FOLLOW-UP TO RESOLUTION 2381 (2021) OF 21 JUNE 2021 OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE

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EL DEFENSOR DE LES PERSONES

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Catalan Ombudsman (Síndic de Greuges de Cataluña)

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Follow-up to Resolution 2381 (2021) of 21 June 2021 of the Parliamentary Assembly of the Council of Europe

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INDEX

1. INTRODUCTION

The report of the Catalan Ombudsman entitled *The granting of a partial pardon to the persons sentenced by ruling 459/2019 of the Supreme Court,* of September 2021, gave an account of the adoption, in June of the same year, of Resolution 2381 (2021) of the Parliamentary Assembly of the Council of Europe, entitled "Should politicians be prosecuted for statements made in the exercise of their mandate?".

The resolution was approved on 21 June 2021, with 70 votes in favour, 28 against and 12 abstentions. It was based on the report written by Member of Parliament Boriss Cilevi□s, to which he had devoted more than a year, including a visit to Spain supported by the state public authorities and in which he interviewed a wide range of actors from both the legal and political spheres.

The resolution makes a series of recommendations to all member states of the Council of Europe, together with specific recommendations to the two states that have been the subject of special attention by the rapporteur: Turkey and Spain.

The purpose of this report is to contribute to the follow-up of the Council of Europe resolutions, assessing the degree to which these recommendations have been met.

2. GENERAL RECOMMENDATIONS TO ALL COUNCIL MEMBER STATES OF EUROPE

In general, PACE Resolution 2381 invites all states to:

- *10.1.1 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;*

- *10.1.2 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;*

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

The last of these recommendations will be further evaluated in the section on the Spanish case. In relation to the first two general recommendations, the following observations can be made:

1. In relation to the first recommendation

1. **Freedom of expression has been suffering from serious problems in Spain for a long time, in which a significant regression can be seen.** To cite only the last four years, (although one could go further: see the Catalan Ombudsman's Report *Human Rights regression: elected officials' freedom of expression and the separation of powers in the kingdom of Spain*, from April 2017), it should be noted that criminal proceedings have begun and the courts have condemned various people to various sentences (fines, imprisonment and disqualification, as the case may be) for expressions contained in songs or performed through social media. Of particular concern is the use of the crimes of exaltation of terrorism (under circumstances in which the terrorist organisations that existed in Spain in recent times have disappeared), insults to the Crown and hate crimes (from expressions directed against some state institutions or the police, which are not protected as such, since they are not vulnerable groups that should be protected from hate speech. The expressions were not addressed to them because of race, colour, national or ethnic origin, age, disability, language, religion or belief, sex, gender, sexual orientation, or other personal characteristics; the reasons they can generate hate speech).

It is worth highlighting the cases of rappers César Strawberry, convicted by the Supreme Court (TS), after a first acquittal from the National High Court (AN), with a sentence from the Constitutional Court (TC) that annulled the sentence of the TS (STC 35/2020, of 25 February 2020); Valtònyc, convicted by the AN (SAN of July 21, 2017) and ratified by the TS (STS 78/2018, of February 15); and Pablo Hasél, convicted twice (SAN of 31 March 2014, confirmed by STS 106/2015, of 19 February) and, for facts similar to those of the first conviction, (SAN of 2 March 2018) and, on appeal (SAN of 14 September 2018, confirmed by STS 135/2020). Valtònyc is currently in Belgium awaiting the resolution of the cassation appeal filed by the Belgian prosecution in the face of the two refusals of the courts to accept his extradition in accordance with the European arrest warrant filed by the Spanish Supreme Court.

2. This restrictive trend has been endorsed by the TC, with an inflection of its doctrine on freedom of expression, which already had some worrying precedents (such as that of STC 177/2015, July 22, the Stern and Roura case, in relation to which the ECHR subsequently declared that it violated the right recognised in Article 10 of the ECHR: ECHR of 13 March 2018, Stern Taulats and Roura Capellera v. Spain, nos. 51168/15 and 51186/15).

Indeed, the latest rulings of TC 190/2020, of 15 December and 93/2021, of 10 May, are particularly worrying for freedom of expression. These two rulings establish an extremely restrictive interpretation of freedom of expression, which, despite the statements of the ruling itself, is difficult to reconcile with the doctrine of the ECHR regarding this matter, as denounced through

the votes that some magistrates of the TC presented in both resolutions. In the first (STC 190/2020) the TC rejected the appeal for protection filed by a person who was convicted of committing outrages against Spain because, during a protest over labour demands by workers at a military facility, the individual made declarations against the Spanish flag (which was being hoisted at the military compound near where the protest was taking place). The TC considers that this sentence does not violate freedom of expression, since, according to the TC, the expressions used, relating to the Spanish flag that was being hoisted, were not necessary for the demands being made and had nothing to do with the protest. In the second (STC 93/2021), the TC did not grant protection to a person, a councillor of a City Council, who was civilly convicted of having called a bullfighter who had been killed by a bull "killer" on Facebook. Again, the TC uses the criterion of the "necessity of expression" used to put forward an idea or opinion and concludes that in this case it was not necessary to express his activist anti-bullfighting stance. It was therefore deemed excessive in terms exercising freedom of expression and could not be protected. This use of the criterion of the "necessity of expression" – alien to any consideration of weighting or proportionality – to put forward an opinion has a very high restrictive potential, as these cases show, and cause a chilling effect that clearly affects the free exercise of freedom of speech.

3. Strictly in relation to the political representatives, it is worth noting President Quim Torra's conviction for disobedience for not having ordered, within the deadline set by the Central Electoral Board (JEC), the removal of a banner (in protest to the existence of political prisoners) from the Government of the Generalitat de Catalunya's building. The sentence also led to the automatic loss of his seat in the Parliament of Catalonia, as decided by the JEC, an administrative body with control over electoral processes. This decision was later ratified by the Supreme Court and the Constitutional Court (STC 25/2022, of 23 February), in the latter case with several individual votes, meaning that, at the very least, the TC should have questioned the constitutionality of art. 42 of the Penal Code (CP). The article states that the penalty of special disqualification for public office entails, as well as the removal of the position of public office, the inability to obtain the same or other positions of public office within the duration of the sentence. This provision of the CP, interpreted in conjunction with art. 6.2.b of the LOREG, states that the conviction for certain crimes can be discounted, even if it is not final (these crimes include terrorism, rebellion and crimes against the Public Administration, among those which have resulted in disobedience). This has resulted in the JEC and the TS understanding that this cause of ineligibility requires the dismissal of persons convicted of these crimes – from such a diverse entity – from their position at the time of the conviction. This applies even if it is a different position from the one they occupied at the time the evidence was presented, for which they were convicted. It is an extensive interpretation of rules that restrict rights, with results that can be considered disproportionate.

Former president Torra has been the subject of another trial, due to later similar evidence, and is at this time awaiting the ruling of the High Court of Justice of Catalonia. A similar judicial settlement was reached in the case of Pau Juvillà, Member of the Parliament of Catalonia, for not having removed from his office in Lleida City Council, where he was councillor, the yellow ribbons in support of those convicted in the Catalan independence process by the TS, during a campaign election, a campaign in which, furthermore, he was not running. The criminal conviction of disqualification for disobedience also led to the loss of his seat as a Member of the Parliament of Catalonia, without even awaiting the resolution of the judicial appeal he had filed.

These criminal convictions show a very restrictive judicial practice of the freedom of expression of politicians. This is not justified by the neutrality of the public authorities during the electoral processes, which cannot in any case lead to politicians not expressing their position and opinions, but to the fact that the public authorities do not interfere in partisanship in the electoral process. The objectivity of public

administrations in the provision of their services is one thing, but the behaviour of the elected is something very different, by virtue of their ideology.

4. In the Juvillà case, moreover, there is a serious problem regarding respect for the right to effective judicial protection (art. 24 EC and art. 6 ECHR). Indeed, the JEC, an administrative body whose work is to guarantee and control the electoral processes, ordered the immediate withdrawal of Mr. Juvillà's seat, without even waiting for the resolution of the precautionary measures requested by the High Court and, even less so, the resolution of the judicial appeal against the sentence handed down by the High Court; simultaneously handing over the Member of Parliament credentials to the next on the list, and to which Mr. Juvillà had himself presented. The immediate withdrawal of the seat, due to a non-final conviction and through the decision of an administrative body, which threatened "legal action" if its order was not complied with, reveals the serious situation of powerlessness that occurs in this case (and which can be extended to other similar ones), where an administrative decision does not have an effective legal challenge, causing irreversible effects.

5. EIn these cases, the disproportionate nature of the sentence and the effects of it being handed down should also be emphasised. In any case, the display of symbols that are considered inappropriate during the election campaign could be resolved (as with other election infractions) with a fine or an administrative sanction, and not with criminal convictions for disobedience that result in disqualification and, additionally, the loss of the representative position of office obtained in an election.

This disproportion stems from the judicial interpretation, and that of the JEC, which are clearly extensive, and also from certain legal provisions that facilitate this result and which should be reviewed. In particular, art. 42 of the Penal Code (CP) and art. 6.2.b of the Organic Law of the General Electoral Procedure (LOREG), which state:

Article 42. Penal Code

The penalty of special disqualification public employment or office causes the definitive removal of the relevant employment or office it befalls, even if it is elective, and of the honours related to it. It also causes the incapacity to obtain the same or other similar positions, during the term of the sentence. The sentence must specify the employment, posts and honours the removal affects.

Article 6.2 b) Organic Law General Electoral Regime

2. The following are ineligible:

a) Those sentenced to imprisonment by final court decision, during the term of their conviction.

b) Those condemned by a court decision, even if not final, for crimes of rebellion, crimes of terrorism, crimes against the Public Administration or crimes against the Institutions of the State, when the court decision establishes the penalty of disqualification for the exercise of the right to be elected, or the penalty of absolute or special disqualification or suspension of public employment or office, under the terms provided by the criminal legislation.

6. Likewise, this also directly affects the freedom of expression of political representatives in the exercise of their representative duties in Parliament, which also affects the guarantee of parliamentary inviolability, with respect to which a very restrictive conception has been established by the TS and TC. With respect to this, we must highlight the criminal proceedings open to members of the Board of the Parliament of Catalonia that allowed the processing of certain legislative initiatives considered unconstitutional and who were sentenced by the High Court of Catalonia to fines and disqualification (STSJ Cat of 19 October 2020). Another member of the board, later a member of the Congress of Deputies, was also convicted by the TS for the same evidence (STS of April 9, 2021) and forced to leave his seat in the Congress of Deputies. Likewise, the previous President of the Parliament of Catalonia, Roger Torrent, and

some members of the board of the same legislature have also been prosecuted for allowing parliamentary debates on monarchy and self-determination and are currently awaiting the oral hearing.

All these facts show a significant regression in terms of freedom of expression, which is particularly serious in relation to expressions which refer to institutions such as the Crown or the police. This is particularly relevant in the act of imposing limits – with criminal consequences – on free expression in the representative and parliamentary sphere, where the mere fact of exhibiting certain political symbols (relating to those convicted by the Supreme Court in the trial of 1 October) or allowing debate on certain issues (such as the right to self-determination or the Crown) may lead to the initiation of criminal proceedings and may result in the disqualification and termination of representative positions. Amnesty International also referred to this regression in its recent annual report on Spain.

2. In relation to the second recommendation

1. In relation to art. 42 CP and 6.2.b LOREG, which have the combined effect of the automatic removal of those in public office convicted of disobedience (even to an administrative body, such as the JEC), see the considerations made in the previous section. Some particular votes in TC rulings have repeatedly held that these provisions had disproportionate effects.

2. On the other hand, **the most problematic provisions of Organic Law 4/2015, on the protection of public safety of 2015 (The Gag Law), have not yet been repealed**, although a legislative amendment is being processed in the Congress of Deputies. The TC stated that it was in accordance with the Constitution, except for the need to authorise the use of images of the authorities, police and facilities in certain cases (STC 172/2020, of November 19). The Catalan Ombudsman has already denounced the regression of this law in its report *Human Rights regression: elected officials' freedom of expression and the separation of powers in the kingdom of Spain*, April 2017.

Both the European Commissioner for Human Rights and the Venice Commission have been critical of this legislation.

3. It is also worth mentioning, in relation to the limitations imposed on elected representatives to exercise their functions, the application which the Board of the Congress made, with a more clearly extensive interpretation, of art. 384 bis of the Law of Criminal Procedure (LeCrim), to those prosecuted for the case of 1 October in Catalonia, who had been elected to the Congress of Deputies (Oriol Junqueras, Jordi Sànchez, Jordi Turull and Josep Rull) and to the Senate (Raül Romeva) in the 2019 legislative elections. In all these cases, the fact that they were being prosecuted for a crime of rebellion (which was later clearly inapplicable in the trial) led to their suspension from their representative positions of office.

Neither could Member of Parliament Jordi Sànchez (elected to the Parliament of Catalonia in the elections of 21 December 2017, and in pre-trial detention at the time for his alleged involvement in the events that led to what occurred on 1 October in Catalonia), who was nominated as a candidate for the Presidency of the Generalitat, present himself at the investiture ceremony. Member of Parliament Jordi Turull, also prosecuted in the same case, was able to run as a prospective candidate for the Presidency of the Generalitat in the first investiture session but was imprisoned by court order before the second session and was given permission to attend. It should be noted that in all these cases the exceptional measure of art. 384 bis of LeCrim, introduced in the anti-terrorism legislation of 1988 (Organic Law 4/1988, of 25 May), which establishes that persons integrated in armed or terrorist gangs and "terrorist or rebel individuals" who are prosecuted and in provisional imprisonment are automatically suspended from the public office they hold, and which the TC interpreted, accepting its constitutionality, in the context of the examination of anti-terrorism legislation (STC 71/1994, of 24 March).

3. SPECIFIC RECOMMENDATIONS FOR SPAIN

Resolution 2381 (2021) makes the following specific recommendations to the Kingdom of Spain:

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

10.3.2 consider pardoning or otherwise releasing 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;

10.3.3 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 that merely express their solidarity with those in detention;

10.3.4 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;

10.3.5 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 pledge to pursue their political objectives without recourse to illegal means;

10.3.6 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 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 and reach a compromise that enables Spain, a strong European democracy, to settle political differences, including on sensitive issues;

10.3.7 implement these recommendations according to the principles of the rule of law as defined by the Council of Europe, paying due attention to the principle of equality of all citizens before the law.

We will now analyse the current degree of compliance:

1) Reform the crimes of rebellion and sedition so that the organisation of an illegal referendum, which was already decriminalised in 2005, cannot be interpreted as inoperative or that disproportionate sanctions can be applied to non-violent infractions

During the first half of 2021, before the adoption of the resolution of the Parliamentary Assembly, it was announced by the media that the State Government was preparing a bill to reform the Penal Code in relation to crimes of rebellion and sedition. **According to the media, once the pardons were granted in the terms which will later been seen, the Government withdrew this reform. Therefore, the Council of Europe's recommendation has not been complied with at the time this report was written.**

At this point, in any case, it is interesting to examine the current regulation of the crimes mentioned by the PACE.

Rebellion

First of all, it must be said that civilians have never been convicted of criminal rebellion, both in its historical formulation and in its current form, by a civil court. STS 459/2021 was the first time civilians were tried for this reason. Although the conviction was eventually for sedition, bringing the charge of rebellion to the hearing before the High Court had consequences that we have described in the report *Supreme Court Ruling 459/2019 and its repercussions on the exercise of the fundamental rights*, of January 2020.

The military rebellion that was indiscriminately applied to civilians and the military in Spanish legal-political history has quite different conceptual and legal roots. Therefore, from a legal point of

view, the jurisprudence generated in this regard cannot be considered a valid antecedent for the case of the Catalan independence process.

The 1995 Penal Code results in a major structural change to all variants of the crime of rebellion. Unlike previous versions of the punitive text, it demands that the uprising of those who want to change the institutional system, in whole or in part, must be public and violent. Previously, only public uprising was required.

The introduction of violence into the penal type was the result of an amendment put forward by the Basque Parliamentary Group on a conditional basis, that is, it made its affirmative vote subject to the introduction of this amendment into the new Penal Code. It can be seen from the Diary of Sessions of Les Corts and from the public statements of the members of parliament that took part in the parliamentary negotiations. This is how it was officially stated: "Those who rise up violently and publicly for any of the following purposes are guilty of the crime of rebellion: [...]" In the Catalan case, the hypothetical variant of the rebellion would be that of no. 5 of article 472 CP: "Declaring the independence of a part of the national territory".

With the new wording provided in the CP-95, the crime of rebellion requires three essential elements to satisfy the fundamental right to the principle of criminal law. The first is the uprising, in other words, a concerted gathering of people who are overwhelming the legitimate authorities, with the aim, in the Catalan case, of proclaiming independence. The second element must be its publicity, that is, the manifestation of the citizen to the insurrectionary movement. The preliminary stages of the conspiracy – in a broad sense – are, by nature, secret; however, if they are discovered, they are subject to specific punishment (art. 477 CP).

The third legal element is violence. In serious crimes, such as rebellion, violence is always considered physical violence against people or things; not merely intimidating, but harmful or destructive.

In STS 459/2019, of 14 October, at no time is a definition of an uprising given, or which of the defendant's acts constituted an uprising. It would be, to put it bluntly, as if someone had been convicted of manslaughter without stating in the ruling who and how the person had died. Secondly, violence is not reflected in the sentence as the third central element of the crime. In fact, it is never directly mentioned in the sentence. It is not clear what specific acts it consisted of. Violent events that are typical of a rebellion are never reported: assault on public institutions, injuries or deaths, arrests, looting, and so on. To offer some further details: next to the Ministry of Economy, in front of which thousands of citizens demonstrated on September 20, 2017 – one of the days of the alleged rebellion – there are three businesses which are highly sensitive to riots: a jeweller, a pharmacy and a bank, in that order. Not one of the three establishments needed to close to the public outside their usual opening hours. A large Barcelona theatre, further along the pavement, which is also a neighbour of the Ministry, held its nightly performance without any issues while the demonstration was being held in front of the Ministry.

In conclusion, in no case can calling an illegal referendum be considered a rebellion in the current wording of the Penal Code. However, as recommended by the Council of Europe, **a review of the type of rebellion would be needed to ensure that it can only occur in the event of serious material violence, with a real alteration of the constitutional order**.

Sedition

HHistorically, until the 1995 CP, sedition was a crime that followed rebellion in the section on crimes against the state's internal security. The CP-95 changed the appearance of the legal text. Since 1995, rebellion has been inserted in a section of the CP (Section XXI of Book II), named "Crimes against the Constitution". Sedition in this new political-criminal approach is integrated separately as another crime "against public order" (Section XXII of Book II of CP). The wording of the current precepts, however, maintains

the historical and morphological kinship with the rebellion, which formally remains a tax-related crime. This is the cause of many interpretive problems, given the countless legal references to sedition in the rebellion.

In fact, the wording of sedition begins with negative wording: "Conviction for sedition shall befall those who, without being included in the criminal offence of rebellion [...]" (art. 544 CP). This negative wording makes it very difficult to understand who can commit a crime of sedition. This is one of the many defects that the legal configuration of this crime suffers from. In actual fact, the doctrine treats both crimes as a pair. Sedition has even been considered a small rebellion. Sedition, like rebellion, requires uprising, publicity, and a tumultuous way of carrying out this action – in other words, violence.

There is no need to repeat what has been said previously regarding uprising and publicity. The difficulties come from the expression "in a public and tumultuous way". One doctrinal sector, especially those in favour of considering sedition as the crime applicable to the case, argue that a tumultuous uprising does not have to be a violent uprising. This is difficult to justify given the penalty at stake, which is 10 to 15 years in prison. The same as homicide.

On the other hand, the purpose of sedition is "to prevent, by force or outside the legal channels, the application of the laws or any authority, official corporation or public official, the legitimate exercise of the functions thereof or implementation of the resolutions thereof, or of administrative or judicial resolutions". It is not just a matter of obstructing or hindering certain public functions, but of not being able to perform them (which STS 459/2019 does not take into account). To do so, either by force (violent acts) or outside the legal channels, that is to say, by extrajudicial means, which in the systematic sense of the crime means to carry out highly violent actions, given the penalty at play.

However, the TS operates contrary to the established hermeneutic standard. In its sentence, when sedition is punished based on a construction of violence, it means that it is not really physical violence, but environmental violence, a legally non-existent concept. Such a peculiar construction was described by the Parliamentary Assembly of the Council of Europe (3-6-2021) as "violence without violence".

As we have established in the previous point, STS 459/2019 nowhere does it speak of the facts that constitute the uprising or what responsibility each of the defendants has individually in the circumstances which are being prosecuted. This is due to it being a collective crime in which the contributions of each defendant must be circumstantial to bring forward a conviction which respects the fundamental rights of criminal law and the equally fundamental rights that come under the umbrella of the overall expression of the right to due process of law.

Nor should the convening of an illegal referendum fit, in a minimally rigorous interpretation, into the criminal type of sedition. However, **the only possible (and necessary) reform is the repeal of the crime of sedition and the reformulation of crimes against public order, especially public disorder crimes, which are a chaotic mishmash, disproportionate and which do not go hand in hand with the constitutional principal of criminal legality.**

2) To pardon or in all other ways liberate the Catalan politicians condemned for their role in organising the unconstitutional referendum of October 2017 and the large-scale peaceful demonstrations that accompanied it. To also consider the possibility of nullifying the procedures of extradition filed against Catalan politicians who are abroad and who are being persecuted for the same reasons

Those sentenced to prison terms, nine in total, by STS 459/2019 were **pardoned on 22 June 2021 for the time they had left in prison, on condition that they did not re-offend and were released.** The other non-custodial sentences, as well as the identical

sentences of the others convicted, were not pardoned.

As the most important penalty imposed regarding the deprivation of rights was the disqualification from holding all kinds of public office (from elected office or roles in the public administration to all kinds of education in officially owned centres), those convicted by this sentence have been excluded from participating in public affairs, including education and public health, until the disqualification comes to an end, and of course the right to stand for election.

Regarding the scope and limits of the pardons granted in June 2021, we refer to the report of the Catalan Ombudsman, *The granting of a partial pardon to the persons sentenced by ruling 459/2019 of the Supreme Court*. Below we refer to the situation of the others who have pending criminal cases for issues related to 1 October.

Other defendants

Although the bulk of the proceedings against second-line public officials, who are therefore not granted immunity, have not been carried out – mainly those that are still under investigation in the Court of Instruction No. 13 of Barcelona – **there has been a steady stream of criminal cases, especially against protesters who took to the streets in protest of the police's actions in the 1-O and subsequent trials.** A large part of them were finally acquitted because the defendants' participation in the events was not proven or because the right to demonstrate prevailed over minor riots. Those convicted, in general, still have their sentences under review. Others whose cases are now closed have, in some instances, called for a pardon if the resolution was particularly excessive. There are no resolutions yet. Nor does it appear at this time that there is a politically concerted action to hold an organised petition for pardons.

For their part, the members of the Board of Parliament who allowed the debates that the TC had banned, were convicted, either by the High Court of Justice of Catalonia (TSJCat) or by the TS, for disobedience. There is no request for a pardon, probably because the penalty is disqualification, and the processing of the pardon may take longer than the sentence itself.

Among the high-ranking defendants the following can be cited:

- Former minister Meritxell Serret, accused of a crime of disobedience, to be tried by the Superior Court of Justice of Catalonia given her current status as Member of Parliament.

- The current Minister of Culture, Natàlia Garriga, for the events of 1-O, when she was director of services of the Department of the Vice-Presidency.

- The current Members of Parliament, Jové and Salvadó, by the Superior Court of Justice of Catalonia, for organising the 1-O demonstration.

- Former Member of Parliament, Eulàlia Reguant, for disobedience in refusing to answer questions from the private prosecution (of the political party VOX) in the case that led to the Supreme Court ruling 459/2019. It is worth noting that this Member of Parliament was already fined €2,500 by the government for these acts, which calls into question the principle of *ne bis in idem*.

Relevant acquittals

For procedural reasons that are not always clear, the cases of the Catalan independence process have been split between a number of courts (Supreme Court, National Court, Superior Court of Justice of Catalonia and various courts of inquiry). In this context, there have been two relevant rulings. The first refers to the entire police force of the Generalitat (police and politicians) in supporting the 1-O referendum. They were acquitted and their conduct considered positive or irrelevant by the facts being discussed at trial. The judgment of the National High Court (October 21, 2020) was not appealed and is therefore final. Affected officials were reinstated in their jobs.

For their part, the members of the Electoral Commission of Catalonia were tried and acquitted in the first instance (judgment of

14 April 2021) for a radical lack of evidence in the participation of the functions that were thought to have been carried out in the illegal 1-O referendum. The prosecution has appealed this acquittal.

Although these acquittals are still good news, it is worth noting the reputational and emotional damage caused by unjustified accusations (which still continue in the case of members of the Electoral Commission) and that the Minister of the Interior was convicted of sedition and 10 and a half years in prison for the same acts for which his subordinates were acquitted.

Euroorders

Several former senior officials of the Generalitat during the events of the 1-O have left the territory of the State and still have their cases pending. This is the situation of the ex-president Carles Puigdemont and the ex-ministers Antoni Comín, Clara Ponsatí and Lluís Puig, to whom the Supreme Court has activated a Euroorder at various times. Contrary to what the Parliamentary Assembly recommends, **"extradition proceedings against Catalan politicians who are abroad and who are being persecuted for the same reasons"** have not been nullified.

The legal situation of the Euroorders against those prosecuted for the events of September/October 2017 are, according to the interlocutory judgment of the ECJ of 30-7-2021, suspended, despite the protests – outside the procedural avenues – of the investigating magistrate of the TS who issued them. According to the ECJ, this suspension took place, precisely because it was the investigating magistrate of the High Court who declared this, as stated in the corresponding court file. For this reason, the Euroorder that was activiated in Italy (Sassari, Sardinia) was revoked less than 24 hours after the arrest of President Puigdemont.

The previous Euroorders have been rejected by the requisite state courts. There is only one remaining in Belgium, which has been appealed by the public prosecutors of that country.

The possibility of them being overruled – so far only temporarily due to tactical and indecipherable movements of the investigating magistrate of the TS – is ultimately the responsibility of the Government of Madrid. Indeed, given that only the Ministry of Public Prosecutions is party to the proceedings of the Euroorders and, consequently, the only procedural body that can call for them, and given that the Public Prosecutor's Office depends, despite a certain functional autonomy, on the Government, at any time they can order the Prosecutor's Office before the TS, via FGE, to withdraw the requests of the Euroorder. In that case, the TS investigator would have no choice but to file them and, as a result, they would be ineffective. At the same time, the preliminary question raised by the same investigating judge before the ECJ would elapse. The same would happen with internal arrest warrants. In short, the last word in this matter is the State Government

On the other hand, with regard to three of these people, who have the status of Members of the European Parliament (Puigdemont, Comín and Ponsatí), the Supreme Court has raised a question before the ECJ, which is still awaiting resolution, in relation to their conviction by judgment 459/2019 when they had already acquired the status of MEPs.

A separate mention should be made regarding the former Members of Parliament Marta Rovira and Anna Gabriel, who are in Switzerland, a country that has from the outset rejected the possibility of extradition, given that Article 3 of the bilateral agreement with Spain excludes political crimes.

Amnesty

The first measure insisted on by public institutions and private and academic organisations was to seek amnesty for all those prosecuted and convicted of the acts that led to legal action and before the Court of Auditors (TCu) which is responsible for accounting. After deliberations of all kinds, the pro-independence political parties in the Congress of Deputies in Madrid submitted a bill on 16-3-2021. It was, however, inadmissible for being incompatible with the

Constitution according to the opinion of lawyers from the legislative chamber. In fact, the Board of the Congress, dated the following 23 March, agreed, "the granting of a general pardon affecting a plurality of persons convicted by a final sentence would be in stark and obvious contradiction with the provisions of Article 62 (i) of the Constitution, according to which it is not appropriate for the law to authorise general pardons".

In other words, it was not even possible to debate its admission to proceedings in its own parliament. However, a simple reading of the Constitution, which speaks of the right of pardon exercised by the king, does not speak of amnesty or, therefore, of prohibiting it. Not even an amnesty, with name and surname, is a general pardon. This is the opinion of much of the criminal and legal-public doctrine. In addition, with its decision, the Board assumes a power, that of prior constitutional control, unprecedented and without any legal support, stealing from the institution legitimately in charge of this function, the Constitutional Court, the right to rule on a controversial topic.

Appeals to the TC and the path to the ECHR

Virtually all of the convictions have been appealed before the TC, which has denied protection and upheld the ordinary sentences and all the proceedings, although not unanimously. Once the internal route of ordinary and extraordinary appeals has been exhausted, the path towards appealing before the ECHR is expedited.

This European body has already received a number of lawsuits arising from the resolutions of the Catalan independence process. It appears that the final ones are still expected and in the meantime one single case has been put together. It is still too early to determine a probable date for the settlement of the claims

3) Withdraw the remaining proceedings against lower-ranking officials, also implicated in the 2017 unconstitutional referendum, and not punish those who have succeeded the imprisoned political leaders, whose actions simply express their solidarity with the detainees

Part of this is already answered in the previous question, but it is worth developing some additional arguments. From the point of view of the defendants and the facts presented, most have not been sentenced. They are still under investigation. Occasionally, individuals are added to the case and occasionally some are withdrawn from the process. In these cases, a provisional filing of the individual proceedings takes place. **In any case, there has been no widespread withdrawal of proceedings against lower-ranking officials by the Public Prosecutor, as recommended by the Council of Europe.**

The two courts of preliminary investigation with the highest number of defendants are the Court of Preliminary Investigation No. 13 and the Court of Preliminary Investigation No. 1, both in Barcelona. Initially, Court No. 13 dealt with the case, but has been losing defendants due to those who have been granted immunity, who have been tried by either the TSJCat or the TS.

These are public officials, from the Administration of the Generalitat or from local administrations, who, apart from the responsibilities they had at the time of the events or may have in the future, do not enjoy special procedural status. In fact, this group is made up of around fifty people, including a good number of mayors. The investigation, which has been about to close on a couple of occasions, and the case referred to court for oral hearing, continues in this phase of investigation.

The other relevant case, owing to the significance of the defendants' positions of public office, none of whom any longer have immunity, is the Voloh Case (Court of Instruction No. 1 of Barcelona). It refers to the alleged involvement of the defendants in encouraging the participation of Russia in the Catalan independence process, which would have been spurred on by a number of individuals involved in judicial process, and in which there are presently no known indications of this involvement.

Interested parties have requested that the proceedings be filed. The Public Prosecutor

has also done so, in part, referring the remainder of them to the National High Court. It is currently unknown how the proceedings will develop, regarding time frame or content.

Another iconic case is that of Tamara Carrasco: an activist accused of sedition, rebellion and terrorism, who had extremely harsh precautionary measures imposed on her (a ban on leaving the municipality for more than a year), and who has been acquitted on two occasions by the Criminal Court and the Provincial Court of Barcelona; sentences that have been appealed by the Public Prosecutor.

In any case, it is necessary to reiterate what has already been said previously: since the Public Prosecutor depends on the Central Government, the latter could override the accusations of the Public Prosecutor and the judge, by virtue of the accusatory principle, should close the case. For some causes, the so-called popular action can come before the court – with the exception of the Spanish monopoly by the Public Prosecutor of criminal action – which is not subject to any mandate from any public or private authority. This could lead, in practice, to the continuation of the proceedings, if the judge deems it appropriate, to the extent that someone is pursuing popular action in accordance with the legal provisions.

4) Ensure that the criminal provision on the embezzlement of public funds is applied in such a way that liability arises only when real and quantified losses can be ascertained in the budget or patrimony of the State

In the framework of Preliminary Actions 80/2019, on 20 April 2021, the Court of Auditors issued an order summoning 34 high-ranking officials of the Generalitat de Catalunya in the period 2011-2017 for "indications of accounting liability" in relation to the expenditure of the Generalitat destined to the realisation of "a participatory process or consultation of the citizens carried out on 1 October 2017". The actions resulted in a provisional settlement in January 2020 following allegations made by the Public Prosecutor and two private entities.

High-ranking officials were forced to hand over a guarantee of 5.4 million euros at the end of July 2021. If they had not done so, the Court would have seized their assets.

Although in the open proceedings there are up to 34 former senior government officials indicted, for now the only lawsuit admitted for processing (Catalan Civil Society) is against just 11 people: the former presidents of the Generalitat, Carles Puigdemont and Artur Mas, the former vice-president Oriol Junqueras, as well as eight other former members of the Catalan Government: Dolors Bassa, Toni Comín, Neus Munté, Jordi Turull, Raül Romeva, Clara Ponsatí, Lluís Puig and Francesc Homs.

It should be noted that Artur Mas and Francesc Homs have already been tried and convicted by the Supreme Court regarding the organisation of the 14-N (2014) consultation. For their part, Oriol Junqueras, Dolors Bassa, Neus Munté, Jordi Turull and Raül Romeva have been for sentenced for the 1-O, while the rest of the defendants have the case pending in the Supreme Court.

In any case, this recommendation is far from being met at the present time.

In relation to the Court of Auditors, it is worth reflecting on the independence and impartiality of this institution, within the framework of its jurisdiction.

Although the constitutional and legal framework should guarantee the independence and impartiality of this body, various aspects of its operation within a democracy call these elements into question.

The Court of Auditors is made up of 12 councillors elected equally by the Congress and the Senate by a qualified majority of 3/5 of the chambers. The term of office of these councillors is 9 years and is renewable. The result of the combination of these factors, together with the majorities that have made up the Cortes Generales over the last 40 years, have meant that the appointments have been made on the basis of party quotas, with little regard for the technical knowledge of most candidates. In addition, the possibility of re-election has

allowed some councillors to remain in office for up to 30 years.

To make matters worse, more than half of the staff of the Court of Auditors do not have the status of an official of the Court itself, as required by law; they come from other public administrations (which the TCu must audit). There have also been serious allegations of nepotism, in the sense that more than 100 of the 400 employees in the TCu had family ties to senior officials of the body itself.

The Spanish Court of Auditors, like some of its European counterparts (France, Italy and Portugal), but unlike most higher audit bodies (including the Court of Auditors of the European Union) has two functions. The first is the typical function of this type of entity: auditing the accounts of the public organisms and of the general budgets of the State (General Accounts). The second is its ability to prosecute for possible accounting liabilities or crimes that may arise from its analysis of public accounts.

Article 15 of the Organic Law of 1982 establishes that:

> "One. The prosecution of accounting, as the Court of Auditors' own jurisdiction, is exercised in relation to the accounts to be rendered by those who collect, intervene, administer, guard, manage or use public goods, wealth or effects.
>
> Two. The accounting jurisdiction extends to the scope of public wealth or effects, as well as to the ancillary obligations constituted in the guarantee of its management."

The public's lack of knowledge regarding this capacity to prosecute, and the critical opinions it began to generate at the beginning of the previous decade (including allegations of nepotism in recruitment and appointments to the Court) motivated the Court of Auditors to initiate a peer review done by the European Court of Auditors and its Portuguese counterpart. This report (2015) can be found on the website of the Court of Auditors in the Transparency section.

With regard to the prosecution capacity, the report recommended, among other things, that the councillors of the Prosecution Section should not discuss and vote on the audit reports and that the instruction of the proceedings should be the responsibility of the Preliminary Audit Unit, under the supervision of the Public Prosecutor. There has been no post-2015 Expert Evaluation. There have also been no reports from TCu itself on a follow-up to the recommendations or any plans for change and improvement based on this document. At least three serious organisational defects remain in the procedural function of the Court.

A first problem is that the second hearing before an appeal can present a risk of collusion. The Prosecution Section is in fact organised as follows: one president of the Section and three other councillors, each in charge of one of the Prosecution Departments, who are responsible for each case to be tried, which are decided by lots. If in the end a sentence is handed down, each of the councillors does so individually as a judge of first instance. If there is an appeal against the ruling, then it is within the scope of the Section itself where the appeal will be considered. This is done using the president with the other two councillors of the Departments who did not participate in the ruling in the first instance. Although the councillor who ruled the first instance did not take part in the second, there seems to be no doubt that sharing the Section for nine years, with tens or hundreds of cross-appeals, generates a strategic game of mutual favours that makes this second instance ineffective. In this sense, it would be much better if the second instance had no connection with the people themselves who issued their sentences in the same Section.

A second element of organisational design that may affect the prosecution councillors' rulings is the recommendation contained in the aforementioned Expert Evaluation. An important source of the activation of the Court's own jurisdiction is the Court's own audit reports, as occurred in the case of the 34 high-ranking officials of the Generalitat. The fact that the councillors take part in the debates and that they are also able to

vote on the approval or disapproval of the audit report, may influence the criteria that are formed on the subject that will then pass to their own jurisdiction, one whom will have to make a ruling on the subject in the first instance. If we were in a judicial scheme, it would be as if the Public Prosecutor or Investigating Judge were included into the judicial body after they themselves formulated the accusation.

The third element, also of a general nature and that affects both the Prosecution and Audit Section, is the presence of the Solicitor General in the duties of the TCu. The Solicitor General is a body belonging to the executive branch of the State, located in the Ministry of Justice, with the rank of Under Secretary, who legally assists the Government. The Court of Auditors, in its auditing role, is in the service of the Parliament and in its jurisdictional role, has judicial power: it does not make sense that the Solicitor General is incardinated in the internal processes of the operation of the TCu; on the contrary, this negatively leads to the independence and impartiality of the institution. Naturally, the State Attorney's Office should be party to the proceedings, but what is unusual is for it to be part of the TCu's decision-making process.

One example of this anomalous situation can be seen in acts 28 and 27 of 2021, linked to the guarantees that were requested in relation to the activities of foreign action of the Generalitat de Catalunya. The investigating officer of the guarantees case sought the opinion of the Solicitor General, which refused to give an opinion – as if it were an impartial third party – precisely because it is not. All this is related to points 2 and 3 of the Expert Evaluation, which show that after more than 40 years of its own jurisdiction, the TCu has not been able to build one single case in the Prosecution Section that guarantees the rights of those affected.

In light of the above, we can conclude that the Court of Auditors does not meet the levels of independence and impartiality that are essential to perform the jurisdictional role entrusted to it by its Organic Law.

5) Withdraw the demand that Catalan politicians who serve their sentences renounce their deep political convictions in exchange for a more favourable prison regime or the possibility of being granted a pardon. They may however be required to commit to pursuing their political goals without resorting to illegal means

As we have already pointed out, those convicted by the Spanish High Court for sedition after the referendum in Catalonia have been pardoned by the State Government (RRDD 456 to 464, all of June 22, 2021) and are today living in freedom. **In order to be granted a pardon, they did not have to give up their political convictions.**

However, some aspects of the proceedings that led to the granting of the pardon (and the situation in which they were enjoying prison benefits while in prison) call into question whether this recommendation is being fully complied with.

1. The pardon is on the condition of "not committing a serious crime again" within 3 to 6 years, depending on the case.

Understanding that these crimes are those that involve penalties classified as serious (art. 33.2 of the Penal Code: imprisonment of more than 5 years, withdrawal of the right to drive vehicles for more than 8 years, prohibition of the right to reside in a certain place for more than 5 years and a ban on approaching the victim or their relatives or communicating with certain people for more than 5 years), it should be noted that the behaviours classified as such are of a very diverse nature, many of which have nothing to do with political or even public activities, so pardons could be revoked by a conviction for actions that have nothing to do with the facts for which they were convicted, not even with the political or public activities of these people.

This restriction can be perceived as a threat that limits the freedom of action of pardoned persons and the full exercise of their rights, including freedom of expression.

2. It is a matter of great concern that the report, which was issued by the Supreme Court before the pardon was granted, makes extensive use of the argument of the "lack of remorse" of the convicts to oppose the granting of their pardons. This "lack of remorse", which was also alleged by the High Court to revoke prison benefits that had been granted to convicts when they were in prison, in the terms expressed by the High Court, is in fact equivalent to the requirement that convicts assume the TS's point of view on the facts that gave rise to the conviction, which for the TS constitutes a crime of sedition and for those convicted, an exercise of their fundamental rights (especially freedom of expression and demonstration) and representation (protected by parliamentary inviolability). Thus, this demand for "remorse" for actions of a purely political nature – since at no time were they attributed to the punishable acts of violence – can be seen as a demand to renounce one's own political beliefs that harms their ideological freedom, as already denounced by this Catalan Ombudsman in the November 2020 Report; *Effects on rights of the criminal enforcement of Supreme Court ruling 459/2019* p. 21. This violation took place with the annulment by the TS of the penitentiary benefits that had been recognised by several courts of penitentiary surveillance, when considering the appeal of the Public Prosecutor, who requested the prisoners were assigned to a treatment programme linked to the crime, which, by its nature and that of the facts which gave rise to the conviction, could essentially only consist of a kind of political re-education programme. This reproach of the TS for a lack of remorse can be seen as a demand to change its ideological and political position.

3. The concern expressed in the previous section may well remain in the future, relating to those who are being prosecuted for the crimes and who are still in exile, awaiting the resolution of the European arrest warrants that the Spanish TS issued to the Belgian justice, in case they are at some point tried in Spain.

4. In relation to the possibility of enjoying prison benefits during the almost four years of their liberty being deprived, we refer to the report *Effects on rights of the criminal enforcement of Supreme Court ruling* 459/2019, of November of 2020, in which we questioned that convicted persons had to undergo a reintegration programme aimed at instilling certain ideas in them, in order to access a certain penitentiary treatment. We reiterate that renouncing one's own ideology must be considered a violation of ideological freedom, in the sense indicated by both the Constitutional Court and the ECHR. In addition, the resolution contained hidden threats against prison workers in case they persisted in maintaining their professional criteria regarding the evolution of prisoners.

6) Establish an open and constructive dialogue with all the political forces in Catalonia, including those that oppose independence, in order to strengthen the quality of Spanish democracy. This must be done through the rule of law, good governance and full respect for human rights, without the need to resort to criminal law, but with full respect for the Constitutional order of Spain that in turn allows the establishment of a strong European democracy

A round table has been initiated between the Government of the Generalitat de Catalunya and the State Government, but this dialogue process is moving forward very slowly (only two formal meetings), and it lacks, at least publicly, a structure and clear and definite planning, with no tangible results to date.

In this sense, it would be necessary to give it a structure and a guarantee, to make it effective to address and resolve the conflict between Catalonia and the State, as the Catalan Ombudsman has repeatedly recommended in its reports on this issue in recent years.

7) Apply these recommendations in accordance with the principles of the rule of law defined by the Council of Europe, and in particular, with respect for the principle of equality of all citizens before the law

The principles of the rule of law, as defined by the Council of Europe, imply respect for the rule of law but also for fundamental rights, including the freedom of expression,

both of which the population in general, as well as political representatives, must be able to exercise their representative duties fully and freely. In particular, the Mahoux Report on the Rule of Law Checklist of the Venice Commission of 14 October 2016, which gave rise to PACE Resolution 2187 (2017), adopted on 11 October of 2017, ("Venice Commission Rule of Law Checklist") points out that the essential elements of the rule of law are (i) legality, which includes a transparent, accountable and democratic law-making process; (ii) legal certainty; (iii) the prohibition of arbitrariness; (iv) access to justice before independent and impartial tribunals, which also includes the review of administrative proceedings; (v) respect for human rights and (vi) equality and non-discrimination before the law.

In Spain, a legalistic and formalist understanding of the rule of law can be seen in recent times, which does not take into account its other essential elements, as has been pointed out. In this regard, the Council of Europe has warned that a formalist interpretation of the rule of law and to legal certainty is contrary to its true essence [PACE Resolution 1594 (2007) and its corresponding report].

In addition, this legalistic conception, disconnected from a proper constitutional interpretation, is often based on a number of political principles that are considered superior to any other. Especially revealing in this regard were the words of the President of the Supreme Court and the General Council of the Judiciary in his inaugural address for the 2017 judicial year:

> "The Constitution (...) is, above all, a set of obligatory legal mandates. When its article 2 holds the constitutional basis in the indissoluble unity of the Spanish Nation, it does not do so as a programmatic frontispiece, but as the ultimate, nuclear and irreducible basis of all the law of a state. It is, therefore, a direct legal mandate that corresponds to guarantee the Judiciary together with the rest of the powers of the State, in short, a duty for all of us of inexcusable fulfilment."

A rule of law, therefore, based finally and primarily on the unity of the state and not on the Constitution, which is entrusted to the judges to protect inexcusably.

SÍNDIC

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