THE CATALAN CRISIS: A LEGAL PERSPECTIVE AT THE INTERNATIONAL AND EUROPEAN LEVELS[1]

LA CRISIS CATALANA: UNA PERSPECTIVA JURÍDICA EN LOS PLANOS INTERNACIONAL Y EUROPEO

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Abstract: For several years now, Catalonia has been going through a serious political crisis, exacerbated by the independence referendum of 2017. The attempt by this autonomous region to separate from Spain with a view to creating a sovereign State has led to a fierce stand-off between the Catalan authorities and the Spanish Government. In this respect, it may be useful to shed some legal light both on the issue of human rights, from an international perspective, and on the issue of immunities, from the perspective of European Union law.

Key words: Spain, Catalonia, secession, independence, Universal Periodic Review, human rights, immunity, European Union

Resumen: Desde hace varios años, Cataluña atraviesa una grave crisis política, agravada por el referéndum de independencia de 2017. El intento de esta comunidad autónoma de separarse de España con vistas a crear un Estado soberano ha provocado un fuerte enfrentamiento entre las autoridades catalanas y el Gobierno español. En este sentido, puede ser útil arrojar algo de luz jurídica tanto sobre la cuestión de los derechos humanos, desde una perspectiva internacional, como sobre la cuestión de las inmunidades, desde la perspectiva del Derecho de la Unión Europea

Palabras claves: España, Cataluña, secesión, independencia, Examen Periódico Universal, derechos humanos, inmunidad, Unión Europea

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While the regional elections of the Parliament of Catalonia on 14 February propelled the socialist candidate of the Spanish Government, former Health Minister Salvador Illa, to the first place, they also led to a strengthening of the pro-independence parties, the Republican Left of Catalonia (*Esquerra Republicana de Catalunya*, ERC), Together for Catalonia (*Junts per Catalunya*, JxC) and Popular Unity Candidacy (*Candidatura d'Unitat Popular*, CUP). These elections marked a new stage in the unprecedented Catalan crisis, exacerbated by the independence referendum of 2017. The unsuccessful attempt by this autonomous region to separate from Spain with a view to creating a sovereign State has led to a fierce stand-off between the Catalan authorities and the Spanish Government. Beyond the political considerations, the legal arguments invoked by the various protagonists of this crisis call for a legal assessment at the international and European levels. Firstly, at the international level, with regard to the alleged human rights violations, Catalonia's demand for independence will be analysed from the perspective of Spain's Universal Periodic Review (UPR) (I). Secondly, at the European level, in view of the heavy and controversial convictions of several pro-independence leaders, the issue of the immunity of Catalan pro-independence Members of European Parliament (MEPs) will be analysed from the perspective of the application of European Union law (II).

I. The Universal Periodic Review perspective: the human rights violations in support of Catalonia's demand for independence?

Under international law, could the Catalan region's claim to independence be supported by human rights violations, as reflected in Spain's most recent UPR?

The UPR, established by the United Nations General Assembly (UNGA) when the Human Rights Council was created in 2006, is a mechanism through which this body promotes universal respect for human rights. In accordance with UNGA Resolution 60/251 founding the Human Rights Council, the UPR aims at establishing a human rights record on a cyclical basis that extends to all UN Member States. To this end, the Human Rights Council must "undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue" (§ 5-c).

Unlike the other mechanisms provided by treaty bodies' experts, through which the competent committees are responsible for verifying the compliance of the concerned country with its international human rights commitments, the control put in place within the framework of the UPR, which is of a diplomatic nature, is carried out by peers, i.e. States. It is therefore based on an intergovernmental dialogue organised around three reports: a

national report prepared by the State under review describing the human rights situation in the country and two other reports prepared by the Office of the High Commissioner for Human Rights, one synthesising relevant information from the human rights treaty bodies and UN entities, and the other synthesising information provided by the civil society, including national human rights institutions and non-governmental organisations (NGOs).

National Report

Spain completed the third cycle of its UPR in 2020.[2] In its *National Report* dated 12 November 2019,[3] Spain committed itself to "continue participating actively in the Council and to support initiatives aimed at making it more robust and effective" (§ 1), stressing that "[c]ivil society organizations had a role in the preparation of this report" (§ 5). In a classic way, the Spanish report makes an assessment of the application of various human rights, whether civil, political, economic, social or cultural.

Spain takes care to specify, in particular, that: "Under Organic Act No. 4/2015, the State security forces are to be guided in their actions by a number of principles, including the principle of equal treatment and nondiscrimination. Disciplinary proceedings are opened for any discriminatory conduct by members of the State security forces, and the persons responsible will, where appropriate, be prosecuted" (§ 46); and that "[v]iolent, aggressive and coercive actions that interfere with the rights to freedom of expression, assembly and demonstration are punishable" under this same law (§ 94). Furthermore, it is stated in the *National Report* that: "The aim of Instruction No. 13/2018102 is to improve the performance of police and security officers in their attempts to ensure police safety. In their operations, the State security forces must, for example, abide strictly by the principle of interfering as little as possible, including in respect of people's privacy and dignity" (§ 95).

These references to the instruments governing the action of police forces are obviously significant. Indeed, in a context of strong tensions between the Spanish Government and the Government of the Autonomous Community of Catalonia which reached a climax in 2017, demonstrations in favour of the independence of this autonomous community had given rise to clashes between the population and the police forces, whose images were widely broadcasted by the media and social networks, sometimes in a roundabout way.[4] Although these tensions are not mentioned in the *National Report*, in particular under the section on "Challenges" (§ 173), the aim was to echo them, in order to anticipate the concerns that were also expressed in the other two reports of the Office of the High Commissioner for Human Rights.

[2] Human Rights Council, Universal Periodic Review: Spain, Third Cycle, 22 January 2020 (https://www.ohchr.org/EN/HRBodies/UPR/Pages/ESIndex.aspx).
[3] Human Rights Council, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: Spain*, A/HRC/WG.6/35/ESP/1, 12 November 2019 (https://undocs.org/en/A/HRC/WG.6/35/ESP/1).
[4] Adrien Sénécat, "Violences policières en Catalogne: attention aux images trompeuses", *Le Monde*, 2 October 2017 (https://www.lemonde.fr/les-decodeurs/article/2017/10/02/violences-policieres-en-catalogne-attention-aux-images-trompeuses_5194905_4355770.html).

It should be remembered that on 6 September 2017 the Catalan Parliament promulgated Law 19/2017 providing for a referendum on self-determination, which the Spanish Constitutional Court ruled illegal the following day, and that on 1 October 2017 voters decided in favour of independence. Following this result, it was illegally that the pro-independence members of the Catalan Parliament, considering themselves to be the legitimate representatives of the Catalan *Generalitat*, proclaimed the independence of the Catalan Republic on 27 October 2017, with a view to entering into negotiations with the Spanish State on an equal footing. This unilateral declaration of independence was immediately followed by a vote in the Spanish Senate which, implementing for the first time Article 155 of the Constitution,[5] authorised the trusteeship of Catalonia, as well as the dismissal of the President of the *Generalitat* and its Government. Accused by the Spanish justice of rebellion, sedition, embezzlement of public funds and disobedience, several Catalan personalities were then prosecuted, tried and imprisoned in Spain, while others fled to Belgium.

This situation is referred to in the two reports prepared by the Office of the High Commissioner for Human Rights on the occasion of the UPR.

Compilation on Spain

In the *2019 Compilation on Spain*,[6] prepared on the basis of relevant UN documents, concerns were expressed about the handling of the Catalan crisis from the perspective of several human rights. In effect, as the situation had been closely followed by various UN bodies, the report lists those several entities that expressed their concerns.

In this sense, from the perspective of the right to liberty and security of the person, "[t]he United Nations High Commissioner for Human Rights was very disturbed by the violence in Catalonia on 1 October 2017. With hundreds of people reported injured, he urged the Spanish authorities to ensure thorough, independent and impartial investigations into all acts of violence. United Nations experts were also disturbed by the eruption of violence on that day" (§ 15). Similarly, "also disturbed by the eruption of violence on that day", "[t]he High Commissioner and the Special Rapporteur on the rights to freedom of peaceful assembly and of association stressed that any use of force by police must be both necessary and proportionate" (§ 15).

Furthermore, the Working Group on Arbitrary Detention deplored the arrest of a number of prominent personalities and, in turn, called for an independent enquiry: "In 2019, in two opinions, the Working Group on Arbitrary Detention found that the deprivation of liberty

[5] Article 155 of the Spanish Constitution provides that: "If a self-governing community does not fulfill the obligations imposed upon it by the Constitution or other laws, or acts in a way that is seriously prejudicial to the general interest of Spain, the Government, after having lodged a complaint with the president of the self-governing community and failed to receive satisfaction therefore, may, following approval granted by the overall majority of the Senate, take all measures necessary to compel the community to meet said obligations, or to protect the above mentioned general interest".

[6] Human Rights Council, *Compilation on Spain. Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/WG.6/35/ESP/2, 18 November 2019 (https://undocs.org/en/A/HRC/WG.6/35/ESP/2).

of Jordi Cuixart, Jordi Sánchez, Oriol Junqueras, Joaquín Forn, Josep Rull, Raúl Romeva and Dolores Bassa was arbitrary, and requested the Spanish authorities to release them immediately, grant them the right to reparation and conduct a comprehensive, independent investigation into the circumstances of their detention" (§ 16). The report stated that "Spain responded that the legal action taken in those cases could not be viewed as a reaction to a legitimate political desire for Catalan independence, but rather as nothing other than a judicial measure imposed in response to specific acts performed outside the rule of law" (§ 16).

From the perspective of the right to take part in public and political life, several UN rapporteurs have called for Spain to respect the right to freedom of expression, assembly and association:

> "On 28 September 2017, two special rapporteurs called on the Spanish authorities to ensure that measures taken ahead of the Catalan referendum on 1 October did not interfere with the rights to freedom of expression, assembly and association, and public participation. They stated that the Spanish authorities had a responsibility to respect those rights, which were essential to democratic societies, and urged all parties to exercise the utmost restraint and avoid violence of any kind to ensure peaceful protests. They were also concerned that websites had been blocked and political meetings stopped. Politicians had been arrested and leaders of the mass protests had been charged with sedition" (§ 22).

It should be noted that the two rapporteurs in question, the US nationals David Kaye and Alfred de Zayas, have publicly and repeatedly taken a position in favour of secessionism.

Regarding more specifically the eruption of violence that had occurred on 1 October 2017, "four special procedure mandate holders urged the Spanish authorities to fully respect fundamental human rights, including the rights to freedom of peaceful assembly and association, participation in public affairs and freedom of expression", calling again for "an investigation" (§ 23). Moreover, "[t]he Special Rapporteur on freedom of peaceful assembly and of association stressed that Spain had a duty to ensure that all measures to manage public protests and public assemblies were in conformity with its international obligations" (§ 23).

In order not to aggravate an already tense situation, it was requested that the charge of rebellion should not be put forward, because of the very heavy punishment it may carry:

> "In April 2018, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression noted that, following the October 2017 referendum, the Spanish authorities had arrested the then-members of the Catalan Government and leaders of civil society organizations and charged them with rebellion, among other things. He urged the Spanish authorities to refrain from pursuing the criminal charge of rebellion against political figures and protesters in Catalonia, which carried a jail sentence of up to 30 years" (§ 25).

In this case, this request was made by David Kaye, UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression from August 2014 to July 2020.

Finally, in order to find a solution, the Spanish authorities were asked to negotiate in good faith with the leaders of Catalonia: "On 25 October 2017, in connection with the situation in Spain, the Independent Expert on the promotion of a democratic and equitable international order called on the Spanish authorities to enter into negotiations in good faith with leaders in Catalonia following the announcement that the Government would suspend the region's autonomy" (§ 24). This request was made by Alfred de Zayas, who served as an Independent Expert on the promotion of a democratic and equitable international order between May 2012 and April 2018.

It is clear from the *Compilation on Spain* that dialogue is seen as an indispensable step to overcome the impasse: "The United Nations High Commissioner for Human Rights firmly believed that the situation in Catalonia should be resolved through political dialogue, with full respect for democratic freedoms, and called on the Government of Spain to accept without delay the requests by relevant United Nations human rights experts to visit. Various United Nations experts also called for dialogue" (§ 26).

Summary of Stakeholders' Submissions on Spain

Similar concerns can be found in the *2019 Summary of Stakeholders' Submissions on Spain*[7] of the Office of the United Nations High Commissioner for Human Rights. This report was based on 89 stakeholders' submissions, listed in footnote 1. In this regard, it should be clarified that the Office of the High Commissioner for Human Rights does not solicit information from national and international NGOs or associations. Any NGO or association has the possibility to send information on a given country before it is reviewed under the UPR, the only condition being that it is accredited by ECOSOC. While the Office of the High Commissioner necessarily makes an objective choice from the most relevant information that it receives in order to prepare its synthesis of stakeholders' positions – some reports being poorly written, not very credible and sometimes even far-fetched –, there is usually no influx of information that would force it to make a drastic selection.

In this context, it goes without saying that it is the NGOs or associations with the most means or being the most active that manage to make their voice heard. Therefore, unsurprisingly, the list of stakeholders having individually or jointly submitted information contains a number of NGOs and associations that stand out for their activism in favour of Catalonia's independence. This is the case, for example, of *Òmnium Cultural* that works for the promotion of the Catalan language and culture, and of the *Assemblea Nacional Catalana* (ANC) whose stated goal is the political independence of Catalonia. It should be

[7] Human Rights Council, *Summary of Stakeholders' submissions on Spain. Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/WG.6/35/ESP/3, 18 November 2019 (https://undocs.org/en/A/HRC/WG.6/35/ESP/3).

noted that these two organisations, whose aims go far beyond the cultural field alone and whose leaders have been convicted of sedition, were particularly active throughout the process leading up to the 2017 independence referendum.

The ANC, in particular, has joined the Unrepresented Nations and Peoples Organisation (UNPO) in filing a submission (Joint Submission 31). Founded in 1991 in The Hague (the Netherlands), UNPO is an organisation whose members are indigenous peoples, minorities, and populations living in occupied or non-sovereign territories. Defending the right to autonomy and self-determination, it provides a forum for its members and helps them to manifest themselves at the international level. UNPO has currently 44 members, including the ANC since 14 December 2018.

It is therefore unsurprising that the Catalan situation is mentioned several times in the stakeholders' report. In this sense, from the perspective of the right to life, liberty and security of the person, police violence and the lack of an independent investigation were deplored by several organisations:

> "Several organizations expressed regret that, on 1 October 2017, the date on which the referendum was held in Catalonia, the National Police and Civil Guard used excessive and disproportionate force against citizens who had gathered peacefully in various locations in Catalonia. They indicated that, in many cases, riot police ploughed directly into the crowd, without first trying to negotiate an alternative solution with them. A number of organizations stated that, as a result, the various hospitals treated almost a thousand people for injuries caused by police assaults. *Associació d'Afectats* (*Afectats*) indicated that the violent police action also caused numerous anxiety and panic attacks among victims, members of their families and people living nearby.
>
> A number of organizations noted that no commission of inquiry had been established to look into the possible accountability of the police officers who took part in the operations and that the perpetrators had not been punished. *Associació Juristes Pels Drets Humans del Maresme* (HHRR) welcomed the fact that criminal proceedings in respect of the events of October 2017 had been brought before the courts, but regretted the slow pace at which they were progressing and the failure to take the action necessary to identify the perpetrators. Several organizations recommended carrying out independent and impartial investigations into the excessive force used by security forces in October 2017 in Catalonia, establishing the corresponding criminal responsibilities and setting up a commission of inquiry. *Afectats* recommended that guarantees of non-repetition should be provided" (§§ 26-27).

Other concerns were also expressed in terms of fundamental freedoms and the right to participate in public and political life:

"*Catalan Associació Professionals* (ACP) and JS31 expressed concern about unwarranted restrictions on freedom of expression and association, principally in the context of the October 2017 referendum, including the digital repression that led to the closure and blockage of many newspaper websites. ACP recommended amending the Intellectual Property Act so that a court order is required for the closure of websites. Joint Submission 10 (JS10) recommended amending Act No. 19/201 in order to recognize the right of access to information as a fundamental right. JS31 recommended upholding the freedom of the media by removing restrictions placed on the media when it comes to reporting on issues related to the pro-independence movement in Catalonia" (§ 41).

Report of the Working Group

At the end of the consideration of these three reports, carried out within the Human Rights Council in the framework of an intergovernmental dialogue, a final report, drafted by a working group composed of three rapporteurs, is adopted by consensus at a plenary meeting. This final report, which represents the culmination of the UPR procedure, contains a summary of the dialogue between State delegations and ends with a number of recommendations aimed at improving the human rights situation in the State under review, which the latter is free to accept or not.

Regarding Spain, the *Final Report* dated 18 March 2020[8] lists no less than 275 recommendations. Among these, there is only one recommendation concerning police violence and calling for investigations, but without any reference to the specific situation of Catalonia: "Ensure independent and effective investigations into cases of disproportionate actions of police officers against participants of public demonstrations (Russian Federation)" (150.95). There is also only one recommendation making a direct reference to Catalonia's secessionist attempt, in order to advocate dialogue between the central Government and the Catalan authorities: "Initiate a constructive dialogue between the new Government and the Catalan people and its institutions (Bolivarian Republic of Venezuela)" (150.9).

Of the other 192 UN Member States participating in the assessment of the overall human rights situation in Spain, only two – Russia and Venezuela – made reference, respectively indirectly and directly, to Catalonia, and only Venezuela considered it useful to make a recommendation in the sense of encouraging dialogue between national and local authorities. It is interesting to note that these recommendations come from countries that have experienced violent police repression in their recent history. It seems clear that if human rights violations in Catalonia had reached a massive, flagrant and systematic threshold, other States would also have made recommendations. This has not been the case.

[8] Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Spain*, A/HRC/44/7, 18 March 2020 (https://undocs.org/fr/A/HRC/44/7). « On 14 January 2020, the Human Rights Council selected the following group of rapporteurs (troika) to facilitate the review of Spain: Bangladesh, Czechia and Nigeria » (§ 2).

Assessment

A first consequence to be drawn is that wherever inter-State procedures are available, whether jurisdictional (European Court of Human Rights)[9] or quasi-jurisdictional (Human Rights Committee),[10] it seems highly unlikely that a State initiates an application against Spain. This is all the more improbable given that no State in Europe – or even elsewhere – has recognised the Catalan declaration of independence. In this respect, while a unilateral declaration of independence is not, *per se*, a violation of international law, in the present case, it did not emanate from an independent and effective government. Consequently, any recognition may amount to interference in the internal affairs of a State whose national Constitution, in Article 1 § 2, explicitly recognises the "Spanish people" as the exclusive holder of sovereignty. On the other hand, the reports used for the UPR may be seen as evidence of the violation of specific rights in the context of individual claims or petitions before judicial or quasi-judicial bodies, or even to support diplomatic action.[11]

Another consequence to be drawn is the lack of credibility of the ground of remedial secession argued to legitimise Catalonia's independence claim. In effect, the notion of remedial secession, which is far from having reached a consensus, emerged beyond the right of peoples to self-determination which, in positive law, can only be invoked to create a new State in the context of peoples under colonial or alien domination or foreign occupation. According to this controversial concept, secession could apply to "peoples" who are victims of massive, persistent and systematic violations of their fundamental human rights, to the point that separation from the mother State appears to be the ultimate alternative. In other words, the violation of internal self-determination would be so serious that it would trigger the birth of a right to external self-determination.

Even a superficial analysis of the rule of law in Spain in general, and in Catalonia in particular, suffice to realise that we are far from the threshold of violations that could trigger a remedial secession. Spain has accepted to ratify most of the main international treaties protecting human rights[12] and is subject to the control of the various competent treaty bodies in this field. No State has ever protested against massive human rights violations in Spanish territory. The relevant cases brought before the European Court of

[9] Spain ratified the European Convention on Human Rights on 4 October 1979, allowing inter-State and individual applications.

[10] Spain ratified the 1966 Covenant on Civil and Political Rights on 27 April 1977, which provides for inter-State communications (art. 41), Spain having accepted such a procedure by a declaration dated 11 March 1998. It subsequently acceded to the Optional Protocol on Individual Communications on 25 January 1985.

[11] In this respect, it is important to be aware that the UPR has an essentially diplomatic value. Its purpose is not to sanction the State under review, but to hold it accountable for its human rights record on the basis of a constructive dialogue. The fact that a certain amount of publicity is given to the UPR mechanism – the reports are made public on the Human Rights Council website while the procedure is commented on in the media – tends to encourage the State under review to solidly justify its positions on certain human rights issues.

[12] See the status of ratifications on the website of the Office of the United Nations High Commissioner for Human Rights (https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=163&Lang=EN).

Human Rights (ECtHR) tend to demonstrate the existence of only occasional violations.[13] In addition, even at the peak of the Catalan crisis, Article 7 of the European Union Treaty, allowing for the suspension of certain Member States' rights when there is a clear risk of a serious breach of European Union values (respect for human dignity, freedom, democracy, equality, the rule of law and human rights, as listed in Article 2), was never envisaged with regard to Spain. This seems to explain why the Catalan issue was not central in Spain's last UPR.

II. The European Union law perspective: the lifting of the immunity of the Catalan separatist MEPs in support of the allegation of political persecution?

Under European Union law, could the lifting of the immunity of the Catalan separatist MEPs be interpreted as the result of "political persecution",[14] as denounced by the concerned individuals?

Carles Puigdemont, President of the *Generalitat* of Catalonia at the time of the self-determination referendum on 1 October 2017, left Spain after his dismissal and the decision to put Catalonia under the central government's trusteeship on 27 October 2017. He fled to Belgium while the Spanish justice issued a European arrest warrant against him for rebellion, sedition, embezzlement of public funds and disobedience. In the European elections of May 2019, Carles Puigdemont was elected at the European Parliament along with other Catalan separatist leaders, Clara Ponsatí, Toni Comín, and Oriol Junqueras. The latter, who remained in Spain, was tried and sentenced to 13 years of prison and ineligibility by the Supreme Court on 14 October 2019. On 3 January 2020, the Spanish Central Electoral Commission stripped him of his mandate as a MEP which, on 13 January, led the European Parliament to declare his seat vacant. A few days later, on 16 January, the European Parliament initiated proceedings on the request for the waiver of immunity made by the Spanish judiciary against Carles Puigdemont and Toni Comín.

Parliamentary immunity is not a personal privilege of an MEP. It aims to ensure that the MEP exercises his or her mandate freely and independently by preventing him or her from being detained or prosecuted because of opinions or votes expressed in his or her official. In accordance with Article 9 of Protocol No. 7 on the Privileges and Immunities of the European Union (2012), the immunity enjoyed by MEPs operates at two levels: in his or her own State, the MEP enjoys immunities similar to those accorded to members of his or her national Parliament; in the territory of any other Member State of the European Union, the MEP enjoys exemption from any measure of detention and from legal proceedings.

However, the same article states that immunity may not "prevent the European Parliament from exercising its right to waive the immunity of one of its members". To this end, if a

[13] See the country profile on the Council of Europe website (https://www.echr.coe.int/Documents/CP_Spain_eng.pdf).

[14] See, in particular, "Carles Puigdemont : 'La Catalogne pose la question des droits de l'homme à toute l'Europe'", *France24.com*, 12 February 2021 (https://www.france24.com/fr/%C3%A9missions/ici-l-europe/20210212-carles-puigdemont-la-catalogne-pose-la-question-des-droits-de-l-homme-%C3%A0-toute-l-europe).

competent national authority asks the European Parliament to waive the immunity of a member, it is up to the President of the Parliament to announce the request in a plenary session and defer it to the competent parliamentary committee, the Committee on Legal Affairs, currently chaired by the Spanish MEP Adrián Vázquez (*Ciudadanos* party). The Committee has the possibility to request any information or explanation it deems necessary, while the concerned MEP has the opportunity to be heard and to present any document or evidence he or she considers relevant, including allegations of political persecution.

This examination, which is not subject to any deadline, can take weeks or even months. At its conclusion, the committee then adopts a document *in camera* recommending that the Parliament waive or maintain the immunity of the concerned member. The decision must be taken in plenary by a simple majority. It is communicated without delay by the President of Parliament to the concerned MEP and to the competent authority of the concerned Member State. Although the waiver of immunity enables the national judicial authorities to launch an investigation or legal proceedings, it is not synonymous with conviction. Only if a MEP is found guilty of a criminal offence could the authorities of the Member State decide to withdraw his or her mandate. Such a procedure is not exceptional. The European Parliament regularly receives waiver requests of parliamentary immunities. Although it does not always respond favourably, it accepts them in the vast majority of cases. Therefore, considering the separatists' intransigence in their headlong rush into illegality and disobedience, it would be difficult to interpret the firm attitude of the Spanish Government as a form of political persecution.

In the present case, although the Covid-19 pandemic considerably delayed the procedure, several months after their election, the recommendation to waive the immunity of Carles Puigdemont, Toni Comín and Clara Ponsatí was voted 15 to 8 with 2 abstentions by the Committee on Legal Affairs on 23 February 2021, and will be submitted to the plenary session of the European Parliament in March. In the event of a vote in the European Parliament in favour of the lifting of their immunity, thus allowing extradition proceedings to continue in Belgium, it is also likely that the pro-independence leaders will refer the matter to the Court of Justice of the European Union (CJEU), as Oriol Junqueras has done.

With regard to the latter, it was by an order of 3 March 2020 (case T-24/20 R) that the Vice-President of the General Court rejected the application for suspension of the execution of the decision of the European Parliament of 13 January 2020, by which it found that the seat of Oriol Junqueras was vacant. The General Court distinguished between, on the one hand, the procedure for the lifting of the inviolability, which is the responsibility of the European Parliament, and, on the other hand, the procedure for the revocation of the mandate, which is the exclusive competence of the relevant Member State. Admittedly, the European Parliament does not have the power to control the regularity of the national procedure which led to the decision to disqualify one of its members from holding office. However, the CJEU may do so, either in the context of an action for failure to fulfil obligations, at the request of the Commission or a Member State (Articles 258 to 260 TFEU), or in the context of a reference for a preliminary ruling, a procedure allowing a domestic tribunal to question the CJEU on the interpretation of the Treaties and on the interpretation or validity of acts of secondary legislation, i.e. those taken by the institutions,

bodies, offices or agencies of the Union, in the context of a dispute brought before it (Article 267 TFEU).

It was through this latter path, initiated by the Spanish Supreme Court, that the CJEU declared in its Grand Chamber judgment of 19 December 2019 (case C-502/19) that Oriol Junqueras enjoyed inviolability from the moment the election results were announced, on 13 June 2019. The benefit of that inviolability should have enabled him, while in pre-trial detention, to travel freely to the European Parliament to discharge his duties. Since Oriol Junqueras had not obtained the authorisation to take the oath to respect the Spanish Constitution – an obligation required by national law for elected members of the European Parliament – his seat was declared vacant by the Central Electoral Commission, which meant that he was unable to attend the first session of the newly elected European Parliament, on 2 July 2019. However, in the absence at that time of a request to lift Junqueras' inviolability, the CJEU did not take a position on the effects of his inviolability, either on the refusal to lift the applicant's pre-trial detention to let him travel to the European Parliament in June 2019 or on the execution of his sentence in October 2019.

In October 2020, the Spanish Constitutional Court recognised the admissibility of two applications for *amparo* filed by Oriol Junqueras, who considered that his constitutional rights and freedoms have been violated both by the decisions of the Supreme Court preventing him from taking the oath as a MEP and by the rejection of the *habeas corpus* requested by his family to obtain his freedom.

For the time being, Oriol Junqueras has had his appeals before the European Courts dismissed. By order of 3 March 2020, the Vice-President of the General Court dismissed his application for interim measures on the ground that it had not been shown that the granting of interim measures was *prima facie* justified in fact and in law (*fumus boni juris*).[15] By order of 8 October 2020 (Case C-201/20 P(R)), the Vice-President of the Court of Justice also dismissed his appeal, considering that the European Parliament was right in considering that it did not have jurisdiction to call into question the lawfulness of the

[15] In this order of 3 March 2020 of the Vice-President of the General Court, the position of the Spanish Supreme Court is clearly explained: "*Mediante auto de 9 de enero de 2020, el Tribunal Supremo se pronunció sobre los efectos de la sentencia de 19 de diciembre de 2019, Junqueras Vies (C-502/19, EU:C:2019:1115), en el proceso penal relativo al demandante. Dicho Tribunal estimó en particular que, a raíz de esta sentencia, no procedía formalizar un suplicatorio de suspensión de la inmunidad parlamentaria del demandante ante el Parlamento Europeo, basándose concretamente en que, cuando el demandante había sido proclamado electo, el proceso penal que le afectaba había concluido y se había iniciado el proceso de deliberación. Así, en la medida en que el demandante había obtenido la condición de diputado europeo con el proceso ya en fase de juicio oral, no podía ampararse en la inmunidad para obstaculizar la persecución de su enjuiciamiento. En la parte dispositiva de dicho auto, el Tribunal Supremo consideró, en particular, que no procedía autorizar el desplazamiento del demandante a la sede del Parlamento Europeo, ni acordar su libertad, ni declarar la nulidad de la sentencia de 14 de octubre de 2019, ni tramitar el suplicatorio de suspensión de la inmunidad parlamentaria ante el Parlamento Europeo. El Tribunal Supremo acordó asimismo comunicar el auto a la Junta Electoral Central y al Parlamento Europeo. Ese mismo día, decidió examinar la solicitud de suspensión de la ejecución del acuerdo de la Junta Electoral Central de 3 de enero de 2020 por el procedimiento ordinario y desestimó las solicitudes de medidas cautelarísimas presentadas en este contexto por el demandante*" (Case T-24/20 R, § 16).

vacancy of a seat resulting from the forfeiture of the mandate in accordance with national law.

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Internationally and nationally, it is clear that there are still a number of thorny issues to be resolved before the Catalan crisis can be overcome. Beyond the tensions generated on both sides, the channelling of the aspirations of Catalan nationalist leaders must go through a pacified dialogue[16] with a view to finding a satisfactory balance between Spain's territorial integrity and Catalonia's autonomy. In this respect, as recalled by the ECtHR, "a political party may promote a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles".[17]

[16] Robert Kolb, Tarcisio Gazzini, Catherine Maia, "The question of Catalonia: a window of opportunity to move forward", *Multipol*, 14 July 2020 (http://reseau-multipol.blogspot.com/2020/07/point-de-vue-question-of-catalonia.html).
[17] ECtHR, *Forcadell I Lluis and Others v. Spain*, Application No. 75147/17, 7 May 2019, § 37.