



Barcelona, 26 February 2018

This report is promoted by the *Col·lectiu Praga (Praga Group)*<sup>1</sup>. Subscribed by 650 lawyers, the report aims to bring to the attention of the Commissioner of Human Rights of the Council of Europe violations of the 1950 European Convention of Human Rights and Fundamental Freedoms (ECHR). Such violations of human rights took place in the wake of the referendum on Independence celebrated in Catalonia, on 1 October 2017, on the referendum day itself, and in the aftermath of the referendum.

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## THE CONTEXT

Following extensive efforts to negotiate the celebration of a referendum on self-determination,<sup>2</sup> the Parliament of Catalonia approved, by absolute majority, two laws:<sup>3</sup> The Law on Referendum<sup>4</sup> and the Law on Legal Transition.<sup>5</sup> The Spanish Government challenged both laws before the Constitutional Court, which suspended them both on an interim basis.<sup>6</sup> Law 19/2017 on the Referendum on Self-Determination invokes international law as its legal basis, in particular the 1966 International Covenants which Common Article 1 recognise the right of all peoples to self-determination. On this basis, although the said Law was suspended, a Referendum on Self-Determination was held in Catalonia on 1 October 2017.<sup>7</sup>

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<sup>2</sup> The Parliament of Catalonia constituted following the elections of November 2012, in which 80% of the seats were in favour of such a consultation, adopted Resolution 5/X of 23 January 2013, by which it approved the Declaration of Sovereignty and of the Right to Decide of the Catalan People. Pursuant to the mandate of this Resolution an effort was made to initiate with the Spanish authorities an agreed democratic process which would enable the citizens of Catalonia decide, by means of a referendum, their future as a political community. This effort took the form, firstly, – and emulating the Scottish process- of a request to the Spanish authorities, by way of a bill before the Spanish Parliament, for the delegation of the powers to authorise and celebrate a referendum. This request followed an agreement, between the Catalan parties which supported this consultation, around both the question of the consultation and the date when the consultation would be celebrated (9 November 2014). The *Congreso de los Diputados* (Spanish lower chamber of Parliament), however, widely rejected this petition. A few months later, the Parliament of Catalonia approved the Law 10/2014, of 26 September, of Non-Referendum Popular Consultations, with the 79% of favourable votes; following which, the Catalan President immediately called one such popular consultation. The Spanish Government, however, challenged both the Law and the Presidential Decree before the Constitutional Court. Consequently, they became automatically suspended (the Constitutional Court's ruling STC 31/2015 declared the law partially unconstitutional, whereas the Constitutional Court's ruling STC 32/2015 declared the Decree totally unconstitutional). Nevertheless, the President of the Generalitat (i.e. the Catalan President) announced the celebration of a "participative process" in order to celebrate the popular consultation on 9 November. This "participative process" was also challenged by the Spanish Government before the Constitutional Court. The initial admission of the challenge implied the suspension of the Decree calling for the consultation, but on 9 November 2014 the designated voting centres were opened to the citizens and 80.76% of votes were in favour of independence. This consultation did not have any political consequence, although in the aftermath Catalan autonomous (regional) elections were called for September 2015.

<sup>3</sup> In the Catalana autonomous elections of September 2015, 59.25% of the votes went to parties which were in favour of celebrating a referendum on sovereignty in Catalonia; of these, 47.8% openly favoured independence.

<sup>4</sup> Law of the Parliament of Catalonia 19/2017, of 6 September, on the Referendum on Self-Determination.

<sup>5</sup> Law of the Parliament of Catalonia 20/2017, of 8 September, on Legal Transition and the Foundation of the Republic.

<sup>6</sup> The interim suspension operates automatically, on the basis of a procedural privilege enjoyed only by the Spanish Government: any administrative decision adopted by an Autonomous Community which is the subject of a challenge by the Spanish Government before the Constitutional Court results in its automatic suspension for a period of at least five months.

<sup>7</sup> As will be emphasized later, it is important to point out that organising a referendum without having specific powers to do so, and the organisation of a referendum, do not constitute an offence in Spain. They were criminal offences and enshrined in the Spanish Criminal Law under Organic Law 20/2003, of 23 December, but this Law was revoked explicitly by Organic Law 2/2005, of 22 June. The second paragraph of its Preamble states literally that they are "*these acts are not serious enough as to deserve a criminal reproach, and even less so considering that the envisaged punishment is prison. Criminal Law is based on the principles of minimum intervention and proportionality, as*

“Yes” votes obtained 90.18% of the votes.<sup>8</sup> Following this result, on 27 October 2017, the Parliament of Catalonia signed a declaration of independence and proclaimed the Catalan Republic. The Spanish Constitutional Court, however, suspended the declaration on 31 October 2017.

The events that took place around the 1 October referendum are well known: instead of choosing dialogue to solve a political conflict, Spain opted for political repression and the institution of criminal charges, which resulted in serious violations of human rights and fundamental freedoms. It pressed unsustainable charges of rebellion and sedition against the leaders of the two main civil organisations who had been mainly responsible for what was a peaceful and democratic process. It also prosecuted the Catalan President, the Catalan Vice-President and various Ministers of the Catalan Government. Some of those charged are in pre-trial detention, others have fled into exile. Spain has also *de facto* stripped Catalonia of its powers through the unconstitutional application of article 155 of the Spanish Constitution. This article was invoked by the Spanish Government to enact Royal Decree 946/2017, of 27 October, which dissolved the Parliament of Catalonia and called for new autonomous (regional) elections. Autonomous elections were held on 21 December 2017 and won again, by an absolute majority, by pro-independence parties, which increased their popular vote. In the light of these elections, it is clear that Catalan citizens, by a significant majority, continue to peacefully and democratically demand their “right to decide”.

This report seeks to denounce violations of human rights and fundamental freedoms enshrined in the ECHR and its Protocols which took place around the events described therein. It does not purport to be an exhaustive narrative of all the relevant events, but to provide examples of is believed to represent an important break down of the democratic values and of the rule of law in Spain.

We consider that this report provides sufficient evidence for the Commissioner for Human Rights to initiate an independent and full investigation into the possible violations of at least the following human rights: the right to freedom of expression and of assembly; the prohibition of inhuman treatment; the right to vote, the right to stand for election and the freedom from discrimination for reasons of political opinion; the right to liberty; the right to an independent and impartial tribunal established by law; the principle of legality in criminal proceedings; the right to appeal in criminal proceedings; and the right to legal assistance. All of these rights are enshrined in the ECHR and its Protocols.

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*pointed out by the Constitutional Court, who has reiterated that a person cannot be deprived of his or her liberty unless it is strictly necessary. In our legal system there are ways to ensure to control legality other than through criminal law”. This Organic Law 2/2005 remains valid and has never been questioned.*

<sup>8</sup> Registered Votes: 5,313,564; Votes Cast: 2,286,217 (Registered Votes in Closed Voting Centres: 770,000); YES: 2,05,038 (90.18%); NO: 177,547 (7.83%); Blank Votes; 44,913 (1.98%).

## I. VIOLATIONS OF FREEDOM OF EXPRESSION (ART. 10 ECHR) AND OF ASSEMBLY (ART. 11 ECHR)

In the wake of the referendum on 1 October 2017 and its aftermath, there took place in Catalonia an escalation of breaches of freedom of expression, assembly and of public demonstration at the hands of Spanish public authorities. Calling for and organising a referendum is not a crime in Spain since the enactment of Organic Law 2/2005<sup>9</sup>. Therefore, support for a referendum constitutes a legitimate exercise of freedom of expression, assembly and public demonstration, in accordance with current Spanish legislation (art. 20 and 21 of the Spanish Constitution).

### FACTS:

The following events may constitute a breach of the rights to freedom of expression, of assembly and of public demonstration.

#### *a) Events before 1 October 2017:*

- On 13 July 2017, the *Guardia Civil* went to the National Theatre of Catalonia to gather information about the public event held there the previous week, organised by the electoral coalition *Junts Pel Sí* ("Together For Yes"), which presented to the public the Law on the Referendum of 1 October. In our opinion, the attendance of the police sought to restrict freedom of opinion and expression.

- On 12 September 2017, the Contentious-Administrative Court Number 3 of Madrid granted an injunction<sup>10</sup> preventing the celebration of an event on the right to decide of the people of Catalonia, organised by a group called "Madrileños for the Right to Decide", due to be celebrated in a space given by Madrid City Hall. In the same way, on 14 September the local government in Gijón revoked permission which had initially been granted to the organisers and banned an act entitled "Catalonia: from the transition to the referendum". On 15 September, the local Police in Vitoria acted on a judicial order to suspend a public act at the Pignatelli student residence in Zaragoza entitled "State Assembly for Parliamentarians and Mayors for the Freedom of Speech, Fraternity and Dialogue". On 27 September, Barcelona City Council's Sarrià-Sant Gervasi District Office denied administrative permission for a public act requested by a local residents' association, considering it a political act linked to the promotion of the referendum..

- On 13 September, the Spanish police prevented the broadcast of a public communication on public media by representatives of the CUP political party in the city of Valencia.

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<sup>9</sup> <https://www.boe.es/boe/dias/2005/06/23/pdfs/A21846-21846.pdf>

<sup>10</sup> Court Order of the Contentious-Administrative Court Number 3 of Madrid banning the event: <https://www.scribd.com/document/358715787/Auto-Suspension-Adcto-Matadero-Madrid>

- On 14 September, the Santa Coloma de Gramenet municipal council banned an act with political content entitled “Democracy”, organised by the private entity Òmnium Cultural.

- On 15 September, the Civil Guard police corps made three people identify themselves and detained them for two hours in a police station in Sant Carles de la Ràpita, confiscating promotional material from them. The same day, the same corps turned up at the private printing Company *Indugraf*, in the town of Constantí, to confiscate material for the referendum. After obtaining the relevant court order from the duty judge in Tarragona, officers from the armed corps spent seven hours on the premises without finding any sort of related material.<sup>11</sup> Also on the same day, various officers from the Civil Guard, the National Police, the Local Police and the *Mossos d'Esquadra* confiscated promotional material and identified, detaining in some cases, of various citizens and elected officials from different municipalities in Catalonia such as Montcada i Reixac, Cerdanyola del Vallés, Sant Carles de la Ràpita, Figueres, Masquefa, Premià de Mar, Llagostera and others.<sup>12</sup>

- On 16 September, local police in the town of Palafolls made various members of the ERC political party identify themselves as they were posting political propaganda in public places, denouncing them afterwards for disobeying authorities. Other action by local police was carried out in the municipalities of Torredembarra, Vall de Ges, Santpedor, El Prat de Llobregat, Torelló and Barcelona. On the same day, local police in the town of Sitges made various people in the streets identify themselves, confiscating the mobile phone and camera of a journalist working for the media channel *Nació Digital*.<sup>13</sup>

- As well as going to other printing businesses and confiscating material, on 19 September 2017, six armoured vans from the Civil Guard turned up at 6 am in the morning at the *Unipost* postal company's premises in Terrassa with the intention of intercepting material relating to the referendum. This action was apparently carried out following instructions from the Chief Prosecutor of Catalonia, yet with no search warrant, leading company representatives to deny Access to the police without a judicial order. For a few hours, some members of the public gathered spontaneously and pacifically in front of the premises in Terrassa and were partially evicted so that the duty court clerk from Terrassa to attend twelve hours after the raid by the Civil Guard (at 6 pm) and present the search warrant.<sup>14</sup>

- On 19 September 2017, plain clothes officers from the National Police, who refused to identify themselves, confiscated propaganda and information documents from a street stall belonging to the association *Assemblea Nacional Catalana* in Reus. The stall was to be used for a public act being organised that

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<sup>11</sup> <http://www.ccma.cat/324/la-guardia-civil-vol-tornar-a-registrar-la-impremta-de-constanti-per-l1-o/noticia/2807808/>

<sup>12</sup> <https://www.vilaweb.cat/noticies/la-policia-local-de-montcada-i-reixac-requisa-a-erc-material-de-campanya-del-referendum-de-l1-o/>

<sup>13</sup> Complete report on all these actions: [http://www.lafede.cat/wp-content/uploads/2017/10/informe\\_drets\\_humans\\_1oct.pdf](http://www.lafede.cat/wp-content/uploads/2017/10/informe_drets_humans_1oct.pdf)

<sup>14</sup> [http://www.lasexta.com/noticias/nacional/guardia-civil-busca-documentacion-referendum-empresa-mensajeria-lhospitalet\\_2017091959c0b63c0cf209c229be9f41.html](http://www.lasexta.com/noticias/nacional/guardia-civil-busca-documentacion-referendum-empresa-mensajeria-lhospitalet_2017091959c0b63c0cf209c229be9f41.html)

same evening and the police officers also obliged three citizens to go the police station to be identified, keeping them there for a few hours.<sup>15</sup>

- Over the course of 20 and 21 September, the detention of fourteen high-ranking staff and technical personnel from the Government of Catalonia prompted numerous spontaneous and pacific concentrations in many towns and cities in Catalonia. The largest in Barcelona saw around 40,000 people gather in front of the Ministry of the Economy. The Deputy Chief Public Prosecutor for the Spanish National Audience decided to take criminal proceedings via the duty courts of the National Audience against an indeterminate number of demonstrators and the heads of the private organisations *Òmnium Cultural* and *Assemblea Nacional Catalana* over a possible crime of sedition (see Ap. III on the detention and imprisonment of these leaders).

- Days before the 1 October referendum, *Correos*, a publicly owned postal services company, blocked in an arbitrary manner the distribution of several postal material. For example, 60,000 copies of *Òmnium Cultural's* magazine which it regularly sends to its members were not distributed.

- See below the searches carried out at the *El Vallenc* newspaper. Security forces also turned up at the offices of various Catalan media channels to present a court order from the High Court of Catalonia requiring, with no explanation, the writers for these media to be identified (*El Punt-Avui*, *La Nació Digital*, *VilaWeb*, *El Nacional*, *Racó Català* and *Llibertat.cat*) without being explicitly covered by the order.<sup>16</sup>

- Over 140 websites and dozens of apps were closed down. Access to websites abroad was blocked by exerting pressure on private internet providers. In addition, the Spanish police investigated several individuals, carried out searches in their homes and later filed criminal charges against them for cloning referendum websites. On 27 September, without any notice, the *Guardia Civil* blocked the websites of the parliamentary political party *CUP*, and of civil organisations *Òmnium*, *ANC* (“*Assamblea Nacional Catalana*”) and “*Empaperem*” (“*Wallpaper*”).<sup>17</sup>

- In the months preceding the referendum, the use of the Catalan independentist flags (*estelades*) was banned in football stadiums and in other public sporting events. For example, the Spanish Government Office in Madrid banned them at the Spanish Football Cup Final<sup>18</sup> and also fined private citizens for whistling while the

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[http://www.diarimes.com/es/noticias/reus/2017/09/19/agentes\\_paisano\\_la\\_policia\\_nacional\\_requisan\\_material\\_identifican\\_miembros\\_l\\_anc\\_reus\\_24919\\_1092.html](http://www.diarimes.com/es/noticias/reus/2017/09/19/agentes_paisano_la_policia_nacional_requisan_material_identifican_miembros_l_anc_reus_24919_1092.html)

<sup>16</sup> See, for example, <http://www.rtve.es/noticias/20170909/guardia-civil-registra-local-valls-busca-material-para-consulta-ilegal-del-1-de-octubre/1611460.shtml>

<sup>17</sup> See for example <http://www.levante-emv.com/comunitat-valenciana/2017/09/23/policia-interroga-joven-replicar-web/1619030.html>, and <http://www.diariovasco.com/politica/interrogatorio-espejos-web-referendum-20170925114444-ntrc.html>.

<sup>18</sup> <http://www.elmundo.es/madrid/2016/05/18/573c46e5e2704e1b068b469a.html>. This prohibition was totally arbitrary, among other reasons because there was no administrative

Spanish national anthem was being played during the same Cup Final, as a way of political protest.<sup>19</sup>

*b) Events during 1 October:*

The people who were gathered in the polling stations were exercising their lawful right to freedom of assembly, in accordance with Spanish law (article 21 Spanish Constitution and Organic Law 9/1983); and those who were voting were exercising, at the very least, their freedom of expression through voting, given that participation in a referendum is not a criminal offence. Spanish security forces assaulted polling stations in 92 municipalities and closed down around 400 polling stations, which resulted in the seizure of ballot boxes and the loss of 770,000 possible votes (the number of registered voters in the closed polling stations). This is developed further below when dealing with the violations of physical integrity caused by the disproportionate use of force by the Spanish security forces (section II below).

- Various journalists suffered unjustified restrictions on reporting the police charges at various polling stations, some of them being attacked by police officers while providing journalistic coverage of the events in polling locations.

*c) Events after 1 October:*

- As will be explained below (section IV, *h*), on foot of the complaint by the Director of Public Prosecutions, the Supreme Court charged the President of the Catalan Parliament and several of its Board Members with rebellion, sedition and mismanagement of public funds.<sup>20</sup> In a disproportionate manner and without the legal requirements, the Supreme Court ordered the pre-trial detention of the President of the Parliament and of the other Board Members, avoidable with bail of €150,000 and €25,000 respectively.<sup>21</sup> As the bail for the President of the Parliament was imposed when the banks were already closed, the President had to spend one night in prison. This measure was in breach of the inviolability of the

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procedure open on which to sustain it (see Order of the Contentious-Administrative Court Number 11 in Madrid, of 15/06/2016). The Judgment of the same Court of 27 July 2016 declared the prohibition illegal: <https://www.vilaweb.cat/noticies/un-jutge-de-madrid-avala-lexhibicio-destelades-en-camps-de-futbol-perque-ho-empara-la-llibertat-dexpressio-futbol-barca-barcelona-sevilla-copa-rei-dancausa-calderon/>.

<sup>19</sup> On 21 December 2017, Mr Santiago Espot was condemned by the Central Criminal Court (National Court) for having whistled against the Spanish national anthem during the Football Cup Final, deeming the whistling an insult to the Spanish King and to the Crown and an unnecessary means for showing his discontent with the political situation: <http://www.europapress.es/nacional/noticia-audiencia-nacional-condena-santiago-espot-pago-7200-euros-multa-pitada-himno-20171222113811.html>.

<sup>20</sup> Complaint to the Supreme Court by the Director of Public Prosecutions against the Board of the Catalan Parliament: <https://www.scribd.com/document/362996215/Querella-de-la-Fiscalia-General-del-Estado-contra-la-Mesa-del-Parlament-ante-el-Tribunal-Supremo>

<sup>21</sup> Order of the Supreme Court dated 09/11/2017 in relation to the personal situation of Maria Carme Forcadell Lluís, Lluís Corominas Díaz, Lluís Guinó i Subirós, Anna Isabel Simó Castelló, Ramona Maria Barrufet i Santacana, and Joan Josep Nuet i Pujals: <http://estaticos.expansion.com/opinion/documentosWeb/2017/11/09/Auto%20Forcadell.pdf>

freedom of expression enjoyed by members of Parliament (Art. 71 Spanish Constitution and art. 57 of the Catalan Statute of Autonomy) and goes against the case-law of the Constitutional Court (STC 30/1997), according to which such inviolability, as a parliamentary prerogative, prevents the initiation of any type of criminal proceedings against elected members of parliament for their expressed opinions or votes cast.

- Eight teachers from La Seu d'Urgell are being investigated by the judiciary for alleged hate crimes for having facilitated in class a debate among students about the events of 1 October and the police violence.<sup>22</sup> There is not, however, any legal basis to proceed against them for such alleged crimes. The same occurred with thirteen teachers from the town of Sant Andreu de la Barca.<sup>23</sup> Education professionals are not the only ones being investigated for this kind of offence: proceedings have also been taken against a mechanic from Reus, various firefighters and people in charge of a gymnasium.<sup>24</sup>

- Private media are being investigated by the judiciary. For example, criminal proceedings have been initiated against the Spanish humour magazine "El Jueves" ("The Thursday") for an alleged offence of insults and hate, on foot of a joke about the actions of the Spanish security forces on 1 October.<sup>25</sup>

- The third Deputy Mayor of Badalona (third biggest city in Catalonia) is being investigated by the judiciary for disobedience and obstruction of justice for having returned to citizens banners and posters which had been seized by the Local Police before 1 October.

- On 10 November, a Courthouse in Reus opened an investigation for alleged hate crime towards public workers, business people, councillors and local residents because of a demonstration calling for the Spanish police to leave the hotel they were staying at.<sup>26</sup>

- On 16 November the actor and journalist Eduard Biosca was legally summoned for a radio gag making a joke about the Spanish police staying on cruise ships in the port in Barcelona and who were responsible for the police charges of 1 October. Finally, Barcelona investigating court No.9 closed the case, due to the

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<sup>22</sup> <https://www.vilaweb.cat/noticies/el-jutge-mante-com-a-investigats-els-vuit-professors-de-la-seu-durgell-per-haver-parlat-de-l1-o-a-classe-independencia-catalunya-referendum/>.

<sup>23</sup> <http://www.europapress.es/catalunya/noticia-fiscalia-cita-13-profesores-instituto-sant-andreu-barca-polemica-20171226112746.html>

<sup>24</sup> [https://www.eldiario.es/catalunya/politica/Declara-incitacion-mecanico-Reus-arreglar\\_0\\_737726597.html](https://www.eldiario.es/catalunya/politica/Declara-incitacion-mecanico-Reus-arreglar_0_737726597.html)

<sup>25</sup> [https://www.elnacional.cat/ca/cultura-idees-arts/jueves-demanda-estat-advocacia\\_217188\\_102.html?utm\\_source=Newsletter+CATAL%C3%80&utm\\_campaign=0a9c567e76-EMAIL\\_CAMPAIGN\\_2017\\_10\\_25&utm\\_medium=email&utm\\_term=0\\_a31d6c8a9b-0a9c567e76-94652421](https://www.elnacional.cat/ca/cultura-idees-arts/jueves-demanda-estat-advocacia_217188_102.html?utm_source=Newsletter+CATAL%C3%80&utm_campaign=0a9c567e76-EMAIL_CAMPAIGN_2017_10_25&utm_medium=email&utm_term=0_a31d6c8a9b-0a9c567e76-94652421).

<sup>26</sup> <http://www.lavanguardia.com/local/tarragona/20180212/44738615323/jueza-instruye-delito-odio-reus-investiga-dos-bomberos-mas.html>



inexistence of an offence<sup>27</sup>. Another humourist, Toni Alba, has also been summoned for slander over some tweets about Judge Lamela<sup>28</sup>.

- On 17 November, the Spanish Police detained six people accused of incitement to hatred for comments made on social media about police violence during the 1 October referendum.

- The Spanish Ministry of Interior facilitated an email and phone-number where citizens could denounce so-called “hate crimes”, encouraging citizens to make complaints against pro-independence persons who are critical, for example, with the actions of the Spanish police on 1 October.<sup>29</sup>

- An extensive report on violations of freedom of expression before and after 1 October, written by journalists, can be found here: [https://www.media.cat/wp-content/uploads/2017/12/Informe\\_1\\_de\\_octubre\\_CAT.pdf](https://www.media.cat/wp-content/uploads/2017/12/Informe_1_de_octubre_CAT.pdf)

## **VIOLATIONS OF RIGHTS**

**The above examples and the described situation in general, denote breaches of the rights of freedom of expression (article 10 ECHR) and of assembly (article 11 ECHR).**

As is well known, freedom of expression, and its realization together with the freedom of assembly, is “*one of the preconditions for the functioning of democracy*” (*Appleby v United Kingdom*, 6 May 2003), a “*pillar of a democratic society*”, which should not be interpreted in a restrictive manner (*Yilmaz Yildiz & Ors v Turkey*, 14 October 2014). This determines a special remit of the protected object which encompasses “*not only the substance of the ideas and the information expressed but also the manner in which they are transmitted*” (*De Haels and Gijssels v Belgium*, 24 February 1997). In particular, and since *Handyside*, the case-law has been constant in stating that article 10 authorises “*not only the information or ideas which are favourably received or considered as inoffensive or indifferent, but also those which clash against, trouble or offend the State or any section of the population. Such are the requirements of pluralism, tolerance and an open spirit, without which a democratic society cannot exist*”.

Consequently, even though Spain may not like that citizens express their support to Catalonia’s independence or to the celebration of a referendum on self-determination through events, meetings, media, banners, posters, artistic events etc. this does not authorise interfering illegally in such rights. Yet, on the basis of the events described, such interference has taken place, at least, in three ways:-

a) **By coercing or censoring freedom of expression before it was exercised.** Such measures have had a dissuasive effect in the discussion of issues which have a

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<sup>27</sup> [https://www.elnacional.cat/es/politica/denuncia-bohigues-policia-espanola\\_238647\\_102.html](https://www.elnacional.cat/es/politica/denuncia-bohigues-policia-espanola_238647_102.html)

<sup>28</sup> [http://www.diarimes.com/es/noticias/penedes/2018/01/30/toni\\_alba\\_sostiene\\_ante\\_juez\\_que\\_solo\\_queria\\_hacer\\_reir\\_con\\_los\\_tuits\\_por\\_los\\_cuales\\_lo\\_acusa\\_un\\_delito\\_injurias\\_32607\\_3058.html](http://www.diarimes.com/es/noticias/penedes/2018/01/30/toni_alba_sostiene_ante_juez_que_solo_queria_hacer_reir_con_los_tuits_por_los_cuales_lo_acusa_un_delito_injurias_32607_3058.html)

<sup>29</sup> <http://www.interior.gob.es/es/web/servicios-al-ciudadano/delitos-de-odio>.

legitimate public interest (*Jersild v Denmark*, 23 September 1994). For example, by prohibiting public events or meetings, or by carrying out searches which sought to intimidate those who wished to express an opinion.

**b) By coercing freedom of expression and of assembly at the time of its exercise.** Freedom to take part in a peaceful assembly, such as the assembly in the polling stations to defend the ballot boxes and the freedom of citizens to express their vote, is of such importance that it cannot be limited (and even less violently through police force), in so far as no criminal or illegal act was being committed (*Ezelin v France*, 26 April 2001). This is even more so considering that the European Court of Human Rights has repeatedly required public authorities to show a degree of tolerance towards peaceful meetings in order to guarantee the freedom of assembly of article 11 ECHR (*Fáber v Hungary*, 24 July 2012; *Berladir & Ors v Russia*, 10 July 2012; or *Malofeyeva v Russia*, 30 May 2013). The violation of the rights of freedom of expression and of assembly occurred, therefore, when public events in favour of the “right to decide of the people of Catalonia” were banned. Or when police violently attacked people who -without breaking any law, as stated in the Order of 4 October 2017 of the Court of First Instance Number 7 of Barcelona (see part II) – were gathered in a peaceful way outside the voting centres, protecting with their bodies the ballot boxes, and expressing with their vote their opinion about the referendum (apart from whatever protection they could have derived from their right of political participation depending on whether or not the vote was deemed to have any legal validity).

**c) By legally prosecuting citizens and publicly elected officials after exercising such rights.** For example, teachers who allowed a debate in their classes about the events of 1 October; elected public representatives of the Board of the Catalan Parliament for having voted in favour of allowing bills in support of the celebration of the referendum; and journalists or artists for having expressed opinions or artistic creations in support of the pro-independence process.

It cannot be said that any of the limits set out in art. 102 ECHR could be lawfully applied to any of these cases as a “necessary measure”. Nor has “public order” been at stake in the events in question, since all expressions and meetings have taken place peacefully; nor could “territorial integrity” be invoked as a limit to such rights, since the mere defence of the right to self-determination of a people is an expression of a political opinion protected by the case-law of the ECtHR (*Okçuoglu*, 8 July 1999). On the contrary, in the cases described, the message that has been given has been a political message, asking for “more democracy”, which is not illegal, which has been expressed in a peaceful manner, and which is shared by the majority of the citizens of Catalonia.

In short, as the ECtHR reminds us, the ECHR does not allow almost any restrictions on the freedom of expression (and by extension on the freedom of assembly to the extent that it is a collective expression) in the field of political discourse or questions of general interest (*Arslan*, 8 July 1999), as is the case in the events in question. This is specially so when there is no incitement to use violence, promotion of armed resistance or calls for uprising (*Yalçin Küçük*, 5 December

2001), as is the case in all the public mobilizations that took place in Catalonia on the occasion of 1 October.

## II. PROHIBITION OF “DEGRADING TREATMENT” (ART. 3 ECHR)

The *Generalitat de Catalunya* (Catalan Government) is competent, in accordance with the Spanish Constitution and the Statute of Autonomy, for maintaining public order in Catalonia through its own police force (the *Mossos d’Esquadra – Policia de Catalunya*), which has 16,873 agents. Nevertheless, from September 2017, the Spanish Government deployed to Catalonia over 10,000 policemen (Guardia Civil and National Police), in order to prevent the celebration of the referendum on 1 October (at a cost of €87 million, according to the Spanish Ministry of the Interior).<sup>30</sup>

In order to coordinate in Catalonia all the different police forces, the Director of Public Prosecutions appointed<sup>31</sup> -in our opinion, illegally<sup>32</sup>- a high-ranking official, Diego Pérez de los Cobos,<sup>33</sup> as the Technical Director of the Police Operation made up by the *Mossos d’Esquadra*, the *Guardia Civil* and the *Policía Nacional*.

### FACTS:

**In this context, and by way of example, the following are some of the events that we wish to denounce:**

On 1 October, during the celebration of the referendum, the *Mossos d’Esquadra* closed more than 100 voting centres, without causing any injury. However, that same day, the Spanish police closed 92 voting centres and carried out 52 police interventions. As a result of the indiscriminate violence and the use of rubber bullets, tear gas and violent charges against people who wanted to exercise their right to vote peacefully (together with their right to freedom of expression and of assembly, see part I above), 1,066 of all ages were injured. One of them lost an eye from the use of rubber bullets, which are banned by law of the Catalan Parliament since 2014.<sup>34</sup>

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<sup>30</sup> According to the statement made to the Senate on 18 January 2018.

<sup>31</sup> Order 4/2017 of the Fiscalía Superior de Cataluña (Chief Prosecutor of Catalonia). This Order is not public, but the previous one is, also addressed to the Spanish Security Forces: <https://www.annanoticias.com/wp-content/uploads/2017/09/fiscalia2.pdf> Also public is the request made by the Catalan Government to the Spanish authorities about Order 4/2017: [https://presidencia.gencat.cat/web/.content/departament/transparencia/acords\\_govern/2017/2017\\_09\\_26/SIG17PRE0854.pdf](https://presidencia.gencat.cat/web/.content/departament/transparencia/acords_govern/2017/2017_09_26/SIG17PRE0854.pdf).

<sup>32</sup> The Statute of Autonomy of Catalonia makes inapplicable articles 38, 43 and 46 of Organic Law 2/1986 which, in certain cases, would allow such an appointment.

<sup>33</sup> Colonel of the *Guardia Civil* and director of the coordination bureau of the State Secretary for Security.

<sup>34</sup> Some international non-governmental organisations have already carried out preliminary assessments of the events:

- “Human Rights Watch” *Spain: Police Used Excessive Force in Catalonia* (<https://t.co/0uIOX4typd>).
- “Amnesty International” *Spain: Excessive use of force by National Police and Civil Guard in Catalonia* (<https://www.amnesty.org/en/latest/news/2017/10/spain-excessive-use-of-force-by-national-police-and-civil-guard-in-catalonia/>).

A few videos of the police interventions can be seen here:

<https://www.youtube.com/watch?v=bBUjNbLa4ko>  
<https://www.youtube.com/watch?v=R0Tig9firKI>

The Court of First Instance Number 7 of Barcelona is processing more than 200 complaints for injuries caused by security forces on 1 October. Yet many other courts in Catalonia are handling cases brought police corps for injuries sustained in relation to the events of that day<sup>35</sup>. The website of the General Council of the Judiciary covers the bulk of these cases<sup>36</sup>.

Thus, for instance, cases brought before the aforementioned investigating court No. 7 in Barcelona

are based on the security forces (and, in turn, the Spanish Government) having committed offences such as injuries, threats and coercion, as well as the alleged offence by public servants against the exercise of the freedom of peaceful assembly (art. 540 of the Criminal Code).

In this context, of relevance is the Order of 4 October 2017<sup>37</sup>, issued by the Court of First Instance Number 7 of Barcelona, which accepts for processing the complaint made by the *Generalitat* against the police interventions, and which contains the following legal ground:

*“The Director of Public Prosecutions also states that freedom of expression, assembly and public demonstration and participation in public affairs must be exercised with due respect for the Law and that in this instance, the purpose of the assembly had been declared illegal by the Constitutional Court.*

*The discrepancy on this is total. It must be remembered that the purported referendum of 1 October 2017 was called in the application of a law of the Parliament of Catalonia which was suspended by the Constitutional Court. Even so, the referendum was called and organised by those responsible to do so. What was illegal and constitutive of a possible offence of disobedience, of which this Court is not seized, was the calling, organization and promotion of the referendum by those responsible (authorities and public servants) against whom the Constitutional Court had personally issued the order, with a warning of the corresponding criminal responsibilities.*

*What is not illegal nor unlawful is for citizens, called by their autonomous administration, to attend the voting centres indicated, in public spaces open for that purpose, to assemble or carry out any other activity that may have been planned there, including the placing of a piece of paper without any legal value into a ballot box.”*

At the same time, from the complaints made, it has been established not only the inexistence of violent attitude by those who publicly demonstrated or were called to assemble, but the lack of proportionality between the police intervention and

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<sup>35</sup> [http://www.antena3.com/noticias/espana/juzgados-catalanes-investigacion-menos-319-denuncias-lesiones-cargas-policiales\\_201801285a6da4740cf27229a9a41f28.html](http://www.antena3.com/noticias/espana/juzgados-catalanes-investigacion-menos-319-denuncias-lesiones-cargas-policiales_201801285a6da4740cf27229a9a41f28.html)

<sup>36</sup> <http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Noticias-Judiciales/Diligencias-previas-abiertas-en-los-juzgados-de-Cataluna-relacionadas-a-la-convocatoria-del-1-de-octubre>

<sup>37</sup> Order of 4 October 2017, issued by the Court of First Instance Number 7 of Barcelona: [https://www.ara.cat/2017/10/06/INSTRUCCIO\\_7](https://www.ara.cat/2017/10/06/INSTRUCCIO_7).

the civil population attending the voting centres. And it has also been possible to confirm from the complaints contained in the Order 1439/17 of the Court Number 7 of Barcelona, that 57% of those injured were over 50 years old, of which 31,25% were over 60 years old. This shows that the means used by the police agents to dissuade the population were wholly disproportionate to the resistance or violence that these could have put up.

Despite all this, the Spanish government has conducted no investigation. It has even decorated police officers who took part in the police charges and cast doubt on the number of injuries suffered, something which has been widely reported and supported by important Spanish media channels<sup>38</sup>.

### **VIOLATION OF RIGHTS:**

The intervention of the National Police and of the Civil Guard on 1 October was in breach of art. 3 ECHR gravely attempting against the physical integrity of the citizens who, peacefully assembled in various voting centres, was violently attacked by the said security forces (see videos mentioned at footnote 34).

The police intervention on 1 October 2017 can properly be qualified as “degrading treatment” in accordance with the ECtHR jurisprudence, since it was capable of creating a feeling of fear, anxiety and inferiority, likely to humiliate, to debase, and to break the physical and moral resistance of the citizens (*Ireland v United Kingdom*, 18 January 1978) who were gathered peacefully at the various voting centres. This degrading treatment succeeded, apart from dispersing the peaceful assemblies, in preventing many citizens from being able to exercise freely their right to freedom of expression by casting their vote in a ballot box.

The videos referred show, furthermore, the peaceful attitude of the citizens and that their exercise of their right to freedom of assembly at no point posed any risk to public order or security, nor to the rights of others. Hence it is possible to state that the use of police force was disproportionate in the sense used by the ECtHR, since it was excessive vis-à-vis the circumstances, which did not suggest at all that the behaviour of the demonstrators represented a clear threat to public order (*Balcik and Ors v Turkey*, 29 February 2009). Furthermore, the police interventions also were disproportionate vis-à-vis any resistance which may have been put up by the citizens, who were lawfully exercising their right to freedom of assembly.

On the other hand, in accordance with the jurisprudence of the ECtHR, and in the application of this article, the Spanish State was obliged to carry out an effective, impartial and exhaustive investigation (*Monacu & Ors v Romania*, 17 September 2014), which would respect the principle of contradiction, and which would have

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<sup>38</sup> Among other complaints, one of the most notable comes from the Catalan Medical Association on 13 October 2017, over the questioning of injuries recorded by doctors.  
[https://www.comb.cat/cat/actualitat/noticies/noticies\\_fitxa.aspx?Id=paolJ%2f7syq7DWLn9lniZZA%3d%3d](https://www.comb.cat/cat/actualitat/noticies/noticies_fitxa.aspx?Id=paolJ%2f7syq7DWLn9lniZZA%3d%3d)

as its object the identification and punishment of those responsible for the degrading treatment. The infringement of this obligation would be grounds for considering infringed article 3 ECHR (*Selmount v France*, 28 July 1999; *Dikme v Turkey*, 11 July 2000; *Iribarren v Spain*, 8 January 2009). In spite of this, the Spanish State not only has refused to open an investigation in the Senate<sup>39</sup> and has stopped investigations which were under way in the Catalan Parliament<sup>40</sup>, but has declared as secret the police interventions, and has awarded the policemen who took part in the police charges on 1 October<sup>41</sup>.

Finally, it should be noted that art. 3 ECHR is part of the ‘hard’ content of the Convention rights, given that it is a non-derogable right in the sense of art. 15.2 ECHR. Consequently, the prohibition of “degrading treatment” should not have been the object of any particular restriction or general derogation in Catalonia on 1 October.

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<sup>39</sup> Agreement between PP, PSOE and C’s refusing to investigate the police charges:  
<http://www.lavanguardia.com/politica/20171129/433292881601/pp-soe-cs-rechazan-investigar-senado-cargas-policiales-1o.html>.

<sup>40</sup> Agreement of the Catalan Government:  
<https://portaldogc.gencat.cat/utillsEADOP/PDF/7471/1638533.pdf>. And in the application of the measures of article 155 of the Spanish Constitution, the Royal Decree which suppresses the Commission of Investigation created by the Catalan Government:  
<https://www.boe.es/boe/dias/2017/10/28/pdfs/BOE-A-2017-12334.pdf>.

<sup>41</sup> <http://www.elboletin.com/noticia.asp?ref=156692>

### **III. VIOLATION OF THE RIGHTS TO VOTE AND TO STAND FOR ELECTION (ART. 3 PROTOCOL NUMBER 1) AND, IN RELATION TO THEM, OF THE RIGHT NOT TO BE DISCRIMINATED FOR POLICIAL OPINIONS AND TO RECEIVE EQUAL TREATMENT IN SIMILAR CIRCUMSTANCES (ART. 14 ECHR)**

#### **FACTS:**

##### *a) Measures for article 155 CE*

Following the vote on 1 October and the approval by the Catalan parliament (27 October) of the declaration of independence (suspended by the Constitutional Court on 31 October), the Spanish government activated art. 155 CE (state coercion measures), with the approval of the Spanish senate<sup>42</sup>. This meant the adoption of different decrees, among them Royal Decree 946/2017, of 27 October, dissolving the Parliament of Catalonia and calling elections<sup>43</sup>. Following the new autonomous elections on 21 December, pro-independence parties revalidated their overall majority, with an increase in the number of votes gained<sup>44</sup>. As shown later, the specific application of art. 155 CE via Royal Decree 946/2017 is an attack, on one hand, on people's voting rights, and on the other, on the right of members of parliament to freely carry out the public duties they were democratically elected to perform.

##### *b) The impossibility of imprisoned candidates and candidates in Belgium of taking part in the election campaign. The denial of their rights as members of parliament*

- Eight candidates in the elections on 21 December were unable to take part in the election campaign either because they were in prison (Mr. Junqueras, Mr. Sànchez and Mr. Forn) and were not granted permission to leave, or because there were unable to return to Spain given the arrest warrants issued against them (Mr. Puigdemont, Mr. Comín, Ms. Serret, Ms. Posatí and Mr. Puig).

- In the case of Mr. Sànchez and Mr. Forn, *Junts per Catalunya* (the political formation whose list included them both) asked the Central Electoral Commission for their imprisoned candidates to be transferred to Catalonia during the campaign so that they could take part in meetings and debates. Failing that, the formation proposed the use of relevant technological means to allow them to record electoral messages in prison, to be broadcast at acts, and for them to be able to give interviews with the media. The Electoral Commission made no ruling, considering the decision outside their powers. Mr. Sànchez made the same request to the

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<sup>42</sup> The Parliament of Catalonia and the Confederal Parliamentary Group Unidos *Podemos*-En Comú Podem-En Marea have disputed, before the Constitutional Court, the approval of the Senate of 27 October 2017 authorising the measures requested by the government, backing article 155 of the constitution, considering the specific measures to be adopted as unconstitutional.

<sup>43</sup> Royal Decree 946/2017, of 27 October, dissolving the Parliament of Catalonia and calling elections: <https://www.boe.es/buscar/doc.php?id=BOE-A-2017-12330>. This decree has been challenged in the Supreme Court by large group of jurists and citizens, as well as another case brought by Catalan parliamentarians.

<sup>44</sup> In the elections on 21 December 2017, pro-independence forces gained 35,302 more votes than in the referendum on 1 October and 112,832 more than in the elections on 27-S.



Supreme Court, who in their interlocutory of 14 December 2017<sup>45</sup> denied the requests, as well as contact with the media and the use of the internet beyond the normal regulations on its access as set out by the prison.

- Penitentiary centres opened cases against Mr. Junqueras and Mr. Sànchez to decide whether to penalise them for disseminating audio files from prison with the intention of participating in the election campaign. The case against Mr. Junqueras was resolved by not allowing him access to the exercise yard for ten days.

- Mr. Sànchez and Mr. Junqueras (both in prison) have been denied the possibility of being granted permission to attend parliamentary sessions as members of parliament, contrary to the jurisprudence of the Constitutional Court. The Supreme Court has also decreed “prolonged legal disqualification” (inexistent in the Spanish legal system) and obliges them to delegate their votes to other members of parliament via the interlocutory of 12 January 2018.<sup>46</sup>

- The President of the Government of Catalonia, Mr. Puigdemont, and the Ministers Ms. Ponsatí, Ms. Serret, Mr. Puig and Mr. Comín (all dismissed by the Spanish government with the application of the measures in art. 155 CE) have not been able to carry out their duties as members of parliament either, as they are unable to return to Spain: arrest warrants are issued against them (a highly questionable order as they have a level of inviolability and can only be detained in cases of a serious offence), charging them with rebellion, sedition and embezzlement.

- Finally, given the difficulty in pursuing their posts, Mr. Forn, Ms. Serret, Ms. Ponsatí, Mr. Puig and Mr. Comín have renounced their mandates as members of parliament.<sup>47</sup>

*c) Interference by the central government and the Constitutional Court in the naming of the President of the Government of Catalonia.*

The central government and the Constitutional Court have interfered, with no legal basis, in the process to designate the new President of the Government of Catalonia. Mr. Puigdemont, according to parliamentary arithmetic, would be the best-placed person to form a new government and was put forward by the President of the Catalan Parliament (according art. 4 of Act 13/2008),<sup>48</sup> for the investiture session on 30 January.<sup>49</sup> The Council of Ministers decided to dispute the proposal of the candidate and the investiture before the Constitutional Court (26 January),<sup>50</sup> despite the negative opinion by the Council of State, which considered

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<sup>45</sup> [http://estaticos.elmundo.es/documentos/2017/12/14/auto\\_Supremo.pdf](http://estaticos.elmundo.es/documentos/2017/12/14/auto_Supremo.pdf)

<sup>46</sup> <https://www.elperiodico.com/es/politica/20180105/auto-supremo-rechaza-salida-carcel-oriol-junqueras-6533195>. In this interlocutory the judge interprets the Regulations of the Parliament, a function which, according to the Spanish legal System corresponds to the Parliament’s Bureau, ruling out the possibility of imprisoned members of parliament being able to vote remotely using technology.

<sup>47</sup> [https://elpais.com/ccaa/2018/01/29/catalunya/1517187415\\_419267.html](https://elpais.com/ccaa/2018/01/29/catalunya/1517187415_419267.html)

<sup>48</sup> Agreement with the President of the Parliament of Catalonia of 22 January 2018, published in the Official Gazette of the Parliament of Catalonia number 3, of 23/1/ 2018.

<sup>49</sup> Resolution by the President of the Parliament of Catalonia of 25 January 2018, published in the Official Gazette of the Parliament of Catalonia number 5, of 26/ 1/ 2018.

<sup>50</sup> <http://www.lamoncloa.gob.es/consejodeministros/referencias/Paginas/2018/refc20180126.aspx>

the challenge to be of a preventative nature (25 January).<sup>51</sup> Detecting the lack of unanimity among the constitutional judges in admitting the challenge (the pressure on the part of the central government with its telephone calls to members of the Constitutional Court is notorious),<sup>52</sup> the session adopted an unprecedented decision, with no legal foundation. Thus, without even admitting the demand for consideration, the court decreed an interlocutory on 27 January<sup>53</sup> adopting various preventative measures not contemplated in its own organic law (LOTG):

“(a) The investiture debate and vote with the member of parliament Carles Puigdemont i Casamajó as candidate to become the President of the Government of Catalonia cannot be held using remote technology or by another member of parliament acting on his behalf.

(b) The candidate may not be invested without the relevant judicial authorisation, even if he appears in person in the parliamentary chamber, if the judicial order for his capture and imprisonment remains in force.

(c) Members of parliament with orders issued against them for their capture and imprisonment will be unable to delegate their vote to other parliamentarians.”

Furthermore, by setting preventative measures which are inexistent in organic law (LOTG) for these types of processes, the court adopted them without any party having requested them and without admitting the appeal for consideration. Likewise, the Constitutional Court waters down the power of interpreting the Regulations of the Parliament of Catalonia, which corresponds exclusively to the Parliament Bureau, directly influencing the forming of the Government of Catalonia. To date, the appeal has still not been admitted for consideration and no alternative candidate has been put forward by the President of the Parliament of Catalonia. The intervention of Catalonia’s autonomy is thus still entirely in force (via art. 155 CE).

## **VIOLATION OF RIGHTS:**

**These events resulted in a violation of the right to vote, the right to be elected and to exercise a political mandate without interference (article 3, Protocol 1); and, in relation to them, a violation of the right not to be discriminated on account of political opinions and to receive equal treatment in similar circumstances (article 14 ECHR).**

According to the case-law of the ECHR, article 3 of Protocol 1 enshrines real individual subjective rights: the right to vote and to be elected (*Mathieu-Mohin and Clerfat v Belgium*, 2 March 1987). Given the reference to the “legislature”, such rights are exercisable in relation to elections to national, federal and regional parliaments. Also according to this case-law, the right to stand for election comprises “*the individual right to stand for election and, once elected, to sit as a member of parliament*” (*Selim Sadak & Others v Turkey*, 11 June 2002).

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<sup>51</sup> <https://www.boe.es/buscar/doc.php?id=CE-D-2018-84>

<sup>52</sup> [https://politica.elpais.com/politica/2018/01/29/actualidad/1517254578\\_964344.html](https://politica.elpais.com/politica/2018/01/29/actualidad/1517254578_964344.html)

<sup>53</sup> [https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP\\_2018\\_005/2018-492ATC.pdf](https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2018_005/2018-492ATC.pdf)

On the other hand, article 14 ECHR prohibits discriminatory treatment by public authorities for reasons of “political opinion”. Nor are public authorities allowed to dispense unequal treatment to, for example, the voters, those standing for elections or to elected representatives, unless based “*on an objective assessment of essentially different factual circumstances*” (*Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium (Merits)*, 23 July 1968).

The above-mentioned violations of rights can take place from three different perspectives:

a) The specific application of article 155 Spanish Constitution by way of Royal Decree 946/2017, of 27 October, which dissolved and called for new elections to the Parliament of Catalonia, breached, on the one hand, the right to vote and, on the other, the right of elected representatives to exercise without interference the public office for which they were democratically elected.<sup>54</sup>

One of the basic elements of the right to vote is the possibility of electing public representatives, but also that such representatives can remain in their office for the period of time for which they were elected, as otherwise the right to vote would not be effective. Undoubtedly, the biggest infringement of this right is the cessation of the political mandate by means of an illegal act. Therefore, the right to vote must be complemented by the right of the elected representatives to remain in the office to which they were elected in accordance with the conditions set out in the relevant law, such as that it should last for the full duration of the mandate or that it should allow the exercise of the representative role.

The duration of the mandate of the elected representatives to the Parliament of Catalonia is set out in the Spanish Constitution (article 147.2 and article 152.1) and in the Statute of Autonomy of Catalonia (Organic Law 6/2006, of 9 July): article 56 (which provides that the Parliament is elected for a period of four years), article 66 (which provides that the term ends on the expiration of the legal mandate of four years, or if nobody is elected President, or due to early dissolution) and article 75 (which grants to the President of Catalonia the power to dissolve the Parliament before its full term expires).

Accordingly, the early dissolution of the Parliament is only contemplated in the Statute of Autonomy as a result of the exercise by the Catalan President of the power vested on him by the Statute, such that an early dissolution of the Parliament on other grounds or through ways other than those expressly and specifically set out in the Statute would affect in a substantial manner the period of time for which the members of parliament were elected, bringing to an end the representative mandate received from the electorate.

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<sup>54</sup> In the regional elections of 27 September 2015.

This breach of the representative mandate of the Catalan parliamentarians elected in the regional elections of 27 September 2015, by means not set out in law and therefore illegitimate, represents a violation of the right to vote to the extent that the right of elected representatives of the Catalan Parliament to exercise without interference the public office for which they were democratically elected has also been breached. In other words: the dissolution of the Catalan Parliament, by way of article 155 Spanish Constitution, which ethereal purpose was to deactivate the proclamation of the Catalan Republic, was in breach of Article 3 of Protocol 1.

b) The circumstances in which the imprisoned and the exiled candidates have had to take part in the electoral campaign breach their right to stand for election and to not be discriminated against for reasons of their “political opinion”.

Mr Junqueras, Mr Sánchez and Mr Forn were candidates for the regional elections of 21 December 2017. All of them are in pre-trial detention, without having been formally prosecuted for any crime. The deposed Catalan President, Mr Puigdemont, and the also deposed Ministers Ms Ponsatí, Ms Serret, Mr Puig and Mr Comín, also candidates, are in exile as Spain has issued arrest warrants against them. None of them, therefore, has been able to take part in the election campaign of the 21 December 2017 elections.

The offences for which they are being charged, the reasons for their pre-trial detention and the arrest warrants constitute discriminatory treatment for reasons of political opinion and show that the ultimate intention is to prevent their political participation as they defend the independence of Catalonia (this is made very clear in the Supreme Court Orders of 5 January 2018 and of 12 January 2018, which re-affirmed Mr Junqueras’ pre-trial detention).

In this way, three infringements of rights take place: the right to stand for election, for not having been able to take part in the election campaign (article 3 Protocol 1); the right not to be discriminated against for political opinions, given that it is their opinion in favour of Catalonia’s independence what has prevented them from taking part in the election campaign (art 14 ECHR in relation to article 3 Protocol 1); and the right to equal treatment, given that they have not enjoyed the same opportunities that the rest of candidates have to defend their political opinion during the election campaign (article 14 ECHR in relation to article 3 Protocol 1).

c) The inability to exercise without interference their role as elected public representatives

Members of parliament in exile or in prison, without having any of their civil rights suppressed, cannot carry out the work they were democratically elected to do in normal conditions. They cannot attend parliamentary sessions or exercise any of their rights as members of parliament other than delegate their vote (only those in

prison). In addition, objectively, the decision by the Constitutional Court not to allow the delegation of votes by “members of parliament with a judicial order for search and arrest issued against them” seriously disrupts the combination of majorities in the Catalan parliament.

The proposal by the President of the Parliament of Catalonia to put forward Mr. Puigdemont as candidate for the President of the Government of Catalonia has been aborted by the Constitutional Court via the adoption of preventative measures which are inexistent in their LOTC, and without having admitted the appeal against the proposal for consideration. As a result, neither can he act as a member of parliament to be invested, despite having a sufficient majority do so.

Again, therefore, three violation of rights take place, as set out in the previous paragraph: the right to stand for election, for none of these elected representatives will be able to exercise fully and without interference the responsibilities for which they were elected (article 3, Protocol 1); the right not to be discriminated against for reason of political opinion, since it is their opinion favourable to the independence of Catalonia what prevents them from exercising such responsibility (article 14 ECHR in relation to article 3 Protocol 1); and the right to equal treatment, given that they do not enjoy the same opportunities enjoyed by the rest of the elected representatives in the exercise of their responsibilities (article 14 in relation to article 3 Protocol 1).

**IV. VIOLATION OF FREEDOM, VIOLATION OF THE RIGHT TO AN INDEPENDENT AND IMPARTIAL COURT, VIOLATION OF THE RIGHT TO A JUDICIAL PROCESS WITH GUARANTEES (art. 6.1 ECHR), VIOLATION OF THE PRINCIPLE OF LEGALITY (art. 7 ECHR), VIOLATION OF THE RIGHT TO A SECOND HEARING IN THE PENAL FIELD (Protocol n. 7), VIOLATION OF THE RIGHT TO THE PREPARATION OF THE DEFENSE (art. 6.3.b ECHR).**

As previously indicated, the Spanish Government has attempted to resolve the Catalan conflict through punitive means and coercion, disregarding the possibility of a negotiated and political solution. One of the most active arms of the State branches in this punitive strategy is the Judiciary one.

The European Council itself has questioned the independence and impartiality of Spain's Judicial Power. In its recently published annual report<sup>55</sup>, the anticorruption group of the Council (GRECO) classifies Spain as the least committed one, out of a sample of 21 countries in the fight against judicial politicization. Spain has ignored three out of every four recommendations made by GRECO to prevent these practices in the judicial field. Moreover, according to its own data, Spain has not completely implemented any of the above mentioned recommendations, and it has but partially implemented only 25% of the recommended measures.

In this context, it is not surprising that the Spanish Government has relied completely on the Prosecutors and on certain Courts in order to apply repressive measures against the citizenry who defended the "right to decide", the "people's right to self-determination", the holding of a referendum, or simply, the independence of Catalonia. Serious violations of rights have been executed in the judicial context.

**FACTS:**

**The following events are some of the situations that we denounce:**

*a) Judicial proceedings and Court of Audits' actions in relation to organizing a participatory process held on November 9 2014.*

- The holding of the participatory process carried out on November 9, 2014 in Catalonia caused the levying of criminal charges against Mr. Artur Mas, then President of the Catalan Government (*Generalitat*); and against various members of his government. They were accused of the offences of disobedience, prevarication, and embezzlement of public funds. The Catalan Superior Court of Justice (TSJC) issued a condemnatory sentence only for the crime of disobedience on March 13, 2017. Concurrently with these facts, on February 2016, the Prosecutor ordered a criminal claim against Mr. Homs, a Spanish Congressman and former advisor to the Catalan president, when the participatory process of

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<sup>55</sup> <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680779c4d>.

November 9, 2014 was held. He was judged by the Supreme Court (due to his condition of member of the Spanish Congress) and found guilty on the charge of disobedience, without the right to a second trial.

- Consequently, although with different intensities, all the accused were convicted for the crime of disobedience with penalty of disqualification from exercising public service functions and monetary fines, as a consequence of their calling and organizing the participatory consultation of November 9, 2014. They were however absolved from the crimes of prevarication, and not judged for the crime of embezzlement of public funds, due to the lack of evidence during the pre-trial proceedings<sup>56</sup>. The sentence for the crime of disobedience does not fulfil the criteria of constant jurisprudence as the said crime always required for its criminal classification the existence of an individual or personal, express and direct summons; which in this case were not carried out.

*b) Disproportionate actions made by the General Prosecutor without legal coverage*

- As remarked before, both the calling and promotion of a referendum is not considered a crime in Spain since the implementation of the Organic Law (*Ley Orgánica*) 2/2001. Nevertheless, the Criminal Prosecutor's Office in Catalonia initiated a criminal proceeding to pursue any activity related to the holding of the referendum. It dictated Instruction 4/17 ordering the judicial police to take the necessary actions to prevent the holding of the "illegal referendum". But this Instruction should have been limited to those who could incur a possible crime of disobedience of the mandate of the Constitutional Court of September 7, and it should have been directed only to certain specific public powers via personal and nominative summons. In addition, there was an open judicial procedure, prior to all these actions issued by the Public Prosecutor, which prevented him from acting in this case (as ordered by the Superior Court of Justice of Catalonia-TPSJ- by Order of September 27<sup>57</sup>), according to the Spanish legal system.

-The General Prosecutor of the Government (September 15, 2017)<sup>58</sup> issued an instruction to initiate investigation proceedings against 712 mayors (more than 75% of the total number of mayors in Catalonia), in order to summon them without the issuance of court orders.

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<sup>56</sup> Despite the fact that the Criminal Courts did not find any evidence to judge them for the crime of misappropriation of public funds, on May 25, 2017, the Court of Accounts admitted a special complaint against the same defendants, Mr. Mas, Mrs. Ortega, Mrs. Rigau and Mr. Homs for possible embezzlement of public funds. As a precautionary measure the Court of Accounts has proceeded to the seizure of the private homes of the defendants, as they cannot secure all of the 5,200,000 euros that are required as bail. This process is now pending trial.

<sup>57</sup> Auto (Order) TSJC, Civil & Criminal Section:

[http://estaticos.elmundo.es/documentos/2017/09/27/auto\\_tsjc\\_10.pdf](http://estaticos.elmundo.es/documentos/2017/09/27/auto_tsjc_10.pdf)

<sup>58</sup> General Prosecutor Instruction.

[http://estaticos.elmundo.es/documentos/2017/09/13/orden\\_fiscalia.pdf](http://estaticos.elmundo.es/documentos/2017/09/13/orden_fiscalia.pdf)

-The Prosecutor's Office refused to investigate the violence perpetrated by the Spanish police during the day, 1-0, of the referendum<sup>59</sup>, in which there were a total of 1,066 people wounded, one of whom suffered the loss of one of his eyes due to the impact of a rubber bullet, the use of which is prohibited by Law of the Parliament of Catalonia (the Spanish Senate has refused as well to set up a commission to investigate these facts <sup>60</sup>; see also footnote 39).

- The Public Prosecutor has filed several complaints without any factual basis, that is, without the mandatory police report, which is the first principle on which any accusation by the Prosecutor has to be based. In spite of these irregularities, these complaints have been admitted by the judicial system (for example, against Mr. Cuixart and Mr. Sánchez).

*c) Transformation of an Individual court case into a Collective court case: Court no. 13 of Barcelona. Indiscriminate inquiries carried out without due legal guarantees in government buildings, political parties, companies, law firms and private homes*

- The Criminal Court no. 13 of Barcelona, under a secret Judicial summary, transformed an individual case – judicial proceedings initiated against former Senator Santiago Vidal after statements made about an allegedly illegal use of personal data of the Catalonia's citizens - into a collective case against the holding of the referendum, without any legal basis. And so,

- Ordered (apparently *ex officio*) the detention of fourteen high ranking officials in the early hours of 20 September. Those detained belonged to the Government of Catalonia (Ministry of Vice-Presidency, Ministry of Economy and Tax Affairs, Ministry of Foreign Affairs, Ministry of Government, Ministry of Work and Social Affairs, CESICAT, CTTI and others), as well as 41 raids on government offices, other Catalan public bodies and private homes (so-called operation ANUBIS). The head of the private company T-Systems was also detained in Madrid. None of those detained had received any prior judicial summons as an "investigated" party, and were held directly (in some cases in the street, on their way to work) by the Civil Guard, acting as judicial police. Six of the detainees immediately requested to appear urgently *habeas corpus* before the relevant duty courts. In three cases, the

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<sup>59</sup> <https://www.documentcloud.org/documents/4065627-Ido-7-Previas-1437-17-1.html#document/p1>

<sup>60</sup> Senate file:

<http://www.senado.es/web/actividadparlamentaria/iniciatives/detalleiniciativa/index.html?legis0126&id1=650&id2=000006>



*habeas corpus* procedure fell back on the same investigating court No. 13 in Barcelona which had ordered the arrests and by not abstaining in favour of the corresponding judge, the defence for the detainees challenged the judge, resulting in the detainees being returned to custody. Three *habeas corpus* requests were dismissed by judicial authorities and the resolution of the other three was held up for several hours before being resolved. All of those detained were provisionally released after appearing before the judge, some having spent two nights in police cells and with the obligation to appear weekly before the judge.

- The above mentioned arrests and searches were a breach of the principle of proportionality (for example, those carried out against the newspapers *Vilaweb*, *El Punt Avui*, or *El Nacional*). There were also several irregularities that violated basic procedural guarantees: for example, in the searches conducted in government buildings without Court search warrants, as well as in two law firms -thus violating the rights to professional secrecy and to defence. Likewise, the mandatory prior notice to the dean of the bar association was disregarded, and harassment of detainees took place (use of handcuffs, excessive retention). The two Press releases published by the Barcelona Bar Association on September 20, 2017<sup>61</sup> illustrate these violations.

- The National Police even attempted to enter, without a court search warrant, the headquarters of the CUP parliamentary political party, which was not possible because the prevention of the members of that party and of other parties (many of them parliamentarians), as well as members of the government of the city of Barcelona including the second deputy mayor<sup>62</sup>.

#### *d) Coercive fines levied by the Constitutional Court against members of the Electoral Syndicate*

- By means of Organic Law 15/2015, of October 16, for the execution of the Constitutional Court's resolutions as a guarantee of the Rule of Law, the Organic Law of the Constitutional Court was amended, with the purpose of transforming this body into the executor of its own resolutions, even including coercive measures. This reform, which was aimed at controlling the "Catalan case", modified the nature of the Tribunal and its role as a neutral arbiter, and garnered severe criticism from the Venice Commission<sup>63</sup>.

Based on the new functions gained by the amendment, the Constitutional Court imposed punitive fines on the members of the Electoral Trusteeship - appointed to control the referendum - of up to 12,000 euros a day<sup>64</sup> if they continued to hold office despite being suspended by the Constitutional Court. These fines have no

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<sup>61</sup><http://www.icab.cat/?go=eaf9d1a0ec5f1dc58757ad6cffdacedb1a58854a600312cccabe27fca69cf3fc3ffc16f3848153193a99da8e5dcc176bf6a43a2fc752eea0b216970adeee6e8eb662342baaa5a87dcy>

<http://www.icab.cat/?go=eaf9d1a0ec5f1dc58757ad6cffdacedb1a58854a600312cc9bf3b0bddd4b0792b628555ee32ac6256ef38bac9ed7d3226b03dd8852c30134bd2803e6b6d798f9>

<sup>62</sup> <http://www.elperiodico.cat/ca/politica/20170920/policia-no-aconsegueix-entrar-seu-cup-6299991>

<sup>63</sup> [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)003-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)003-e)

<sup>64</sup> [https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP\\_2017\\_067/NOTA%20INFORMATIVA%20N%C2%BA%2067-2017.pdf](https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2017_067/NOTA%20INFORMATIVA%20N%C2%BA%2067-2017.pdf)

prior precedent, and were imposed without the possibility of further review and, in many cases, without the electoral Trusteeship having been notified in advance of the prior request by the Court itself.

*e) Deprivation of the right to freedom of Mr. Jordi Sánchez and Mr. Jordi Cuixart, presidents, respectively, of the Catalan National Association -ANC- and Òmnium Cultural: disproportionate performances outside the area of jurisdiction of the National Audience.*

- The detentions and searches of September 20, previously referred to, provoked peaceful and spontaneous popular demonstration. In particular, the one which took place before the Catalan Ministry of Economy, peacefully convened by the ANC (Mr. Sanchez) and Òmnium (Mr. Cuixart). As leaders of this popular demonstration and being presidents of these two organizations, the National Court charged Mr. Sanchez and Mr. Cuixart with the crime of sedition.

- Following the complaint issued by the General prosecutor for the crime of sedition, *without prior filing of a police report* and full of assumptions rather than facts, Judge Carmen Lamela, head of the Court of Instruction no. 3 of the National Court, summoned Mr. Sanchez and Mr. Cuixart to declare on October, 16. After giving an affidavit, they were arrested and transferred to pre-trial prison<sup>65</sup>. More than a thousand jurists<sup>66</sup> have demanded their release. They are political prisoners as defined by the Council of Europe. Also:

- The actions that give rise to such an accusation cannot constitute a crime of sedition, in accordance with the current Criminal Code, but rather were a free exercise of the right to demonstrate (violation of Article 21 EC),
- The National High Court (and its Central Court of Instruction) was not the competent Court for this case nor, therefore, the judge predetermined by law (violation of Article 24. 2 CE); it can only be a magistrate's court based in Catalonia.
- The actions do not fulfil the instances that the Law of Criminal Procedure and constitutional jurisprudence require to order provisional detention (violation of Article 17 CE).

All these will be developed on section *g*).

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<sup>65</sup> Order of Pre-trial Prison of Mesrrs. Jordi Sánchez y Jordi Cuixart  
<https://ep00.epimg.net/descargables/2017/10/16/15744723466058a08ef324f5ad67090d.pdf>

<sup>66</sup> <http://collectiupraga.cat/wp-content/uploads/2017/10/Denuncia-cast.pdf>

*f) Judicial actions against the legitimate Government of Catalonia:  
disproportionate actions and outside the jurisdiction of the National Court.*

- On October, 30 the General Prosecutor filed a complaint against the President and the advisors of the Government of Catalonia<sup>67</sup> before the National Court for the crimes of rebellion, sedition and embezzlement. Judge Carmen Lamela, who was again presiding the Court judged this case. Besides the unfairness of these charges, as will be discussed in the next section, the lack of legal professionalism and the political motivations of the General Prosecutor are clearly evident, as demonstrated by the title given to the lawsuit: "The Harder They Fall" which was widely reported in the media<sup>68</sup>.

- There are indications that the Public Prosecutor's Office acted in order to assure that Judge Lamela, decorated by the National Police, would instruct this Court case. It is also suspected that the prosecutor's office waited for three days before presenting their claim in order to coincide with Judge Lamela being on-duty again.

All these proceedings were hurriedly accomplished, since at the end of the complaint (not the lawsuit), the Prosecutor urged the judge Central Court no. 3 (Mrs. Lamela), to order to the judicial police to elaborate a report about the incidents of September 20, being this police force under the control of the same Prosecutor's office. The manner in which this was accomplished illustrates the arbitrary way in which the complaint – which should have been a lawsuit - was filed without the necessary factual data provided by the Judicial Police at the time of the facts.

- On November 2, the Vice President of the Catalan Government and nine ministers were summoned before the same judge, Ms. Lamela who ordered the pre-trial imprisonment without bail of the Vice President and eight of the ministers<sup>69</sup>.

- The facts that have given rise to this accusation, cannot constitute neither an offense of sedition or rebellion, (as there have been neither tumults nor violence), nor an embezzlement in accordance with the current Spanish Penal Code. Neither was the National Court the competent one for this case nor, therefore, was the judge predetermined by law. Much less were there the requirements provided by the Law of Criminal Procedure and constitutional jurisprudence fulfilled in order to duly order pre-trial prison.

All of them were summoned less than 48 hours in advance; the next day being a holiday (November 1st). This period of time is considered insufficient to prepare a defence of such dimensions, being that the sentences of imprisonment in these cases can be *up to 15 years*. In addition, the lawyer of several of the Catalan officials arrested is also representing the members of the Catalan Parliament's board, and on that same day and time he had to appear before the Supreme Court for another

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<sup>67</sup> State Attorney General Lawsuit: <https://www.scribd.com/document/362996220/Querella-delFiscal-General-del-Estado-contra-Puigdemont-Junqueras-y-el-resto-de-consellers-cesados>

<sup>68</sup> <http://www.eldiario.es/catalunya/politica/MINUTO-Diada-13-685361458-15144.html>

<sup>69</sup> Provisional detention order: <https://ep00.epimg.net/descargables/2017/11/02/206acc57dbcb5fb428a2e881369b64b7.pdf>

case against the members of the above mentioned board. The lawyer of the Catalan Ministers asked the National Court to postpone the time of the statements, without any success. Thus, in addition to not having had a reasonable period of time to prepare their defence, the Catalan ministers had to declare without being properly instructed by their lawyer, a fact that makes their defencelessness even more evident, and which demonstrates a greater violation of their right to counsel.

*g) Violations of rights common to the facts of paragraphs e) and f)*

- Since the Public Prosecutor's Office and the investigating judge determined the offenses that the prisoners have not been able to commit, there have been serious breaches to their rights of freedom and to the principle of legality. The crimes charged are those of rebellion, sedition and embezzlement of public funds, which carry long prison sentences. The elements that the law requires to be proven have not been adequately presented as we mention in the following:

- **Rebellion and sedition:** the common and indispensable element of both crimes, as set out in the current penal code, is an uprising, which must be public and *violent* (article 472 Spanish Criminal code-PC) and public and *tumultuous* (Article 544 Spanish Criminal Code CP) perpetrated by a multitude of people. Conducting peaceful demonstrations for or against ideas, institutions or governments constitutes the exercise of the right of reunion and does not qualify as criminal activity, such as sedition and rebellion that require strength or violence and a public uprising
- **Embezzlement:** the certifications provided by the General Intervention of the Catalan Government (“Generalitat”) rule out any improper use of public funds.

- The above mentioned pre-trial imprisonment implies a serious violation of the right to liberty: the loss of freedom is governed by strict principles of exceptionality and proportionality, given that the fundamental right to personal freedom is affected. This is, according to all Spanish jurisprudence and the ECHR, pre-trial detention is a very exceptional measure that must be applied proportionately. The legitimate reasons of executing a “pre-trial imprisonment” are the non-flight of the accused, the non-repetition of the crime and the non-destruction of evidence. As for the first, the accused have appeared before the courts whenever they have been summoned; In fact, four of them were abroad and came to the Court voluntarily and personally. With regards to the relapse into criminal attitudes, those who could have committed a crime in their former positions cannot commit the crimes with which they have been charged because the Spanish Government has dismissed them as Ministers. Finally, the risk of destruction of evidence is non-existent. The running of public offices of the Catalan government has been taken over by Spanish government officials. For the two of the defendants who are not public authorities, the associations they preside over have not shown that they have carried out a single breach of the official requirements with which they have been charged.

- The competence of the National Court: in the case of prosecution of the dismissed members of the Catalan Government and the Presidents of Òmnium Cultural and of the ANC, the Central Judge no. 3 of the National Court (AN), Mrs. Carmen Lamela, has assigned to herself a competence that she lacks, despite the fact that art. 65 of the Organic Law of the Judiciary (LOPJ)<sup>70</sup> does not grant the jurisdiction to prosecute crimes of rebellion, sedition or embezzlement. In addition, contradicting its previous approaches, the Criminal Chamber of the AN, by order of 6-11-2017 decided to ratify the peculiar interpretation of the central Investigative Judge (by majority and not unanimously). In this way, the judge predetermined by law, the first procedural guarantee of the accused in the criminal court, is far from being fulfilled, and is being replaced by a judge who is not competent to hear this case. This replacement is unconstitutional.

*h) Judicial actions against the President and the members of the Bureau of the Catalanian Parliament who allowed the parliamentary debate on independence.*

- Following the complaint by the State Attorney General's Office (filed on October 30, 2017, but announced prior to the production of the facts), the Supreme Court tried the President of the Parliament and the members of the Parliament's bureau for the alleged crimes of rebellion, sedition and embezzlement. Bail was set at 150,000 € for the President of the Parliament. This amount was disproportionate and did not comply with the legal requirements for avoiding pre-trial prison. The President of the Parliament was prevented from depositing this amount on the same day and, therefore, she was forced to spend one night in prison before posting her bail the following day. Provisional freedom was granted on bail of € 25,000 for the rest of the members of the bureau<sup>71</sup>. In addition, the President and members of the Parliament are forced to appear weekly in court, are forbidden to leave the country and their passports have been withdrawn.

*i) Transfer to the Supreme Court of the cases above mentioned*

- The cases against the President of the Generalitat and its 8 Ministers, and that of Mr. Cuixart and Mr. Sánchez, have been transferred from the National Court to the Supreme Court on November 24, 2017. However, by law, the Supreme Court is not assigned to judge this case. According to the current Court Law jurisdiction, the Superior Court of Justice of Catalonia must be in charge of this criminal trial as the alleged crimes have been carried out in the territory of Catalonia (Article 57.2 EAC).

- On December 4, 2017, the Supreme Court reviewed the pre-trial imprisonment and allowed the provisional release under on bail of € 100,000 for six of eight

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<sup>70</sup> <https://www.boe.es/buscar/act.php?id=BOE-A-1985-2666&tn=1&p=20151028#asesentaycinco>

<sup>71</sup> Order resolving the personal situation of Ms. María Carme Forcadell Lluís, Mr. Lluís Corominas Díaz, Mr. Lluís Guinó i Subirós, Ms. Anna Isabel Simó Castelló, Ms.<sup>a</sup> Ramona María Barrufet i Santacana, y Mr. Joan Josep Nuet i Pujals:  
<http://estaticos.expansion.com/opinion/documentosWeb/2017/11/09/Auto%20Forcadell.pdf>

Catalan Ministers, with the obligation to appear weekly before the court, the prohibition to leave the country, and the surrender of their passports. However, it maintains, arbitrarily, pre-trial imprisonment for the Vice President of the Catalan Government (Mr. Junqueras), the Catalan interior Minister (Mr. Forn) and the two presidents of the associations ANC (Mr. Sánchez) and Òmnium Cultural<sup>72</sup> (Mr. Cuixart), even though, as in the prior cases, it has been shown that there is no risk of escape.

- Faced with the abovementioned judgment, Vicepresident Mr. Junqueras (re-elected as deputy in the elections of December 21, 2017) presented an appeal that was decided by a judicial writ on January 5, 2018<sup>73</sup>, confirming his preventive confinement. In reference to this writ, it is worthwhile to point out two violations of rights:

- The right to a fair trial and with legal guarantees: a few days before the judgment, several media outlets announced that Mr. Junqueras would not be released.
- The right to freedom and the right to non-discrimination because of one's political ideals; keeping Mr. Junqueras in jail while awaiting trial is not justified in any way. Firstly, even though the Supreme Court acknowledges that both for the charge of rebellion and sedition, an uprising needs to occur, not one single instance of it is mentioned in the writ. Secondly, the writ states that Mr. Junqueras urged citizens to demonstrate (without offering any proof of this accusation). It must be pointed out that this argument fall on its own merits since the right to peaceful, unarmed demonstration, like all the pro-Catalan independence demonstrations have been, is a basic right (art. 21 CE). The writ therefore turns peaceful demonstrations into criminal activities when they support the independence of Catalonia. This digression, which is clearly antidemocratic and contrary to the Constitution, is reinforced by another argument: the attribution to Mr. Junqueras of promoting in an illegal way – still to be proved – pro-independence demonstrations that were expected to end with confrontations with the police; It is however not specified what crime is being committed with these actions, and in any case they again represent the exercise of a basic and fundamental right. In this way, the events of October 1 are presented as illegal violent acts. However, as it has been previously pointed out, the referendum of October 1 is not an illegal action; both the calling and promotion of a referendum are not considered crimes in Spain since the passing of Organic Law 2/2005 (vid. ap. I). Thirdly, the Supreme Court affirms that there is a possibility that Mr. Junqueras will reiterate his “criminal” behaviour: *“There are not currently any facts that make us understand that the intention of the accused is to give up the possibility of occupying the very same or similar political position which allowed him, because of the political*

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<sup>72</sup> Supreme Court Order of December 4, 2017:

<https://ep00.epimg.net/descargables/2017/12/04/6b55476a43f9dc390d0d85e052dc7054.pdf>

<sup>73</sup> <https://www.elnacional.cat/uploads/s1/34/30/52/4/5-1-18-auto-desestima-apelacion.pdf>

*power he wielded, to accomplish the criminal activities that he's being accused of; there is neither, beyond some personal statements non-corroborated by subsequent actions, that his will or the party who presents him as candidate to the Presidency of the Generalitat, any indication that there he or his party are to abandon the notion to make effective the unilateral proclamation of independence, which was their objective, although not obtained through the State's activation of constitutional and legal mechanisms in defence of democracy; there is also no indication that they will pursue their goal through means different to the already initiated ones, and, therefore, he faces similar consequences as the ones he's already faced."* This reasoning clearly illustrates the point that Mr. Junqueras remains deprived of his personal freedom because of his defence of Catalan independence.

- For their part, the Catalan Minister of the Interior (Mr. Forn) and the leaders of the two associations ANC (Mr. Sànchez) and Òmnium Cultural (Mr. Cuixart), upon being notified of the interlocutory of 4 December which kept them in prison, asked to appear again before the investigating judge<sup>74</sup> with the aim of demonstrating the reasons why their provisional imprisonment did not concur. The judge agreed to hear their declarations, but fixed the date for 11 January 2018<sup>75</sup>: more than a month later, after Christmas, New Year and Epiphany.

In their respective new declarations, the three under examination stated they would abide by the constitution and the two who had been elected members of parliament in the election on 21 December 2017 (Mr. Forn and Mr. Sànchez) even declared their willingness to renounce their seats if their party did not renounce the unilateral path.<sup>76</sup> Notwithstanding, finally on 23 February 2017 the Minister of the Interior informed his party (PdeCAT) of his decision to renounce his status as a member of parliament.<sup>77</sup>

However, neither the pledge to abide by the constitution, nor the categorical rejection of unilateralism, nor even the relinquishment of the post of member of parliament by the dismissed Catalan Minister of the Interior (extremes which clearly show the inexistence of any possible reoffence), have led the investigating judge to lift the measure of provisional prison. Thus, the interlocutory decisions of

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<sup>74</sup> <http://www.deia.com/2017/12/06/politica/estado/forn-solicita-volver-a-declarar-en-toda-regla-ante-el-juez-llarena>

<sup>75</sup> <http://www.libertaddigital.com/espana/politica/2017-12-14/llarena-cita-de-nuevo-a-forn-y-los-jordis-para-el-11-de-enero-1276610670/>

<sup>76</sup> <https://www.elperiodico.com/es/politica/20180111/declaracion-tribunal-supremo-jordi-cuixart-jordi-sanchez-joaquim-forn-6544392;>  
<http://www.lavanguardia.com/politica/20180209/44633180858/declaracion-jordi-cuixart-supremo-referendum-1o.html>; <http://www.lavanguardia.com/politica/20180207/44595510922/audios-jordi-sanchez-declaracion-ts-pablo-llarena-1o-gobierno.html>;  
<http://www.lavanguardia.com/politica/20180208/44609014506/audios-joaquim-forn-declaracion-juez-tribunal-supremo-mossos.html>

<sup>77</sup> <http://www.lavanguardia.com/politica/20180123/44240358102/joaquim-forn-renuncia-acta-diputado-salida-carcel.html>

2 and 6 February ratified the measure in relation to Joaquim Forn and Jordi Sànchez.<sup>78</sup>

*j) The European arrest warrant (OED): inconsistencies and non-feasibility of its issuance.*

- When the rest of the members of the Catalan Government were dismissed at the appeal of the Judge from National Court nº 3, (they went to Belgium before the issuance of any summons and the opening of arrest against them), the judge, Mrs. Lamela, issued an European Arrest Warrant. At this point, the first incongruity becomes apparent: in addition to the three aforementioned crimes (rebellion, sedition, embezzlement), it adds those of prevarication and disobedience, for which the prosecutor never filed criminal actions. Two of those affected by the issuance of that European Arrest Warrant (OED) filed an appeal against it on the grounds that it went beyond what the prosecutor had previously requested and was therefore incongruous.

- On November 13, the judge answered that such incongruity was non-existent, since the prosecutor considered that prevarication and disobedience are inherent in rebellion. The judicial sophistry is evident: the prosecutor does not act for less serious crimes, because he considers them included in more serious ones; nor does he endeavour to prove those facts prior to the serious crimes for which the complaint is filed; he mentions them in passing. The judge, unexpectedly and illegitimately expands the motives of the European Arrest Warrant (OED) to include two new crimes. However, all of the above was not enough to document the OED. It was not enough because none of these five accusations appears in the list of 32 crimes established by European legislation (Directive 2011/99 / EU, transposed to the Spanish legislation, law 23/2014 of mutual recognition of criminal resolutions in the European Union<sup>79</sup>). Anticipating this obstacle in the standardized form in which the European Arrest Warrant is printed, the box for the crime of corruption was marked. It would seem therefore, that there had been a concerted effort to obscure the facts presented to the Belgian judges by altering the charges brought in Spain against the Government of the Generalitat, into new charges of corruption, something that is entirely without merit.

- Foreseeing that the Belgian judiciary was not going to extradite any of the four members of the Catalan Government residing in Belgium, the Examining Judge of the Supreme Court withdrew on December 5 the OED issued by the Examining Judge no. 3 of the National Court<sup>80</sup>. The international arrest warrant sent to Interpol was also revoked. We are then faced with the anomaly that the Spanish Justice, with the consent of the Public Prosecutor's Office (who is appointed by the

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<sup>78</sup> [https://www.elnacional.cat/es/politica/llarena-mantiene-joaquin-forn-prision\\_235152\\_102.html](https://www.elnacional.cat/es/politica/llarena-mantiene-joaquin-forn-prision_235152_102.html) (the news item includes the text of the interlocutory by the TC of 2.2.2018)

[https://www.elnacional.cat/es/politica/juez-llarena-deniega-libertad-jordi-sanchez\\_236304\\_102.html](https://www.elnacional.cat/es/politica/juez-llarena-deniega-libertad-jordi-sanchez_236304_102.html) (the news item includes the text of the interlocutory by the TC of 6.2.2018).

<sup>79</sup> <https://www.boe.es/buscar/act.php?id=BOE-A-2014-12029>

<sup>80</sup> Order of 5 December of the Supreme Court retiring the European Arrest warrant“<http://estaticos.elperiodico.com/resources/pdf/8/6/1512468316668.pdf>



Government) only will persecute the residents now in Brussels in case they return to Spain. However, for the very same facts, four people—Messrs. Oriol Junqueres, Joaquim Forn, Jordi Sanchez and Jordi Cuixart— are still being held in pre-trial prison without bail.

*k) Prison conditions of prisoners:*

The aforementioned pre-trial prisoners are not in modules of prisoners for pre-trial imprisonment, but mixed with convicted prisoners<sup>81</sup>. Mr. Sánchez has witnessed, very closely, a knife attack between prisoners during the celebration of Mass. They suffer from cold temperatures in their cells due to lack of radiators and poorly fitted windows. The heating only works in the area for visiting relatives.<sup>82</sup>

Those who remain imprisoned today, and were candidates for Catalans elections on December 21 (Mr. Junqueras, Mr. Forn and Mr. Sanchez) were not allowed to communicate with their lawyers to prepare their candidacies. They were also forbidden from giving their lawyers any kind of documentation, thus violating their right to be elected under conditions of equality (right of passive suffrage, see above).

*l) Resolutions by the Constitutional Court interfering with the formation of the Government of Catalonia*

The President of the Parliament of Catalonia's proposal of Mr. Puigdemont as the President of the Government of Catalonia has been aborted by the Constitutional Court via the adoption of preventative measures which are non/existent in its LOTC and without having admitted for consideration the appeal against the proposal lodged by the central government. In addition, objectively, the decision by the Constitutional Court not to allow, among other preventative measures, the delegation of the votes of "members of the parliament with judicial orders for their search and capture issued against them" undermines the majority in the parliamentary chamber (see section IV. c).

**VIOLATIONS OF RIGHTS:**

We understand that the following violations of human rights (as specified by the CDEH) derive from the points presented above:

a) The right to freedom (art. 5.1.c)

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<sup>81</sup> According to section 8 of Organic General Penitentiary Law 1/1979, of 26 September, pre-trial prisoners must be located in specific centers. Each province may have more than one of these centres. However, "(s)hould there be no such centres for female or youth pre-trial prisoners, they will occupy men's units completely segregated and with their own regime and organisation". According to section 8 of Organic General Penitentiary Law 1/1979, of 26 September, pre-trial prisoners must be located in specific centres. Each province may have more than one of these centres. However, "(s)hould there be no such centres for female or youth pre-trial prisoners, they will occupy men's units completely segregated and with their own regime and organisation".

<sup>82</sup> About their everyday prison life: <http://elmon.cat/amp/politica/bbc-explica-vida-dels-presos-politics>. Link to BBC report <http://www.bbc.com/news/world-europe-42136236>

As it has been previously stated, the judicial resolutions, which execute pre-trial imprisonment for the Catalan politicians, do not have any basis neither in law nor in jurisprudence. Thus: the motives cited to first place them under preventive arrest and then maintain them in prison are not judicial motives but political ones aimed at persecuting pro-independence ideals. It is not demonstrated in the rationale of the judicial resolutions that an offence has been committed: the crimes that they are accused of (sedition and rebellion) demand a violent public uprising that has not taken place at any moment. Their preventive imprisonment violates art. 5.1.c. ECHR.

b) The principle of penal legality (art. 7)

The ECtHR through reiterated and consolidated jurisprudence has declared that art. 7 does not limit the retroactive application of the penal code against a prisoner, but it further implies the principle that only the law can define a crime and prescribe a punishment and the principle that that it's not appropriate to give an extensive unfavourable interpretation against an imputed person of the penal code (among others, *Kokkinakis vs. Greece*, May 25, 1993).

This mandate of determination of the penal code is set down by the ECtHR in the prohibition of analogy, a mandate of "strict" interpretation of the legal code, and in the standard of "predictability" of judicial decisions (interdiction of arbitrary amendments).

The charges for the crimes of rebellion, sedition and embezzlement are not sustainable (see. section *g*) in the light of the literal interpretation and the consolidated jurisprudence in such crimes. It does not thus fulfil the standards of "predictability" and of "strict" interpretation of the penal code that the ECtHR demands. Therefore, art, 7 ECHR is violated with grave consequences to the liberty of those in preventive prison (art. 5.1 .ECHR).

The resolution of the crime of disobedience (see. section *a*) is likewise not sustainable in a judicial framework so that it can be inferred a violation of the principles of "predictability" and "strict" interpretation of the legal code that the ECtHR demands, and as a consequence, the principle of legality recognized in art. 7 ECHR.

c) Violation of the right to a fair trial (impartial judge) (art. 6.1)

The charges of the crimes of rebellion and sedition to the leaders of two associations defending independence and to the president and members of the Catalan government, without presenting any fact that responds to the elements that conform this type of crime, makes evident the bias of the judge who is persecuting a certain ideology rather than a crime (see sections e, f, and g).

The opening of a new process of possible embezzlement of public funds by the Prosecutor's Office leads to the same conclusion: it appears more like a

“punishment” for organizing the participatory process of November 9-, 2014 than the consequence of facts that can be proven; this charge had already been dismissed for lack of proof (see. section a).

The transforming of an individual case into a general one by Court no. 13 without any plausible basis (see. section c) is also a violation of the right to impartial judgment.

The withdrawal of the European arrest warrant (OED) by the Spanish judge realized that the Belgian justice was not going to extradite any of the members of the Catalan government residing in Belgium (see section j)), is also a strong indication of partial justice.

All of these actions were accomplished with the support of a public prosecutor at the service of the Central Government (see section b) and a Constitutional Court that has been transformed, after the polemic amendment of its Organic Law, in a punitive court (see section d).

All these facts violate the right to impartial judgment recognized in art. 6.1 ECHR, since judgment has been passed based on prejudices against a certain ideology, and has therefore been judged in a partial manner (*Piersack v. Belgium*, judgment of October 1, 1982)

d) Violation of the right to court established by law (art. 6.1)

The National Audience conceded itself a jurisdiction that does not belong to it in the case of the judgment of destitute members of the Catalan government and prior to it, in the case of the presidents of ANC and *Òmnium Cultural* (see section g).

The Supreme Court, to whom these cases were transferred, is neither the established judge, according to current legislation, but it is the Supreme Court of Justice of Catalonia who has the jurisdiction of this trial since the alleged crimes were perpetrated in the territory of Catalonia. (art. 57.2 EAC)

In consequence, all the above facts constitute a violation to the right of court established by law in accordance with art. 6. 1 ECHR.

e) Violation of the right of due process (art. 6.1)

The ECtHR considers contrary to the ECHR the expressing or stating of opinions by judicial authorities outside the framework of a condemnatory sentence or the appropriate political or administrative authorities.

The judicial leaks are a clear violation of this right, not only of the right of presumption of innocence, but also of the right of due process. The leaks about the contents of the writ by the Supreme Court in relation to the denial of freedom to Mr. Junqueras (see section i)) are violations of the right established in art 6.1 ECHR.

f) Violation of the right to a second trial in the penal framework (Additional Protocol no.7)

Additional Protocol no. 7 recognizes the right to a double degree of jurisdiction in the penal framework. One of the people condemned for the crime of disobedience (see section a) has suffered a violation of this right, since the Supreme Court is the only body that judged his case (as a congressman he was gauged).

g) Right to defence preparation (art. 6.3 b)

The summons to the members of the Catalan government by the National Audience were given with a timeframe of less than 48 hours, the next day being a holiday (see section f). This timeframe is considered inadequate to prepare a proper defence for an accusation of such gravity, with potential punishment of up to 15 years in prison.

Furthermore, the same lawyer represents several members of the Government Board of the Catalan Parliament and on the same day and time he was expected to appear before the Supreme Court for lawsuits presented against members of such Board. Under the circumstances, the lawyers requested a postponement to the National Audience in the case against the Catalan ministers, which was not granted. In consequence, besides not having been allowed enough time to prepare for the defence of all his clients, the ministers were forced to give their affidavits without answering to their lawyer's questions. This clearly indicates a situation of defencelessness and a subsequent violation of this right.

Article 6.3.b ECHR has therefore been violated.

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