 when "they cannot be reasonably regarded as advocating or inciting the use of violence". Similarly, in *Dmitriyevskiy v. Russia*, the Court noted that "where the views expressed do not comprise an incitement to violence […] Contracting States cannot rely on protecting territorial integrity and national security, maintaining public order and safety, or preventing crime, to restrict the right of the general public to be informed of them".

40. A case illustrating that hate speech or calls for violence are exempted from the protection by Article 10 is that of *Osmani and Others v. "The Former Yugoslav Republic of Macedonia".*[27] The applicant, an ethnic Albanian mayor, organised armed shifts to protect the Albanian flag he flew in front of the town hall, in defiance of a judgment of the Constitutional Court, set up crisis headquarters, organised shelters for injured people in case hostilities would start, etc. In subsequent fighting, with both sides using firearms, three persons were killed and many more injured. The Court found the application based on Article 10 inadmissible, concluding that many parts of the incriminated speech encouraged the use of violence and that the applicant's speech, together with his more practical actions, "played a substantial part in the occurrence of the violent events that followed".

41. The last case I should like to mention in this section is *Kerestecioğlu Demir v. Turkey*.[28] It has been communicated in 2019, but not yet decided by the Court. The applicant was an MP, a former Assembly colleague, whose parliamentary immunity was lifted because of a statement made to the press. The immunity was lifted in a peculiar fashion (see paragraphs 54 and 55, below).

42. To sum up, the Court attaches a high degree of importance to freedom of expression, and in particular that of politicians. Limitations are acceptable in the case of calls for violence and gratuitous personal attacks outside the context of a wider political debate. It should also be noted that in the cases in which the Court did not find a violation, the sanctions imposed were mild. Harsh sanctions, notably ones involving deprivation of liberty, have been found disproportionate.

2.3.2. Freedom of association and assembly

43. As the Venice Commission noted in an earlier report (see paragraph 14, above), many States have restricted the freedom of association of political parties advocating secessionist or even federalist ideas. The Court has set some limits for such restrictions.

---

23. *Makraduli v. "The former Yugoslav Republic of Macedonia"*, appl. nos. 64659/11 and 24133/13, judgment of 19 July 2018.
24. *Piermont v. France*, appl. nos. 15773/89 and 15774/89, judgment of 27 April 1995.
25. *Ahmet Sadik v. Greece*, appl. no. 18877/91, judgment of 15 November 1996.
26. *Gündem v. Turkey*, appl. no. 23144/93, para. 77, ECHR 2000-III
27. *Rufi Osmani and Others v. "The Former Yugoslav Republic of Macedonia"*, Application no. 50841/99, admissibility decision 11 October 2001.
28. *Kerestecioğlu Demir v. Turkey*, appl. no. 68136/16, case communicated (see case law information note no. 227, March 2019).

44. In a case concerning the dissolution of the United Communist Party of Turkey (TBKP), the Court did not find the interference with freedom of association "necessary in a democratic society". The TBKP's programme referred to the Kurdish "people", "nation" or "citizens", but without claiming on their behalf the conferment of special rights (or minority rights). The party programme mentioned the right to self-determination and deplored the fact that due to recourse to violence it was not "exercised jointly, but separately and unilaterally". The Court stressed that

> *"democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned. To judge by its programme, that was indeed the TBKP's objective in this area."*[29]

45. In another Turkish case concerning the dissolution of the Turkish Socialist Party (SP), which advocated setting up a federation and whose chairman made public declarations such as "the Kurdish people are standing up" and spoke of the "Kurdish nation's right to self-determination and to create a separate State by referendum", the Court considered the dissolution of the SP as excessive. It found that – interpreted in context – the impugned statements did not advocate separation from Turkey. They were intended to stress that the federation proposed by the SP could not be achieved without the free consent of the Kurds, expressed by referendum. Also, there was no incitement to violence or to infringe the rules of democracy. The Court, in its Grand Chamber judgment in *Socialist Party and Others v. Turkey*[30] stressed that:

> *"the fact that such a political programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do no harm democracy itself." (paragraph 47)*

46. The case of *Sidiropoulos and Others v. Greece*[31] concerned a Greek association named "Home of Macedonian Civilisation", whose statutory purpose was to preserve the folk culture and the traditions of the Florina region. The Greek authorities refused to register this association, on the grounds that it had separatist intentions, as the term "Macedonian" was used to dispute the Greek identity of Macedonia and its inhabitants by indirect means. The Court found that the mere assertion that the association represented a danger to Greece's territorial integrity did not justify such a restriction on freedom of association.

47. In United Macedonian Organisation Ilinden – PIRIN and others v. Bulgaria,[32] the Court found that:

> *"the mere fact that a political party calls for autonomy or even requests secession of part of the country's territory is not a sufficient basis to justify its dissolution on national security grounds. In a democratic society based on the rule of law, political ideas which challenge the existing order without putting into question the tenets of democracy, and whose realization is advocated by peaceful means must be afforded a proper opportunity of expression through, inter alia, participation in the political process."*

48. In *Gorzelik v. Poland,*[33] the Court found no violation of Article 11 in the refusal of the Polish authorities to register an association called "Union of People of Silesian Nationality". The Court accepted the government's argument that the association's real intention was to abuse of the electoral privileges granted to national minorities in Polish law, at the expense of other, recognised national minorities (see paragraphs 97, 102, 106 of the judgment).

49. To sum up, the Court generally protects the freedom of association of political parties (and also of other associations) even when they advocate radical changes to the constitutional order – provided their means are non-violent and do not violate the rules of democracy and the objectives pursued do not harm the very essence of democracy.[34]

---

29. *United Communist Party of Turkey and Others v. Turkey*, appl. no. 133/1996/752/951, judgment of 30 January 1998, para. 57.
30. *Socialist Party and Others v. Turkey*, appl. no. 20/1997/804/1007, judgment [GC] of 25 May 1998.
31. *Sidiropoulos and Others v. Greece,* appl. no. 57/1997/841/1047, judgment of 10 July 1998
32. *United Macedonian Organisation Ilinden – Pirin and others v. Bulgaria*, appl. no. 59489/00, judgment of 20 January 2006.
33. *Case of Gorzelik and others v. Poland*, appl. no. 44158/98, [GC] judgment of 17 February 2004.

50. Freedom of association and assembly and the rules governing admissible limits generally follow similar principles as those applicable to freedom of speech. Calling for non-violent, but illegal actions may or may not be subject to sanctions. In *Elvira Dmitrieva v. Russia,*[35] the Court stressed that:

> *"the fact that the applicant breached a statutory prohibition by 'campaigning' for participation in a public event that had not been duly approved is not sufficient in itself to justify an interference with her freedom of expression".*

By contrast, in *Forcadell I Lluis and others v. Spain,* the Court seems to leave open the possibility that campaigning for non-violent, but unlawful actions can be sanctioned (see above, paragraph 24). In the end, all depends on proportionality, as the Venice Commission has stressed in its 2020 report prepared at our request.

51. I was pleased to hear from the eminent experts who contributed to our hearing in Berlin in November 2019 – three former judges of the European Court of Human Rights, from Belgium, Spain and Turkey – that they fully subscribed to our analysis of the Court's case law, as first summed up in the introductory memorandum[36]. During the hearing before the committee in Berlin on 10 November 2019, Professor Dr. Isil Karakas, former vice-president of the European Court of Human Rights and judge in respect of Turkey, stressed the importance of freedom of expression for politicians, that the requirement that interference with freedom of speech must be "proportionate to the legitimate aims pursued" and that the reasons adduced by the national authorities must be "relevant and sufficient". She also stressed that the State authorities have a wider margin of appreciation as to the need for interference with freedom of expression when such remarks incite to violence against an individual, a public official or a sector of the population. Professor Karakas found that a common problem in many Turkish cases before the Court is the failure of the national courts to carefully analyze the statements in in their political context, in light of the case law of the Court.

52. The second expert, Professor Françoise Tulkens (also a former judge and vice-president of the European Court of Human Rights), stressed that the Court is particularly attentive to the freedom of expression of parliamentarians. In a democracy, parliaments or similar institutions at local and regional level are essential spaces for political debate. Only the most serious reasons, such as hate speech and the direct incitement of violence could justify restrictions of political speech. Article 10 paragraph 2 of the Convention hardly leaves any room for restrictions to freedom of speech in the area of political debate. Criminal sanctions could only be considered as necessary and proportionate in absolutely exceptional circumstances. The third expert, Professor Lopez Guerra, also a former judge at the European Court of Human Rights, mostly discussed the cases of the Catalan politicians in Spain, stressing in particular the issue of proportionality of the sanctions imposed.

53. It is thus quite clear that the Convention strongly protects both the freedom of expression, even for "unconstitutional" speech, of politicians and the freedom of association of political parties advocating radical constitutional change – on condition of non-violence and respect for basic democratic principles. What makes this report so difficult is that the Spanish and Turkish politicians covered by my mandate are – at least officially – not prosecuted or even convicted for what they said, but for what they allegedly did: namely, by organising the unconstitutional referendum in 2017 and related mass protests, committing the crime of sedition (in Spain), and membership in or support for terrorist organisations (in Turkey). Let us have a closer look at some of these cases.

3. Examples of alleged improper prosecution of politicians for their political activities

3.1. Turkey

3.1.1. The mass ad hoc lifting of parliamentary immunity in 2016

54. Presently, 14 members of the Grand National Assembly are in detention, including the two Co-Chairs of the opposition HDP, Mr Selahattin Demirtaş and Ms Figen Yüksekdag. In a "one shot", *ad hominem* procedure involving a temporary change of the Turkish Constitution, the parliamentary immunity of at least

---

34. This is what distinguishes the above-mentioned Turkish cases from the Refah Partisi case (*Refah Partisi (the Welfare Party) and Others v. Turkey)*, appl. nos. 41340/98, 41342/98, 41343/98 and 41344/98) [GC] judgment of 13 February 2003. In this case, the Court accepted the prohibition of the (Islamist) Welfare Party, whose programme advocated the introduction of Sharia principles that the Court found incompatible with core democratic values.
35. Appl. nos. 60921/17 and 7202/18, judgment of 30 April 2019, para. 84.
36. See paragraph 44.

139 parliamentarians was lifted *en bloc*, automatically, on the sole basis of requests ("dossiers") filed by the prosecution until a given cut-off point. The usual procedure for lifting immunity, involving procedural safeguards and the right of the parliamentarians whose immunity shall be lifted to defend themselves before their peers, was suspended temporarily for these cases only. Both the Venice Commission[37] and the Assembly itself[38] strongly criticised this move, which deprived many parliamentarians, a vast majority of them members of opposition parties, of the opportunity to participate in the fundamental debate on the constitutional changes replacing the parliamentary by a presidential system of government. Whilst the lifting of immunity by itself did not prevent parliamentarians from exercising their mandates, it paved the way for the detention of a significant number of them and had a severe chilling effect on freedom of expression in parliament. This is also true for the huge number of "summaries of proceedings" the prosecution reportedly sent to parliament with a view to lifting MPs' immunities since the June 2018 elections – 1 393 in total, of which 989 against HDP MPs. In its Resolution 2376 (2021) the Assembly found that this gravely impedes the exercise of the MPs' political mandate (see above paragraph 12).

55. According to the Turkish authorities' response to my request for comments on the introductory memorandum, the deleterious atmosphere created by a series of devastating terrorist attacks more or less openly supported by certain politicians provided the backdrop for the temporary constitutional change allowing for the grouped lifting of the immunity of a large number of MPs. They recalled that the proposal was supported by a large majority in parliament (of 531 deputies who attended the final vote, 376 voted in favour and 140 against). On the date of adoption, the provisional article concerned 154 MPs in total and the distribution among the political parties was 29 MPs from AK Party, 59 MPs from CHP, 55 MPs from HDP, 10 from MHP and one independent member, which is why it could not be said that the HDP was targeted in a discriminatory way. Also, all parliamentarians were entitled to participate to the debate, to table motions of amendments, to speak and express their views, including their concerns about the lifting of their inviolabilities and finally there was no European consensus or a "common European standard" on the matter of an individual right of defence against the withdrawal of immunity by parliament.

56. An application concerning the suspension of immunity is pending before the European Court of Human Rights.[39] The Assembly's position and that of the Venice Commission are clear, and the Court will reach its own conclusions in due course, in full independence.

3.1.2. Political speech as ground for criminal prosecution of politicians in Turkey?

57. It is alleged[40] that criminal law has been used in an arbitrary way to silence dissenting voices over many years in Turkey, and especially since July 2016 (the attempted military coup).

58. The Venice Commission noted in its Opinion on the mass lifting of parliamentary immunity:[41]

> *"that Turkey belongs to the countries where the European Court of Human Rights has most often found a violation of the right to freedom of expression. At the moment, 104 cases (Incal group of cases) of violation of the freedom of expression with respect mainly to propaganda for terrorism are pending for execution in the Committee of Ministers of the Council of Europe. To these cases further cases on insulting the President and other public officials have to be added."*

59. The criminal law provisions used to prosecute politicians for political speech include such offenses under Turkish law as "praising a crime and a criminal", "inciting people to hatred and enmity", "insulting a public officer", "terror propaganda", "insulting the President" or even "membership in" and/or "aiding and abetting a terrorist organisation". The question arises whether these provisions are sufficiently clear and foreseeable in order not to violate Article 7 of the Convention (no punishment without law). Human Rights Watch has examined the indictments against several opposition MPs for terrorism-related offenses. In its view "evidence cited in the indictments consists mainly of political speeches rather than any conduct that could reasonably support charges of membership of an armed organisation or separatism."

60. The General Preamble of the constitutional amendment enabling the above-mentioned (chapter 3.2.1.) mass lifting of parliamentary immunity states quite openly that the intent of the amendment is to enable prosecutions of politicians in respect of forms of expression, namely of political speech: according to the

---

37. See Venice Commission Opinion, No. 858/2016 op. cit.
38. Resolution 2156 (2017) "Functioning of democratic institutions in Turkey", paras. 10 and 11.
39. Appl. no 68136/16, Filiz Kerestecioğlu Demir v. Turquie, dated 11 November 2016, communicated on 5 March 2019.
40. See for example Third Party Intervention Submissions on Behalf of Article 19 and Human Rights Watch, in the European Court of Human Rights in the case of Selahattin Demirtaş and others v. Turkey, pages 1 and 8.
41. Venice Commission Opinion, No. 858/2016 op. cit., para. 51.

Preamble, the purpose of the amendment is to address public indignation about "statements of certain deputies consisting of emotional and moral support to terrorism, the de facto support and assistance of certain deputies to terrorists and the calls for violence by certain deputies."

61. Here are some examples: the charge brought against Ms Nihat Akdogan of "making the propaganda of a terrorist organisation" is reportedly based on a parliamentary question she asked the Minister of the Interior about the whereabouts of allegedly smuggled property seized from shop owners by the police in 2015, in her constituency in south-eastern Anatolia with a majority Kurdish population. The same charges against Mr Selahattin Demirtaş and Ms Idris Baluken are reportedly based on simply using the words "Kurds" and "Kurdistan". According to HRW, the evidence against Mr Demirtaş consists mainly of his speeches, "none of the information seems to point to anything approaching criminal activity".[42] The conviction of Ms Figen Yüksedag Senoğlu for "spreading terrorist propaganda" was reportedly based on the fact that she attended a militant's funeral at which some (other) attendees shouted slogans.

62. Another feature of the alleged intimidation campaign against opposition politicians is the widespread use of pre-trial detention.[43] Pre-trial detention must generally be used as means of last resort, on strictly interpreted grounds such as risk of absconding, recidivism or tampering with evidence. In the case of parliamentarians, the careful balancing required by the Court must also include the fact that detention prevents them from debating, campaigning, or voting in parliament and generally engaging in public debate in the exercise of their democratic mandate. Abusive pre-trial detention may therefore raise not only an issue under Article 5 of the Convention (right to liberty and security), but also under Articles 10 (freedom of speech) and 11 (freedom of assembly and association). The Court will also need to examine allegations that the detentions of parliamentarians, especially those since July 2016, are motivated by political considerations, such as weakening the opposition in view of the wide-ranging constitutional changes in early 2017 (switch to a presidential system) and the votes on extensions of the state of emergency declared after the coup. This would point to a violation also of Article 18 in conjunction with the aforementioned provisions. This was indeed the conclusion of the European Court of Human Rights in its Grand Chamber judgment on the case of Selhattin Demirtaş. The interference with the elective mandates of parliamentarians and candidates may also constitute a violation of the right to free elections (Article 3 of the [first] Protocol to the Convention). Under Assembly Resolution 1900 (2012), politicians detained in violation of these provisions shall be considered as "political prisoners".

63. The Turkish politicians' cases have also attracted a large amount of attention at the international level. The Inter-Parliamentary Union (IPU)'s Governing Council adopted a Decision in 2019 concerning 61 parliamentarians.[44] The "summary of the case" recalls that over 600 criminal and terrorism charges have been brought against the parliamentarians of the People's Democratic Party (HDP) since 15 December 2015, when the Constitution was amended to allow the "wholesale lifting of parliamentary immunity." The IPU Decision is highly critical, noting:

> *"with deep concern that the information received so far by the Committee, particularly court decisions, confirms to a large extent that HDP parliamentarians have been charged and convicted primarily for making critical public statements, issuing tweets, participating in, organising or calling for rallies and protests, and political activities in furtherance of their parliamentary duties and their political party programme, such as mediating between the PKK and the Turkish Government as part of the peace process between in 2013 and 2015, publicly advocating political autonomy, and criticizing the policies of President Erdoğan in relation to the current conflict in south-eastern Turkey (including denouncing crimes committed by the Turkish security forces in that contact)." (2019 IPU Decision, page 4)*

The IPU trial observers also noted numerous procedural (fair trial) issues and complained about not having been given access to imprisoned MPs as requested.

3.1.3. Additional information brought to the attention of the Rapporteur

64. HDP representatives submitted several detailed summaries of the legal situation of their parliamentarians. These submissions, including a number of concrete cases (see appendix 1 to this report) support the conclusion that freedom of speech of politicians is strongly threatened in Turkey, notably due to the excessively wide interpretation of provisions criminalising "terrorist propaganda" and different types of

---

42. See Third Party Intervention, op. cit, at footnote 28.
43. On the topic of abuse of pretrial detention, including in Turkey, see the report "Abuse of pretrial detention in States Parties to the European Convention of Human Rights", Doc. 13863 of 7 September 2015.
44. IPU, Decision adopted by consensus by the IPU Governing Council at its 204th session (Doha, 10 April 2019, available at: www.ipu.org/sites/default/files/documents/2019_-_159_public_-_decisions_governing_council-e.pdf.

insult to the president or other representatives of the State. Presently there are still 14 former HDP MP's, including the former Co-chairs, in prison. But many more received prison sentences over the past five years.[45] Even if some of them have by now been released from prison and found asylum abroad, the fact remains that a highly unusual number of politicians were given prison sentences for crimes whose excessively wide interpretation the European Court of Human Rights has already held to violate the Convention. As to the examples in the attachment, I asked the Turkish authorities to provide more detail about the actual facts underlying these convictions and how the prosecution and the courts have analysed and evaluated the impugned statements in their context, in light of the case law of the Court.

65. According to the HDP Representation Office in Europe, as of April 2021, 16 490 HDP members and administrators were detained, over 5 000 of whom are still imprisoned. Acting on the basis of emergency decrees, the Turkish Government also seized, between 2016 and 2018, 95 of the 102 mayorships held by the party and arrested 93 of its mayors. Following the elections in March 2019, 38 HDP co-mayors were arrested and 11 of them remain behind bars today. The government appointed "trustees" in 48 out of 65 municipalities run by the HDP. Six more elected HDP co-mayors[46] were prevented from taking office because they had previously been dismissed by emergency rule decrees. Many locally elected politicians go on to be prosecuted criminally, on similar grounds as the members of parliament mentioned above and in appendix. For example, Mr Adnan Selçuk Mizrakli, co-mayor of Diyarbakir, was suspended in August 2019 and arrested on 22 October 2019. He was accused of "terrorism" in an opinion by the prosecutor's office based on Mr Mizrakli's membership in the "Democratic Society Congress" (DTK) and the "Sarmasik Association for Struggle against Poverty", the two largest NGOs in the Kurdish region. DTK representatives were even officially invited to the Turkish parliament to express their views on the draft new constitution. The Turkish authorities now seem to consider the DTK as a branch of the (terrorist) PKK, as indicated in their comments in appendix.

66. In their extensive and well-argued response to my request for comments on the introductory memorandum and on the information received from the HDP, the Turkish authorities refer to a number of judgments of the Court permitting limitations of the freedom of speech and in particular to sanction hate speech and calls for violence, the latter including speech that can be interpreted as indirectly condoning terrorist violence.[47] They stress that

> *"the exercise of freedom of expression in parliament carries with it 'duties and responsibilities' and note that "the Venice Commission observed that in most national parliaments members could be subjected to internal disciplinary sanctions by parliament."*

67. The Turkish response also cites a research paper commissioned by the European Parliament, according to which

> *"the quality of being a parliamentarian does not attenuate a person's responsibility – id est, provide him with a wider freedom of expression – but even leads to a greater duty of care. Politicians (thus also parliamentarians) must be 'particularly attentive in terms of the defence of democracy and its principles', since their aim is to come into power."*[48]

68. Most importantly, the Turkish response extensively describes the suffering of the Turkish people after the peace process with the PKK fell apart and a number of terrorist attacks occurred, which killed hundreds of members of the security forces as well as numerous civilians. This created an atmosphere in which statements, in particular by HDP politicians, that condoned such acts or expressed respect for terrorists killed by the security forces as "martyrs" had become intolerable. Some of the examples given in the submission of

---

45. According to the DHP, 3 of these 14 were elected in the 2018 general elections and arrested after their immunities were lifted. These parliamentarians are Ms Leyla Güven, Mr Musa Farisoğulları and Mr Ömer Faruk Gergerlioğlu. 5 out of 14 former parliamentarians were arrested in October 2020 due to the charges under the scope of the "Kobane Case", namely Ms Emine Ayna (deputy for Diyarbakır until 2015), Ms Ayla Akat Ata (deputy for Batman between 2007 and 2015), Mr Nazmi Gür (Deputy Co-chair responsible for Foreign Affairs of the BDP and then the HDP between 2011 and 2015), Mr Ayhan Bilgen (elected as HDP deputy for Kars in 2015 and 2018, and as co-mayor of Kars in the local elections in March 2019) and Ms Beyza Üstün (HDP deputy for İstanbul on between June and November 2015).

46. Mr Zeyyat Ceylan, co-mayor of Diyarbakir-Baglar, Ms Leyla Atsak, co-mayor of Van-Caldiran, Mr Gülcan Kaçmaz Sagyigit, co-mayor of Van-Edremit, Mr Yilmaz Berki, co-mayor of Van-Tusba, Mr Mühazit Karakus, co-mayor of Erzurum-Tekman, and Mr Abubekir Erkmen, co-mayor of Kars-Digor-Dagpinar. I also received a list of an additional 32 mayors and co-mayors whose mandates were seized by decision of the Ministry of Interior or a court decision.

47. For example, *Féret v. Belgium*, no. 15615/07 16 July 2009, *Keller v. Hungary*, no. 33352/02, 4 April 2006, *Ollinger v. Austria*, no. 74245/01,13 May 2004) and *Zana v. Turkey*, 18954/91, para. 49, 25 November 1997.

48. The paper referred to by the Turkish reply is: "Parliamentary immunity in context", author: Sascha Hardt, Assistant Professor of comparative constitutional law, Maastricht University, September 2015.

the Turkish authorities – depending on their context – could be seen as constituting "hate speech" of the sort that would be unacceptable in most of our countries. This said, my interlocutors from the HDP insist that these elements were taken out of their context, which made it clear that the intention was to foster peaceful dialogue, at a time when this was also promoted by the Turkish Government.

69. At its meeting on 29 June 2020, the committee held an exchange of views with Turkish legal expert Dr. Altiparmak. He recalled that in 2015, the HDP had for the first time passed the 10% threshold required in Turkey to obtain seats in parliament. With 13.1% of the votes and 80 seats, the HDP had become the second largest opposition party. On 28 July 2015, President Erdoğan had stated that he had no intention of banning the party, but that each member had to "pay the price" as an individual. Shortly after this speech, numerous criminal charges were brought against HDP MPs, most of them for speeches made 1 000 days or more previously. Within a few months of Mr Erdoğan's speech, the prosecutor's office had submitted to parliament 368 new requests to waive immunity, compared with 182 between 2007 and 2015. Proceedings were initiated against all of them based on speeches they had made (at party meetings, demonstrations, funerals) and not for actions committed. 17 HDP MPs and one CHP were arrested, others were charged, none for "ordinary" crimes or involvement in violence, but for "insulting" the President or a State official, terrorist propaganda or hate speech. These crimes were defined very broadly and vaguely in the Turkish legislation, which had already been called into question by numerous judgments of the Court and by the Venice Commission. The definition of crimes such as support for terrorism and hate speech was broad and unclear – for example: anti-LGBTI speech was permissible, but people could be convicted for criticising such speech. A series of 15 criminal cases initiated on 4 November 2016 against 15 MPs by five different prosecutors in five cities showed that this was being centrally coordinated. In addition to the MPs, 94 mayors had been suspended in south-east Turkey and replaced by "persons of confidence" appointed by the prefects. In the 2019 municipal elections, the HDP had won in 65 municipalities. 52 of those elected had been replaced either by the runner-up candidate (from the ruling AK Party) or by "persons of confidence" on account of criminal charges alleging links with terrorist groups targeting persons against whom there had been no criminal charges prior to the elections. In other words, the mere fact of being an elected HDP member was sufficient to be subject to criminal charges.

70. In the ensuing discussion in committee, our Turkish colleague Mr Aydin stressed that the parliamentary institution in Turkey and the independence of MPs were protected by immunity; but immunity did not cover individual MPs who had committed criminal acts, including terrorist propaganda or sowing hatred; both were contrary to the values of the Council of Europe, as the Assembly had recognised in its Resolution 2127 (2016); everyone was equal before the law, and the immunity of the MPs in question had been lifted by a large majority of MPs. In reply to our Greek colleague Mr Kairidis, Dr Altiparmak confirmed that the new law on the enforcement of sentences, which was designed to unburden prisons in the face of the Covid-19 pandemic, indeed excluded those convicted of terrorism-related crimes, i.e. most of the imprisoned HDP politicians.

71. Whilst the HDP, possibly due to its Kurdish origins, is the most heavily affected by prosecutions for political speech, other opposition parties are also concerned, for example the social-democratic Republican People's Party (CHP), whose Istanbul provincial chairperson, Canan Kaftancıoğlu, was sentenced in September 2019 to nine years and eight months in prison for "insulting the President", "insulting a public official because of his/her duty", "provoking people into enmity and hatred" and "propaganda for a terrorist organisation".[49] On 27 October 2020, the Court found that CHP Chair Kemal Kiliçdaroğlu's freedom of expression was violated by a civil fine imposed on him for two speeches in 2012 strongly criticizing then Prime Minister Erdoğan.[50] On 4 May 2021, the Court also found a violation of the freedom of speech of our former colleague Filiz Kerestecioğlu.[51]

3.2. Spain

72. In Spain, criminal prosecutions, many of which have already led to convictions with long prison terms, target the most prominent representatives of the Catalan pro-independence parties in office at the time of the 2017 referendum and many of their successors. A senior Spanish politician had publicly referred to the intention to "decapitate" once and for all the Catalan independence movement.[52] The prosecutions targeted the president, vice-president and several cabinet members of the ousted autonomous Catalan Government,

49. See Amnesty International, Europe: "Human rights in Europe - review of 2019", 16 April 2020, Index number: EUR 01/2098/2020, p. 82.
50. See *Kılıçdaroğlu v. Turkey*, appl. no. 16558/18, judgment of 27 October 2020; appeal by the Turkish government rejected on 21 April 2021.
51. *Kerestecioğlu Demir c. Turquie*, appl. no. 68136/16, judgment of 4 May 2021 (in French).

as well as the Speaker and three members of the Catalan Parliament's presiding board (Bureau), dozens of senior government officials and over 700 mayors.[53] According to Omnium Cultural, the largest Catalan cultural association, more than 2 500 persons have been "retaliated against" in some form, in connection with the 2017 referendum. [54]

73. These prosecutions must be seen in the context of the events surrounding the referendum on self-determination held on 1 October 2017. The referendum was held on the basis of two laws adopted by the Catalan Parliament in September.[55] Both laws were challenged in the Spanish Constitutional Court (CC), which rapidly suspended their application and later declared them unconstitutional. The CC's decisions were notified to the members of the Catalan Government, 60 of its senior officials and all mayors of Catalonia. These persons were individually reminded of their duty not to take any action contrary to the suspension and warned of possible criminal prosecution in case of disobedience. The Spanish Government also took control of the finances of Catalonia and placed the Catalan police force (the "Mossos d'Esquadra") under the control of the Spanish Ministry of the Interior. Nevertheless, the referendum went ahead, despite attempts by the national police to block it. It was accompanied by mass demonstrations with several hundreds of thousands of participants. These were largely peaceful, except for some minor incidents. On 4 October 2017, two parliamentary groups (representing 56.3% of all seats in parliament) asked the Catalan Parliament Board to convene a plenary session in which the President of the Generalitat of Catalonia should evaluate the results of the referendum of 1 October and the effects of said results, by virtue of article 4 of Law 19/2017, on "the referendum of self-determination". The Board agreed to the request, and the meeting was scheduled for 10 am on 9 October. Three other parliamentary groups (representing 43.7% of the seats) contested the convening of this session on the grounds that it would violate the Rules of Procedure of the Catalan Parliament. Sixteen Socialist deputies asked the Constitutional Court to adopt a provisional measure suspending the plenary session. The Constitutional Court declared the appeal admissible and ordered the provisional suspension of the plenary session. On 26 April 2018, the Constitutional Court, ruling on the merits, found that the procedure followed by the Bureau of Parliament calling the plenary session did not comply with the provisional suspension of Law 19/2017 decreed by the Constitutional Court on 7 September 2017 and had prevented the denouncing deputies from exercising their functions. The Constitutional Court stressed that the Catalan Parliament had the mission of representing all citizens and not only specific political groups, even if the latter formed a majority. On 10 October 2017, a plenary session of the Catalan Parliament was nevertheless convened, despite the suspension by the CC of a session convened for the previous day for the same purpose.[56] At this session, Catalan President Carles Puigdemont stated that the mandate from the people was that Catalonia become an independent State, as a republic. He continued "with the same solemnity" that the parliament would suspend the effects of the declaration of independence so that in the coming weeks both sides may engage in a dialogue, without which it was impossible to reach a negotiated solution.[57] Following this declaration, the Spanish Government launched the process leading to the application of Article 155 of the Spanish Constitution, which, as established in it, was approved, after the corresponding debate, by the Senate by the absolute majority on 27 October 2017. As a consequence, the autonomous government of Catalonia was dismissed and substituted by bodies set up by the central government; and new parliamentary elections in Catalonia were called. They were held on 21 December 2017, and again resulted in a pro-independence majority in parliamentary seats,[58] although not in votes.

74. Prosecutions for crimes carrying up to 30 years in prison were launched against top Catalan politicians. Many of them were kept in pretrial detention, seven former ministers, one civil society leader elected to parliament in the new elections on 21 December 2017, and the leader of the largest Catalan cultural association, Omnium Cultural, Mr Jordi Cuixart, were convicted by the Supreme Court of Spain in October 2019, for the crimes of sedition, embezzlement of public funds and disobedience. They were sentenced to prison sentences between 9 and 13 years. Others, including the former Catalan President, Mr Carles

52. See "Carles Puigdemont: Spain Must Talk to Catalan Leaders", Time, referring to the statement of the then Vice-President of the Spanish Government (Deputy Prime Minister).
53. See *El Defensor de les Persones* (Catalan Ombudsman), "The violation of fundamental rights and freedoms arising from the criminal justice reaction following October 1, and application of the Article 155 of the Spanish Constitution", May 2018 (henceforth: Catalan Ombudsman report), at page 13.
54. www.catalannews.com/politics/item/a-referendum-an-independence-bid-and-the-many-trials-that-ensued (news from March 2021).
55. Laws 19/2017 of 6 September 2017 and 20/2017 of 8 September 2017.
56. A complaint against this suspension by 76 members of the Catalan Parliament was rejected as inadmissible by the European Court of Human Rights (*Maria Carmen Forcadell I Lluis and others v. Spain*, appl. no. 75147/17, decision of 7 May 2019).
57. See Catalan Ombudsman report, op. cit., page 9.
58. 70 of 135 seats, with a record participation of 79%.

Puigdemont and the former Catalan education Minister, Ms Clara Ponsati, have left Spain. Their extradition, requested by the Spanish authorities, has so far been refused in all cases, on different grounds.[59] The charges against them, as well as the sentences handed down against those who had remained in Spain are considered by many commentators as grossly disproportionate. This was also the view of the experts – the former judges of the European Court of Human Rights for Spain, Turkey and Belgium – at the hearing before the committee at its meeting in Berlin on 14-15 November 2019 and of several interlocutors during my meetings with the Spanish authorities on the occasion of my fact-finding visit from 3 to 6 February 2020. Personally, I also find that these women and men, some of whom I met in their place of detention, do not belong in prison.

75. The critics of the harsh measures taken against the Catalan politicians point out that the organisation of an illegal referendum was explicitly decriminalised by Organic Law 2/2005. The preamble of this law states that:

> *"criminal law is governed by the principles of minimal intervention and proportionality, as stated by the Constitutional Court, which has reiterated that it cannot deprive a person of their right to freedom unless it is absolutely indispensable. In our legal framework there are means for control of legality other than criminal law."*

These other means for control of legality include the sharp tools put at the disposal of the Spanish Constitutional Court to ensure execution of its own decisions, including the suspension of laws pending the completion of their review on the merits, and heavy fines and other sanctions inflicted on non-compliant officials.[60]

76. It is argued that the organisers of the referendum of 1 October 2017 could not foresee that after its explicit decriminalisation, the organisation of an illegal referendum would be subsumed under other, even harsher provisions of the criminal code. The Supreme Court's final judgment of 14 October 2019 dismisses this argument, effectively finding that organising a referendum that was explicitly prohibited by a court order was not covered by the law decriminalising the organisation of (other) illegal referenda.[61]

77. The prosecutors I met during my fact-finding visit to Spain confirmed that both the crime of rebellion, of which the Catalan leadership was accused by the prosecution, and the crime of sedition, for which they were convicted by the Supreme Court requires an element of violence. This is indeed the prevailing interpretation of these criminal provisions, and it is also required that the violence can be attributed to the person accused of the crime.[62] The prosecution of the politicians who organised the referendum of 1 October 2017 for the crime of rebellion can hardly be based on actual violence. As many observers noted, the mass demonstrations surrounding the referendum were impressively peaceful. The widely shown video footage of these demonstrations is indeed very clear in this respect. The rare violent incidents that were nevertheless observed are attributed by supporters of the Catalan politicians to the police, who occasionally used baton charges, tear gas and rubber bullets to hinder the voting and cordon off polling stations.[63]

78. During my fact-finding visit, both the Interior Ministry in Madrid and the Catalan authorities provided me with statistics on the number of police officers and members of the public injured during the mass protests surrounding the referendum and on the day of the referendum itself. I was given similar numbers by both sides: The Spanish Interior Ministry referred to a total of 431 injured policemen, 111 of whom had been "beaten", 10 having had to take leave on health grounds. Among the demonstrators, 1 066 received some medical attention, 82.5 % of them had been "beaten". 5 injuries were categorised as serious. The police had

---

59. See the report adopted by the committee on Legal Affairs and Human Rights on 25 June 2019 on "Interpol reform and extradition: creating trust by fighting abuse", Doc. 14997 (Rapporteur: Aleksander Pociej, Poland, EPP/CD), paragraphs 59-63.

60. The Venice Commission had discouraged Spain from endowing the Constitutional Court with the responsibility to enforce its own decisions by applying severe pecuniary and institutional sanctions without the necessary procedural guarantees. "Attributing the overall and direct responsibility for the execution of the Constitutional Court's decision to the Court itself should be reconsidered, in order to promote the perception that the Constitutional Court only acts as a neutral arbiter, as judge of the laws." (Spain, Opinion on the Law of 16 October 2015 amending the Organic Law no. 2/1979 on the Constitutional Court, adopted at the 110th Plenary Session (10-11 March 2017, Opinion no. 827/1917, paragraph 71).

61. Criminal Chamber of the Supreme Court of the Kingdom of Spain, judgment no. 459/2019 dated 14 October 2019, English translation available at: www.poderjudicial.es/cgpj/en/Judiciary/Supreme-Court/Judicial-News/Press-Release--Special-Proceedings-20907-2017 – referred to in the following text as "Judgment of 14 October 2019", page 339.

62. See for example Catalan Ombudsman report, op. cit., pages 29-31 and footnote 51, with references to the legislative history of the current Article 472 (rebellion).

63. See Amnesty International, "Spain: Excessive use of force by National Police and Civil Guard in Catalonia", 3 October 2017.

been instructed to target "equipment" used for the illegal referendum (namely to make urns and ballots "unavailable"). Video footage showing violent charges with batons and tear gas by police could in part be "manipulated", but some transgressions also by police could not be excluded. The ministry did not have information on the number of police officers currently under investigation for unlawful violence as this was the competence of the regional courts. Disciplinary action would be taken in due course depending on the outcome of the ongoing criminal investigations. The ministry stressed the good reputation of the Spanish National Police and Guardia Civil who used riot gear only on rare occasions (between 0.03% of all demonstrations in 2015 and 0.29% in 2019) and who were regularly trained in de-escalation techniques. But the security forces on duty in early October 2017 did not expect to be confronted with such a high number of people and their "hostility", which, as I was told, prevented them from intervening against the illegal referendum as instructed. The figures I received from the Catalan Government (Generalitat) are very similar: a total of 12 members of the security forces received medical care, as well as 1 066 participants in the referendum and in the demonstrations, between 1 and 4 October 2017, of whom 83% had a "minor" diagnosis, 16.4% a "moderate" one and 0.5% (five persons) a "serious" one.

79. In my view, given that millions voted in the referendum and participated in the mass demonstrations in early October 2017, both the organisers of the referendum and the protests and the security forces have every reason to be proud of the very limited number of injured persons on both sides. Having met the imprisoned Catalan leaders, I am entirely convinced that their intentions were peaceful and that their calls for non-violence were genuine. The Spanish Supreme Court, in its judgment of 14 October 2019, clearly shares this assessment. For example, regarding Mr Cuixart, "[t]he Court does not question his commitment to non-violence, which is always commendable." (page 236). Regarding Mr Romeva, the Supreme Court says: "This profile of Mr Romeva [promoting a culture of peace] is a well-known fact that this Court acknowledges, praises and respects. There is no doubt whatsoever as regards his commitment to peace." (page 308). As in most mass events, some defensive reactions and even some transgressions by individual demonstrators were probably inevitable and cannot be blamed on the organisers.[64] Otherwise, any peaceful protest would put the organisers at risk of serious criminal liability for unwanted acts by extremists or even provocateurs. The Supreme Court's position in this respect seems unclear: on the one hand it recognises (at page 372) that:

> *"the messages were a faithful reflection of the will, shared by the co-defendants accused of the offence of sedition, to do everything possible (excluding – it cannot be denied – violent acts,[65] except for foreseeable but unavoidable ones involving rogue elements) to prevent the state and regional law enforcement agencies from completing the actions they had been ordered to perform by the court."*

On the other hand, the court still finds them guilty of sedition, which under Article 544 of the Spanish Criminal Code requires a "tumultuous uprising" (page 372).

80. Having apparently understood that it would be difficult to prove violence in the usual sense of the word,[66] the Spanish prosecution adopted a novel interpretation of the violence requirement for the crime of rebellion dubbed "violence without violence" or "bloodless violence".[67] Following this interpretation, the sheer number of demonstrators mobilised by the organisers constitutes an inherent threat of violence, designed to intimidate and overwhelm the authorities.

81. In an interlocutory order of 5 January 2018, the Supreme Court[68] found that there was violence from the moment in which the president and government acted by intending to declare independence, placing themselves outside the rule of law, and doing so "from the exercise of power, which explains why they did not need to use violence to attack it at that time as a step prior to the execution of the plan". The Supreme Court even likened the actions of the Catalan politicians to the behaviour of putschist officers such as those bursting into parliament armed with pistols on 23 February 1981. The Catalan Ombudsman found this comparison "disproportionate, distorted, unfair and alarming". In its final judgment of 14 October 2019, the Supreme Court found that the level of violence did not reach the threshold required for a conviction for "rebellion", but that it was sufficient for the crime of "sedition." Our Catalan interlocutors were adamant that it was obvious from the

---

64. The German court (Schleswig-Holstein Court of Appeal), which refused the extradition of Carles Puigdemont, based its decision precisely on the fact that the Spanish authorities did not produce any evidence of violence that could be attributed to him.
65. Underline added by the Rapporteur
66. Reportedly, the bill of indictment dated 4 April 2018 of the High Court of Spain (Audiencia Nacional) categorically stated that there was no violence in the events of September and of 1 October. Similarly, the Supreme Court, in its interlocutory order of 17 April confirming the bill of indictment of 21 March, admitted as a possibility "the scenario in which the element of violence was not sufficiently proven in the specific case."
67. See Catalan Ombudsman report, op. cit., page 31.
68. Ibid.

outset that the indictment for "rebellion" was untenable. They argue that it was only used in order to deprive the accused of their parliamentary mandates and thereby change the majority in the Catalan Parliament.[69] The prosecutors we met in Madrid denied this, arguing that it was only during the course of the evidentiary hearings during the actual trial that the legal qualification of the incriminated acts "crystalized".

82. Article 544 of the Spanish Criminal Code defines as sedition the actions of those who, without being committed to the crime of rebellion, stage a public, tumultuous uprising to impede by force, or outside legal channels, any authority, official body or public civil servant from exercising their duties. In my understanding, the Supreme Court gave Article 544 an interpretation that effectively turns non-violent civil disobedience, when committed by politicians elected to public office or civil society leaders, into the serious crime of sedition, which according to its wording requires a "tumultuous uprising". For example, regarding the former Speaker of the Catalan Parliament, Ms. Carme Forcadell, the Supreme Court found that her vote as such on certain resolutions was not a criminal act and that it was in any event secret, though the judges indicated that they could easily "guess" how she voted (judgment page 320). "The decisive factor was that as president of the legislative body she did not prevent resolutions openly in opposition to the declarations of the Constitutional Court from being voted on." (page 320) The Supreme Court also considered the following, more or less well-defined, actions or deeds as seditious: "annihilating the constitutional pact" (page 241), the "creation of a parallel constituent legal system whose objective is to bring into crisis the constitutional order currently in force" (page 242), "championing the de facto derogation of constitutional principles", "attacking the constitutional foundations of the system" (page 247) and "challenging constitutional legality" (page 316). In my view, these rather abstract actions, if they can be so described, or modus operandi seem to be a far cry from the wording of Article 544, which requires, concretely, a "tumultuous uprising".

83. Also, as a matter of proportionality in view of the prison term of 8-15 years attached, any "actions" fulfilling the definition of Article 544 should arguably reach a minimum threshold of danger or closeness to achieving their unlawful aims – which the Supreme Court itself did not seem to consider as having been reached, when it called the aims of the accused a "pipe-dream":

> *"Despite the defendants' rhetoric, as a matter of fact the measures ostensibly designed to bring about independence as promised were manifestly not up to the task. The State at all times retained its control of military, police, judicial and even social force. And, by doing so, it made any bid for independence a mere pipe-dream. The defends were aware of this." (page 264).*

84. Other, more concrete actions invoked by the Supreme Court to underpin the conviction for sedition include the protest in front of the Catalan Ministry of Finance in Barcelona on 20 September 2017. The mass protest in front of the building hindered the judicially authorised search-and seizure by the police, who, as the court says, felt

> *"materially incapacitated in the face of the crowds that had gathered with an attitude, frequently of hostility and of outright opposition at all times.[…] Taking advantage of their overwhelming numerical advantage which was intimidating or, at the very least dissuasive […]" (page 390; see also the detailed description of the events in question at pages 41 to 46).*

85. But can peaceful protests be considered as being "outside legal channels" within the meaning of Article 544 of the Criminal Code (sedition)? Can the exercise of a fundamental right become a serious criminal offense merely because many persons exercise their right at the same time? Frankly, I do not think so. The Supreme Court seems to acknowledge this on several occasions (for example pages 266, 237, 239, 274 and 369) and stresses that none of the demonstrators have been indicted, let alone convicted for any offense (page 235). But this begs the question of how the nine politicians convicted of sedition can possibly be the authors of a "tumultuous uprising", all on their own, as the Catalan Ombudsman asks.[70] If the mass protests as such were legitimate exercises of the right to freedom of expression and assembly, as the Supreme Court says, then I would expect that this would also apply to those who organised and called for these protests.

86. The application of Article 544 foreseeing prison terms between 8 and 15 years to peaceful mass protests also raises the issue of proportionality and contradictory evaluations, in comparison with other criminal provisions foreseeing far milder penalties for more dangerous behaviour, such as the crime of protest

69. According to the electoral laws, an indictment for rebellion, but not one for sedition, justifies that parliamentarians are deprived of their mandates.

70. See Sindic (Catalan Ombudsman), "Supreme Court Ruling 459/2019 and its repercussions on the exercise of the fundamental rights", January 2020, page 18 (point 5 in fine).

with criminal purposes or using weapons or explosives, or the crime of public disorder, punished by prison terms between six months and six years (the latter applicable in the most serious cases when weapons are carried or violent acts are committed that endanger people's lives).[71]

87. In my view, such a wide interpretation of the crime of sedition, in conjunction with the earlier explicit decriminalisation of the organisation of an illegal referendum, could create an issue of "*nullum crimen, nulla poena sine lege*" under Article 7 of the Convention. Also, an interpretation which would penalise the organisation of peaceful demonstrations on the sole ground of the large number of participants may well be seen as a potential violation of the freedom of assembly protected by Article 11 and fail the Court's proportionality test. Obviously, the Court will have the final say on this, in all independence.

88. On 22 April 2021, the Spanish Constitutional Court (12 Members) rejected the complaint by Mr Turull against his conviction by the Supreme Court, finding no violations of Mr Turull's rights to penal legality (Articles 25.1. of the Spanish Constitution), personal freedom (Article 17.1), ideological freedom (Article 16) and freedom of assembly (Article 21). These articles correspond roughly to Articles 7, 5, 10 and 11 of the European Convention on Human Rights. Two judges dissented, finding Article 544 not sufficiently clear and predictable and the penalty disproportionate. Even more recently, on 14 May 2021, the Constitutional Court, with the same two judges dissenting, also rejected the "de amparo" appeal by Josep Rull. Both Mr Turull and Mr Rull have announced that they will take their case to the European Court of Human Rights, which will of course have the last word, in all independence, on the interpretation of the Convention rights in play.

89. The conviction of several leading Catalan politicians involved in the organisation of the 2017 for embezzlement of public funds also raises some question-marks. I was told in Madrid that the central government had taken over the administration of the Catalan budget before the referendum and that the Finance Ministry confirmed that it had successfully prevented any misuse of funds. In Barcelona, I asked the Catalan authorities how they were able to organise the referendum in these circumstances. I was told that what limited funds were required came from donations, many of them from the Catalan diaspora. Otherwise, civil servants and many citizens had volunteered their time and made available suitable premises for polling stations. Dolors Bassa, the former social affairs minister whom I spoke to in prison, was given a 12 year sentence for having allegedly made available some social office and school premises; I was told that for the latter, she could not possibly be held responsible – the education minister at the time of the referendum was Ms Clara Ponsati, who has since left Spain for the United Kingdom.

90. Keeping in mind the criteria of Resolution 1900 (2012) on the definition of political prisoners (see above point 2.1.1.), allegations of defence rights violations, unfair imposition of pre-trial detention and doubts on the neutrality of the courts dealing with the cases of the Catalan politicians may also be relevant. The trials were held very much in public, having been televised in full. This provides for an impressive amount of transparency. But it is alleged that some investigated individuals had to testify without a clear idea of the offenses for which they were being investigated. Reportedly, the members of the Catalan Government were summoned less than 48 hours before their hearing in court regarding pretrial detention. The individuals accused of rebellion were served their bill of indictment (68 pages) only two hours before their detention hearing. Carles Puigdemont's lawyer was reportedly denied access to the case file until his client's arrest in Germany.[72] Other criticisms include the long hours the defendants had to stay in the courtroom, purportedly biased and distorting statements by the prosecutors and the influence exercised on access to the courtroom by supporters of the far-right VOX party, which was even granted procedural status as "civil party", and the rejection by the court of numerous requests for evidence by the defence. Finally, it has been criticised that politicians were tried in first and last instance by the Spanish Supreme Court, rather than of before the *Audiencia Nacional*, the first instance court competent to hear cases of national importance, or the High Court of Justice of Catalonia.

91. Regarding judicial impartiality, doubts have been raised due to the direct contacts which allegedly took place between the judges of the CC and members of the national government. Also, the President of the CC publicly stated that the judiciary's mission was to guarantee the unity of Spain. This has been understood as openly taking a stand against the political positions defended by the indicted Catalan leaders, whose court cases were still pending.[73] Furthermore, as the Supreme Court in its judgment of 14 October 2019 (page 114) admits, an investigating judge involved in the case, Mr Pablo Llarena, had referred in one of his decisions to "the strategy targeting us", thus admitting that he felt like one of those "targeted" by the strategy used by the accused. The impartiality of the Spanish Supreme Court is finally put into doubt by a message of a senior

71. See Sindic, Supreme Court Ruling 459/2019, op. cit., page 22.
72. See Catalan Ombudsman report, op. cit., page 26-27.
73. See Catalan Ombudsman report, op. cit., page 37 and footnote 67.

senator bragging that they could control the Supreme Court and the General Council of the Judiciary "through the back door".[74] It has been noted that the Court had found violations of Article 6 for lack of impartiality of the judges in several Spanish cases, lastly in the judgment of *Otegi Mondragon et al. v. Spain (6 November 2018).*[75]

92. Numerous trial observers have periodically published detailed assessments of the fairness of the proceedings against the Catalan leaders.[76] I cannot go into any detail in this report. It will be up to the Spanish Constitutional Court and ultimately the European Court of Human Rights to assess the overall fairness of the proceedings. The Court's case law on the demands of Article 6 (3) (a) (right to a fair trial) is clear: the accused must be made aware "promptly" and "in detail" of the accusation, including the facts on which it is based and their legal qualification.[77] The Court has also upheld the defendant's right to adequate time and facilities for the preparation of their defence.[78] Regarding independence and impartiality, the Court has developed standards requiring the absence of subordination of judges to any type of executive authority and the absence of prejudice or bias. Whilst the personal impartiality of the judge is presumed, an objective element requires that a given judge in a given case offers enough guarantees to exclude any legitimate doubt in this respect.[79]

93. Numerous international human rights bodies, NGO's and parliamentarians from many countries have denounced the arrests, detention and prosecution of the former Catalan Government members.[80] For lack of space, I shall just refer to two particularly important findings, by the UN Working Group on Arbitrary Detentions (UNWGAD). The UNWGAD, at the end of May 2019,[81] determined that the detention of Oriol Junqueras, Jordi Sanchez and Jordi Cuixart was "arbitrary" within the meaning of the Universal Declaration of Human Rights (Article 3) and the International Covenant on Civil and Political Rights (Article 9). Despite an unusually sharp rebuke by the Spanish Government, a second decision in July came to the same conclusion for three more Catalan politicians (Raül Romeva, Dolors Bassa and Joaquim Forn).

94. The Catalan politicians in detention have intermittently benefited from the milder prison regime generally applied to non-violent offenders, which they were granted by the Catalan prison administration, whose decisions were sometimes appealed by the prosecution. The detainees contend that they are asked to "repent" for their actions in order to qualify for these privileges, or to benefit from a chance at pardon. They publicly refused to renounce their deeply held political objectives. The Spanish delegation recalls that the requirement to undertake to refrain from committing further crimes applies to all detainees who wish to have privileges including the right to leave the prison at certain times, and that repentance or regrets are required by law from all convicts who wish to qualify for a pardon. To treat the Catalan politicians differently would amount to a violation of the principle of equality before the law. In my view, it should be possible to find a formula which would allow the detainees to make the necessary undertakings without disowning their deeply held political convictions and objectives – provided they pledge to pursue them without using illegal means.

4. Conclusions

95. We have seen that the European Convention on Human Rights foresees strong protections for freedom of speech of politicians, not only in their own, personal interest, but for the sake of the functioning of democracy. In a democracy, politicians are permitted to argue and campaign even in favour of changes that would violate the existing constitution, on two conditions: firstly, that the proposed changes do not themselves violate the fundamental principles of democracy, the rule of law and the protection of human rights, and secondly, that the means advocated to achieve these changes are democratic and non-violent. The Court has recognised that hate speech and calls for violence are not covered by freedom of speech. These are also

74. See Ombudsman, "Supreme Court Ruling 459/2019", op. cit., page 27.
75. See https://leidenlawblog.nl/articles/otegi-mondragon-et-al-v-spain-the-impartiality-of-the-audiencia-nacional.
76. For example, International Trial Watch, Catalan Referendum Case, press release of 18 February 2019, Assessments of 1-0 Trial (Week 1), etc. (weekly); Briefings of the Generalitat de Catalunya (Government of Catalonia), starting on 13 February 2019
77. For example, *Mattoccia v. Italy*, appl. no. 23969/94, judgment of 25 July 2000, paragraphs 58-59.
78. For example, *Sadak and others v. Turkey*, appl. no. 29900/96, 29901/96, 29902/96 and 29903/96, judgment of 17 July 2001, paragraphs 57-58.
79. See *Piersack v. Belgium*, appl. no. 8692/79, judgment of 1 October 1982, paragraph 30.
80. I have received a massive "Compilation of Positionings by International Organisations regarding Catalonia's Human Rights Situation before and after the Referendum of 1 October 2017, dated 23 January 2019. Since then, many more such statements have reached me, most highly critical of the treatment of the Catalan politicians in question. Most recently, 52 French MPs voiced their concerns in an opinion article in the Journal du Dimanche on 1 September 2019.
81. https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session84/A_HRC_WGAD_2019_6.pdf

covered by the prohibition of the abuse of rights under Article 17 of the Convention. But in order to protect democratic debate, the Court has – rightly, in my view – interpreted the limitations that may be placed on free speech as "necessary in a democratic society" quite narrowly. We have also seen that in the two countries mentioned in the motion for a resolution underlying my mandate as Rapporteur, these protections have allegedly been violated in several high-profile cases. That said, I should like to make it clear that I do not consider that the situation in both countries as regards freedom of speech of politicians and the rule of law is the same.

96. In Spain, the authorities argue that the politicians in question are not prosecuted for what they have said, but for what they have done – organising an illegal referendum on independence and generating political pressure by organising mass demonstrations, by abusing their position of power as members of the regional government. The authorities stress that the mere expression of pro-independence views is not a ground for criminal prosecution in Spain. I could see for myself during my visit that many Catalan politicians who publicly advocate these views and even fly the pro-independence flag in front of public buildings are not criminally prosecuted. Spain is a living democracy with a culture of free and open public debate. The question remains for which facts exactly the former members of the Catalan Government were convicted – given that the organisation of an illegal referendum was explicitly de-criminalised not long ago, and that participating in and even organising peaceful demonstrations constitutes the exercise of a fundamental right. Can the exercise of a constitutional right constitute a crime, one that is punished by long prison sentences such as those handed down against the Catalan politicians in Spain? Can organising a peaceful protest turn into a crime because many hundreds of thousands of people follow the organisers' call? While the approval of the "disconnection laws" and the holding of the referendum were clearly unconstitutional and directly disobeyed injunctions from the constitutional court, they were not violent, or "tumultuous", at least in my understanding. They might well require some sanctions, for example as "disobedience", but the long prison terms for "sedition" seem disproportionate.

97. In my view, the heavy-handed use of criminal law against politicians who used peaceful means to pursue objectives that do not negate fundamental principles of democracy and human rights was disproportionate. The imprisoned Catalan politicians' objectives – ultimate independence for a democratic Catalonia – and the means used by them – the October 2017 referendum and a – for practical purposes – symbolic declaration of independence immediately suspended pending negotiations with the Spanish authorities – were clearly incompatible with the Spanish Constitution, as the Constitutional Court had held beforehand. But should "disobedience" to a judgment of the Constitutional Court be punished as a very heavily sanctioned criminal offense such as "rebellion" or "sedition"? To me, some passages in the judgment of the Spanish Supreme Court of 14 October 2019 look like illustrations for the difficulty of justifying the presence of violence as required by the crime of sedition ('violence without violence', as the prosecution argued). The court needed to rely on the sheer number of peaceful demonstrators preventing the security forces from carrying out their assigned task of rendering "unavailable" the ballots and ballot boxes prepared by volunteers; and it needed to find that the element of the crime of sedition of a "tumultuous uprising" is fulfilled by such abstract deeds as "annihilating the constitutional pact" (page 241), the "creation of a parallel constituent legal system whose objective is to bring into crisis the constitutional order currently in force" (page 242), "championing the de facto derogation of constitutional principles" or similar abstract notions (above, paragraph 82). Of course, the final decision will be up to the competent courts, as I mentioned on several earlier occasions.

98. Using criminal prosecutions based on the outdated and overly broad crimes of rebellion and sedition to deal with what is in truth a political problem that should be solved by political means may well be counterproductive. It turns politicians into heroes or martyrs. The same is true for the continuing prosecutions, albeit mostly for lesser crimes such as "disobedience", of hundreds of other Catalan politicians and officials suspected of involvement in the organisation of the unconstitutional referendum and the surrounding mass protests. I hope that some recent acquittals are a good sign in this context. Maybe inclusive and open dialogue will be a better means to convince the Catalan people that remaining in Spain is their best option.

99. In Turkey, it seems to be rather more explicit that the politicians in question were prosecuted and convicted for what they said, rather than for something they did. Here, the key question is whether the provisions criminalising certain types of political speech are sufficiently clear, foreseeable and narrowly drafted to satisfy the requirements of the Convention, as interpreted by the Court. The sheer number of opposition politicians that are imprisoned or being prosecuted for political statements speaks for itself. Frankly, some of the procedures followed, such as the temporary lifting of constitutional protections for the purpose of lifting the immunity of 193 members of parliament *en bloc*, and some of the facts giving rise to a conviction, such as a parliamentary question about the actions of the security forces and the whereabouts of confiscated assets in

the MP's constituency, are rather unique and do not belong in any parliamentary democracy. The failure to execute key judgments of the Court, such as those in favour of MM. Demirtaş and Kavala, whose release was ordered by the Court and the Committee of Ministers, is unacceptable.

100. As many of the cases in question are still pending before the Strasbourg Court, or are likely to be the subject of applications in due course, I do not intend to "pre-empt" the Court's future judgments by taking position in favour or against the appropriateness of the prosecution or conviction in the one or other individual case. But I did not hesitate to sum up in the draft resolution preceding this memorandum the general principles, which the Assembly might wish to reaffirm and point out possible systemic problems for which the cases in question can be referred to as examples, as has been the practice of the Assembly for many years.

Appendix 1

Examples of Turkish politicians belonging to the HDP prosecuted for statements made in the exercise of their mandates: information provided by the HDP and comments received from the Turkish authorities[82]

– Ms Figen Yüksedag received a total of six prison sentences (for "insulting the President" and "terrorist propaganda").

– Mr Selahattin Demirtaş, whose case is still pending before the European Court of Human Rights' Grand Chamber after the Court found in its first judgment that his pre-trial detention was politically motivated. Mr Demirtaş was sentenced to 4 years and 8 months in prison for a speech he delivered during the Newroz celebrations in Istanbul in March 2013. I was given a translation of the full text of this speech. I would be interested in an explanation of what exactly qualifies as "terrorist propaganda" in this speech dedicated to the peace process then engaged between the Turkish State and Kurdish separatists. In another case, Mr. Demirtaş was sentenced to 3 years and 6 months in prison for "terrorist propaganda".

– Ms Leyla Birlik was sentenced to 1 year and 9 months for "insulting the President", based on a speech she delivered on 13 August 2015 protesting against arbitrary detentions by security forces. I have received a translation of the relevant extract of this speech and would like to understand better in which way this text, which strongly and in a polemic tone criticises the action of the Government, shall constitute an insult to the president.

– Mr Idris Baluken, former deputy co-chair of the HDP parliamentary group, was sentenced to 16 years and 8 months in prison for "violating the law on meetings and demonstration marches" and "membership" and "propaganda" of a terrorist organisation. I would like to understand better which was the factual basis for this draconic punishment, as well as the 7 years and 6 months sentence handed down by the 16th Penal Chamber of the Supreme Court on 4 December 2018.

– Mr Adam Geveri and Ms Nursel Aydogan, both former HDP MP's were sentenced to 1 year and 3 months in prison for "violation of the law on meetings and demonstration marches", based on their participation, on 7 January 2015, in a public protest against the killing of three Kurdish women by security forces in Sirnak. They were allegedly tried for slogans shouted by other protesters.

– Mr Abdulla Zeydan was sentenced on 11 January 2018 to 8 years and 1 month in prison for "aiding a terrorist organisation" and "making terrorist propaganda".

– Mr Caglar Demirel, former MP, was sentenced to 7 years and 6 months for "membership in a terrorist organisation".

– Ms Burcu Celik, former MP, was given on 9 April 2018 a prison sentence of 6 years for "deliberately helping a terrorist organisation whilst not being a member", for a speech she gave at a funeral ceremony on 25 September 2015. The Supreme Court finally reversed her conviction and she was released on 16 October 2019. I would be grateful for information on the time she spent in detention until then and what the content of the speech was that she was initially convicted for.

– Mr Ferhat Encü was sentenced to 4 years and 7 months for "terrorist propaganda" and violation of the curfew. He lost his mandate as MP on 6 February 2018 and was released from prison on 14 June 2019.

– Ms Selma Irmak was convicted several times for "membership in a terrorist organisation" (7 years and 6 months) and "terrorist propaganda" (2 years and 6 months), as well as insult to the Turkish government (1 year). She was deprived of her seat as an MP on 19 April 2018.

– Ms Besime Konca was sentenced to 2 years and 6 months for "terrorist propaganda", and her mandate as an MP was revoked on 3 October 2017.

– Ms Meral Danis Bestas was sentenced to 2 years and 3 months for "insulting the Turkish government and State".

– Ms Nursel Aydogan was sentenced to 4 years and 8 months in prison for "committing a crime on behalf of a terrorist organisation without being a member of this organisation". Her mandate as an MP was revoked on 9 May 2017.

---

82. The Turkish authorities were invited to provide more detail about the actual facts underlying these convictions and how the prosecution and the courts have analysed and evaluated the impugned statements in their context, in light of the case law of the Court.

– Mr Ahmet Yildirim, deputy co-chair of the HDP parliamentary group, was sentenced to 14 months in prison for "insulting the President". He was deprived of his mandate as MP on 27 February 2018.

– Mr Osman Baydemir was sentenced to 5 and a half months in prison for "insulting a public officer on duty". On 19 April 2018, he was deprived of his parliamentary mandate. On 10 December 2018, he was given another prison sentence of 1 year and 6 months for his participation in a demonstration in Sirnak in 2015 to protest against curfews in Kurdish towns.

– Mr Ibrahim Ayhan was sentenced to 15 months in prison for "terrorist propaganda" and lost his mandate as MP on 27 February 2018.

– Mr Lezgin Botan was sentenced to 2 years in prison for "threatening a public officer". On 23 March 2018, he was once again convicted, for "membership in a terrorist organisation", "disrupting the unity of the state and the integrity of the country" and "inciting people to committing crimes". I would like to know more about the interpretation of the crime of "disrupting the unity of the state and the integrity of the country" – is it not the very task of opposition politicians to develop and campaign for alternatives to existing government policies?

– Mr Behçet Yildirim was sentenced on 15 January 2018 to a total of 5 years in prison for "aiding and abetting a terrorist organisation" and "terrorist propaganda".

– Ms Dilek Öcalan was sentenced on 1 March 2018 to 2 years and 6 months in prison for "terrorist propaganda".

– Ms Gülser Yildirim was sentenced on 19 April 2018 to 7 years and 6 months for "membership in a terrorist organisation".

– Mr Dilan Dirayet Tasdemir was sentenced on 8 May 2018 to a suspended sentence of 1 year and 8 months.

– Mr Mahmut Togrul was sentenced on 6 November 2018 to 2 years and 6 months in prison for "terrorist propaganda", for a speech he held in Gaziantep on 25 February 2016 criticising State violence against Kurdish people in Cizre and other Kurdish towns.

– Mr Ertugrul Kürkçü was sentenced on 18 December 2018 to 2 years in prison for "terrorist propaganda", for a speech held during a Newroz celebration in Igdir in 2016.

– Mr Sirri Süreyya Önder was sentenced in 2018 to 4 years and 8 months in prison for a speech he delivered in Istanbul in March 2013 during a Newroz celebration.

– Mr Hisyar Özsoy was sentenced to a suspended sentence of 11 months in prison for "insulting the President".

– Ms Aysel Tugluk, former deputy co-chair of the HDP, was sentenced to 1 year and 6 months in prison; in another case he was sentenced she was sentenced to 10 years in prison for "managing a terrorist organisation".

– Ms Sebahat Tuncel, co-chair of the Democratic Regions Party, was sentenced to 2 years and 3 months in prison for "violating the law on meetings and demonstration marches".

– Ms Filiz Kerestecioglu, MP for Ankara and former Member of the Turkish PACE delegation, was charged with "terrorist propaganda" for a question she had asked the Council of Europe's Secretary General during the PACE plenary session in January 2018, about possible measures the Council of Europe could take to prevent civilian deaths in Afrin and the violent suppression of peaceful anti-war demonstrations in Turkey. Naturally, I am particularly worried about the case of my former colleague and would like to obtain detailed information about her present legal situation.

– Mr Ömer Faruk Gergerlioğlu, MP for Kocaeli, was sentenced to 2 years and 6 months in prison for "terrorist propaganda". The conviction was allegedly based on a re-tweeting a post on the T24 website dated 20 August 2016 entitled "PKK: if the state takes a step, the peace comes in a month", which was itself not incriminated.

– Mr Murat Sarisaç, MP for Van, is subject to an investigation opened on 16 February 2020 by the Van Prosecutor's office for "hiding and aiding a terrorist in his home". I was informed that the "terrorist" in question is a HDP functionary, Mr Yunus Durdu, who was arrested by a group of plain-clothes officials who had harassed Sarisaç for some time. Mr Sarisaç had tweeted that he would file a criminal complaint against these men.

– Leyla Güven: On 24 September 2019, the Supreme Court of Appeals upheld the prison sentence of HDP deputy Ms Leyla Güven (6 years and 3 months) in the Kurdish Communities Union (KCK) case, despite her parliamentary immunity. On 22 December 2020, she was sentenced to 14 years and 3 months in prison for “membership in a terrorist organisation" and 8 years in total for two counts of "propaganda for a terrorist organisation". Ms. Güven is still in prison.

– Mr Musa Farisoğlulları: On 24 September 2019, the Supreme Court of Appeals upheld the prison sentence of HDP deputy Mr. Musa Farisoğulları (9 years) in the Kurdish Communities Union (KCK) case, despite his parliamentary immunity. He is still in prison.[83]

– **Summary proceedings against 19 MPs**, opened in April 2019 on the ground that they failed to “react” to a speech they were listening to, by HDP co-chair Pervin Buldan. Ms Buldan spoke at an event in Diyarbakir on 27-28 October 2018 titled “Middle East Crisis and Democratic Nation Solution”. She reportedly said: “The peace and negotiation process should start once again, isolation of Mr Öcalan should be removed as soon as possible and Mr Öcalan should be included in this process … We, as all identities, beliefs and sects, will once again resist and strengthen the resistance … We express our belief that we will contribute to the start of a new period, a new process that will begin with Mr Öcalan by the removal of the isolation on him.”

Extract from the “Reply of the Turkish authorities” received on 5 May 2020 from the Turkish delegation

Brief information on the specific cases mentioned in the memorandum

Allegations Against Selahattin Demirtaş in the Indictment: “The suspect’s activities as “the Executive of the Political Field Centre” within the structure of KCK/TM (KCK Turkey Council) set out in Article 14 § 2 of the KCK Convention”, “The suspect’s acts and procedures as an executive at the Democratic Society Congress, which is considered as the subcomponent of the PKK/KCK armed terrorist organisation”, “The suspect’s acts concerning the offences of “disseminating propaganda in favour of the terrorist organisation”, “breach of the Law on Meetings and Demonstrations”, “praising the crime and criminal”, “inciting the public to hatred and hostility”, “inciting to committing offences”, “inciting not to abide by the laws” by way of using expressions in a way to legitimise the terrorist and violent acts of the PKK/KCK armed terrorist organisation during his speeches on different dates,”.

Allegations Against Nihat Akdoğan in the Indictment:: “-On 28-29 August 2015, when he realized that the terrorists -who engaged in a fight with the police from behind the ditches dug and barricades set up by the members of the PKK/KCK terrorist organisation in the Kıran Neighbourhood, got stuck – the applicant attempted to serve as a human shield in order to stop the fight. As a result of this, the terrorists, who had engaged in a fight with the police, fled the incident scene.”, “In the terrorists’ funerals he attended, the applicant referred to the dead terrorists as “martyrs”, “The applicant participated in protests and demonstrations which were held on various dates and which included the propaganda of the terrorist organisation”.

Allegations Against İdris Baluken in the Indictment:: “The suspect attended unlawful meetings which were organised by the PKK terrorist organisation and which were forbidden by the Governorship on account of the reasons of public security. During the mentioned demonstrations, the rags representing the PKK/KCK, the posters of the killed organisation members and the posters of Abdullah Öcalan, the ring leader of the organisation, were carried; and slogans were chanted in favour of the PKK.”, “In the course of his speech of 7 July 2012, the applicant expressed that “all Kurdistan people are proud of you, during the operations carried out by the security forces in the rural areas of Bingöl in winter of 2012, 50 Kurdish young persons, guerrillas died.”, “In the course of his speech of 13 December 2015, he regarded the operations carried out against the terrorists in Sur, Nusaybin, Cizre, Dargeçit, Silopi and Şemdinli as massacre; and he regarded the acts which were performed by digging ditches as resistance.”, “On 26 February 2016 the crowd which gathered together in order to protest the operations carried out against separatist terrorist organisation members in Sur district of Diyarbakır province chanted slogans in favour of the PKK and its ring leader Abdulah Öcalan. During his speech, the applicant promoted the acts of digging ditches and used expressions indicating his consideration that the fight he regarded as resistance must be sustained”.

83. The cases of Ms Güven and Mr Farisoğlulları were added to the appendix on 22 April 2021, they were not included in the list submitted to the Turkish authorities for their comments in 2020.

Allegations Against Figen Yüksekdağ in the Indictment: “The suspect’s acts and procedures as an executive at the Democratic Society Congress, which is considered as the subcomponent of the PKK/KCK armed terrorist organisation”, “The suspect’s acts concerning the offences of “disseminating propaganda in favour of the terrorist organisation”, “breach of the Law on Meetings and Demonstrations”, “inciting the people to hatred and hostility”, “inciting to committing offences”, by way of giving statements in a way to legitimize terrorist and violent acts of the PKK/KCK armed terrorist organisation during her speeches on different dates”.

Appendix 2 – Dissenting opinion presented by Mr Ziya Altunyaldiz (Turkey, NR) member of the Committee on Legal Affairs and Human Rights, pursuant to Rule 50.4 of the Rules of Procedure

The report unjustly targets Turkey alleging that certain politicians in Turkey were prosecuted or detained solely for what they express as MPs. This biased approach and baseless allegations harm the credibility of the report. The report should have refrained from duplicating the work of the Monitoring Committee. Furthermore, this issue merited a more comprehensive objective examination to ensure that all relevant factors are duly taken into account.

There can be no doubt that speech in Parliament enjoys an elevated level of protection. Parliament is a unique forum for debate in a democratic society, which is of fundamental importance. That being said, while the freedom of parliamentary debate is of fundamental importance in a democratic society, it is not absolute in nature.

In Turkey, the immunity of 154 MPs from all political parties represented in the parliament was lifted in June 2016. The legislative change was not a measure against parliamentary non-liability of MPs and did not lift the immunities from prosecution regarding what they express in any platform as MPs. In other words, it had nothing to do with the freedom of expression of the MPs. The exemption to the inviolability did only affect the files which had already been transmitted to the relevant authorities at the time of the adoption of the amendment. The amendment did neither abolish as a whole the parliamentary immunity nor had the effects on the future acts of the MPs.

During the relevant deliberations of the Turkish Parliament which lasted two whole sessions, all parliamentarians were entitled to participate to the debate, to table motions of amendments, to speak and express their views, their concerns about the lifting of their inviolabilities. The procedure to amend the constitution did not deprive them to express their thoughts freely on the lifting the inviolability.

Concerning the claim that MPs' right to defence was compromised, it should be underlined that the Turkish Parliament does not give a judicial decision on the acts investigated by judicial authorities and their right to defence remained intact.

Last but not least, it is important to remember that "terrorism" lacks a comprehensive and agreed definition under international law and that countries are free to enact and implement anti-terror legislation in order to protect the fundamental rights of their citizens as long as the legislation in question is in line with international standards. While countering terrorism, Turkey aims to strike a proper balance between protecting fundamental freedoms and maintaining public order and security.

It should have been acknowledged that Turkey exerts the utmost effort to fulfil its international obligations while addressing threats to its security.

Appendix 3 – Dissenting Opinion by Mr Antonio Gutiérrez, Mr Sergio Gutiérrez, Mr Marc Lamuà and Ms María Fernández (Spain, SOC), members of the Committee on Legal Affairs and Human Rights, pursuant to Rule 50.4 of the Rules of Procedure, with which Mr Omar Anguita, Ms María Luisa Bustinduy, Mr Héctor Gómez, Mr Manuel Miranda, Ms Esther Peña, Ms Susana Sumelzo and Mr Salvador Vidal (Spain, SOC), members of the Spanish delegation, have associated themselves

1. The report starts from the presumption that the pro-independence politicians were prosecuted for expressing their ideas in the exercise of their mandate. This prejudice contaminates the entire text, is reflected in the resolution and induces the Assembly to present recommendations that contradict the rule of law.

2. Nothing vindicates better the respect of the Spanish legal system for freedom of expression, than a paragraph taken from the Sentence No. 459/2019 of the Supreme Court of Spain that judged the Catalan leaders:

“What is sanctioned, in short, is not to give an opinion or advocate a secessionist option, but to define a parallel, constituent legality and to mobilise a multitude of citizens to oppose the execution of the legitimate decisions of the judicial authorities, holding a referendum that had been declared illegal by the Constitutional Court and by the High Court of Justice of Catalonia, the result of which was the necessary condition for the entry into force of the transitory law, which meant a definitive break with the structure of the State”.

3. Those actions reported by the Supreme Court are contrary to the principles of the rule of Law that the CoE so heartedly defends, and however, the Report hardly pays any attention to them. On the contrary, the report hints at some doubts about judicial impartiality and makes a harsh judgment on the sentence:

“In my understanding, the Supreme Court gave Article 544 an interpretation that effectively turns non-violent civil disobedience (…) into the serious crime of sedition” (paragraph 82)

These comments express an alternative interpretation of the facts that the Supreme Court has examined and qualified. But all must abide by the interpretation that the Judicial Power makes of the law, and must respect fully their independence. It is a special responsibility of all (PACE included) neither to interfere in the judicial processes underway, nor to qualify a sentence that can be challenged in a higher instance. As it is already happening, all cases of the independentist politicians will come to the ECHR.

4. In the final recommendations, The Assembly invites the Spanish authorities to:

“consider dropping extradition proceedings against Catalan politicians” and “drop the remaining prosecutions also of the lower-ranking officials involved in the 2017 unconstitutional referendum” (Draft resolution, paragraphs 9.3.2 and 9.3.3).

With this exhortation, PACE is clearly interfering with the competencies of the Spanish judiciary. Only judges may make decisions regarding the prosecution of crimes. The invitation also contradicts the principle of equality before the law, since it implies that some offences should be prosecuted while others should not.

5. In summary, in our opinion, the report criticizes the ruling of the Supreme Court (without taking into account that said judgment will be reviewed by the ECHR) and invites the Spanish authorities to take measures that are not in their power and that violate the principle of separation of powers and judicial independence.

Appendix 4 – Dissenting Opinion by Ms Marta González Vázquez (Spain, EPP/CD) and Ms María Teresa Jiménez-Becerril Barrio (Spain, EPP/CD), members of the Committee on Legal Affairs and Human Rights, pursuant to Rule 50.4 of the Rules of Procedure, with which Ms María del Carmen Leyte Coelho, Mr Javier Maroto Aranzábal, Ms María Valentina Martínez Ferro, Ms Margarita Prohens Rico and Mr Gonzalo Robles Orozco (Spain, EPP/CD), members of the Spanish delegation, have associated themselves

The report entitled "Should politicians be prosecuted for statements made in the exercise of their political mandates" prepared by Mr Boriss Cilevics, as it currently stands, cannot be accepted by the Parliamentary Assembly for the following reasons:

1. The report (point 8) states that several senior Catalan politicians were prosecuted and convicted to long prison terms for several crimes, *inter alia*, for statements made in the exercise of their political mandates (*sic*) when they were prosecuted for sedition, misuse of public funds and non-compliance to the court orders.

2. It also states (point 8.4) that it is undisputed that none of the politicians in question called for violence and that it is recognized that they called on demonstrators to refrain from any violent acts. The Spanish Supreme Court has just issued a report in which provides detailed information about the violence used in the events happened on September 2017, adding that the condemned prisoners were active participants in the gathering of several thousands of people that were called to vote in an illegal referendum, and that the mobilizations were neither peaceful nor democratic, as they tried to escape the decisions of the courts through the use of force.

3. The report also says (point 8.5) that the provisions of rebellion and sedition were enacted in response to the frequent attempts at military takeover in the past. This statement is astonishing. Spain is a full democracy and does not live under the threat of a military coup.

4. The rapport asks the Spanish Government to reform the criminal provisions of rebellion and sedition for their disproportionate sanctions (point 9.3.1). The Spanish Supreme Court considers that these crimes are similarly treated in many other European countries and does not see the need for this change.

5. The report asks the Spanish tribunals to drop the remaining prosecutions of Catalan leaders and lower-ranking officials involved in the call for an illegal referendum in 2017, as well as the government to pardon or release from prison (9.3.2 and 9.3.3) the Catalan politicians convicted. The Spanish Supreme Court just informed that a pardon cannot be granted as none of the requirements of the law regulating the pardon is fulfilled. As regards extradition, it is a competence of the court and the Council of Europe must respect the independence of the judicial power.

6. The rapporteur asks for a change in the details of the criminal provision of misappropriation of public funds (9.3.4). This is an intromission in the internal affairs when the report does not deal with these subjects and when there is no comparison of this crime in a European prospective.