Catalonian
human rights review

Judicial controls in the context of the 1 October referendum

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19 December 2017

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EXECUTIVE SUMMARY

1. In this Opinion we address the legality of the measures surrounding the referendum in Catalonia, in particular, in the period prior to it taking place on 1 October 2017. We consider the human rights implications of controls imposed on the Catalan Parliament and public officials by the Spanish Constitutional Court, as well as the human rights implications of prosecutions of officials in relation to steps taken towards independence. We preface our work with we do not in any way question the authority of the Spanish State to act in response to decisions made by the Catalan institutions. In that regard, we note the importance of compliance with the judgments of the Constitutional Court in ensuring that the Constitution itself is respected.[1] All such measures must however, not only comply with Spanish constitutional law, something we do not analyse in our Opinion, but also with European and International law, including the European Convention on Human Rights. Whilst Chapter 2 of the Spanish Constitution provides for the protection of fundamental rights, we have seen no judicial analysis of whether measures to be taken or that have been taken interfere with individual rights and if so, whether they are in pursuit of a legitimate aim, necessary and proportionate. Our Opinion focuses to a large extent on these questions.

2. We have concentrated on three key issues. **First**, the controls imposed on Parliamentary debate and the adoption of Resolutions; **secondly**, the imposition of criminal sanctions on individuals alleged to have assisted in the holding of the referendum; and, **finally**, legal questions that arise from the power of the Constitutional Court to implement and enforce its own rulings, such as to give it in effect legislative and executive functions.

3. We approach these difficult questions from a position of independence; none of us has any connection with Catalonia or any political position on the issues. We seek to provide a solely legal analysis of the situation, conscious of the highly political nature of the events.

4. This Opinion was commissioned before the crisis that has engulfed Spain following the voting that took place on 1 October 2017. We are conscious therefore that numerous issues remain to be resolved, not least the serious issues surrounding violence that took place at the hands of the Spanish police on 1 October and the likely infringements of Articles 3 and 8 of the ECHR. Nevertheless, our objective in providing this Opinion has been to set out the legal issues in the run up to the referendum on 1 October 2017.

5. As explained below, we consider that numerous issues of serious concern arise as regards Spain's compliance with European and international human rights provisions. In this regard, it should be recalled that respect of fundamental rights is an essential part of the rule of law (*Etat de droit*) in a democratic society.

Relevant legal history and key legal measures

6. Our Opinion sets out the key legal decisions that provide the backdrop and context for our analysis. So far as we know this historical background to the decisions relating to the recent referendum have not previously been recorded in this way. The relevant decisions are:

    a. First, the initial Resolution of 23 January 2013 of the Catalan Parliament (**Resolution 5/X of 2013**), which set in train the process towards a referendum on independence, which was provisionally suspended on 8 May 2013 and declared unlawful under the Constitution by the Constitutional Court decision of 25 March 2014 **STC 42/2014**.

[1] This importance of the authority of the judiciary is echoed and supported by the Venice Commission report of 10-11

b. Secondly, **Law 10/2014** and **decree 129/2014** which provided for a referendum on independence to be held on 9 November 2014, which was automatically suspended on 14 October 2014 and held to be unconstitutional on 25 February 2015: **STC 32/2015**.

c. Thirdly, the '**citizen participation process**', which the Catalan Government decided on 14 October would take place on 9 November 2014 instead of the referendum that had been suspended by the Constitutional Court. The Constitutional Court provisionally suspended this vote on 4 November 2014 and subsequently declared it unconstitutional on 11 June 2015 in its decision **STC 138/2015**.

7. Our legal analysis addresses in particular the following subsequent decisions:

a. The Constitutional Court decision of 2 December 2015 **STC 259/2015**,[2] which declared **Resolution 1/XI** of 9 November 2015 concerning the initiation of a process towards independence: the 'constituent process' unlawful under the Constitution.

b. The Constitutional Court enforcement decision on 19 July 2016: **ATC 141/2016** by which the Constitutional Court held that **Resolution 5/XI** of 20 January 2016 setting up the Constituent Process Committee to examine issues relating to progress towards independence unlawful as in contempt of its earlier Decision STC 259/2015.

c. The Constitutional Court enforcement decision of 6 October 2016: **ATC 170/2016,** by which it held that **Resolution 263/XI** in which the Catalan Parliament ratified the findings of the Constituent Process Committee to be unlawful as in contempt of its earlier Decision STC 259/2015.

d. The Constitutional Court enforcement decision of 14 February 2017: **ATC 24/2017**, by which it held **Resolution 306/XI** of 6 October 2016 in which the Catalan Parliament voted to hold a binding referendum on independence to be unlawful and in contempt of its earlier Decisions STC 259/15 and ATC 141/2016.

e. The decision of the Constitutional Court of 19 September 2017 holding that the decision of the Parliamentary Board to allow the Catalan Parliament to vote on the proposals for **Law 19/17** providing for a referendum on 1 October 2017 constituted disobedience in respect of its earlier Decision STC 259/2015, and imposing fines of €12,000 per day on members of the Electoral Commission.

f. The decision of the Constitutional Court of 5 October: **ATC 4856/2017, holding that** the proposed sitting of the Catalan Parliament on 4 October to assess the results of the referendum would constitute disobedience to its earlier Decision STC 259/2015.

Legal analysis

(i) The control of Parliamentary debate and the adoption of Resolutions

8. On repeated occasions, the Constitutional Court has held that the Catalan Parliament is prohibited from debating the question of Catalan independence, from voting on any motion or resolution relating to independence and from appointing a body or group of individuals to consider and advise in relation to independence (the Constituent Commission). The Constitutional Court has concluded that such actions contravened its previous judgments and

[2] https://www.tribunalconstitucional.es/ResolucionesTraducidas/STC%20259%20-%202015%20%209N%20(English).pdf

has imposed its orders as 'enforcement' measures in relation to its earlier judgments. Accordingly, the Constitutional Court has quashed non-binding resolutions by the Catalan Parliament, issued warnings backed by criminal sanctions and imposed criminal sanctions, including financial penalties, in relation to the activities of office-holders; namely members of the Electoral Commission, as well as referring matters to the criminal courts. Members of the Government and civil servants have been arrested and detained.

9. Such restrictions raise serious issues regarding Spain's compliance with the fundamental rights to freedom of speech and freedom of association guaranteed by Articles 10 and 11 of the European Convention on Human Rights (ECHR) and Articles 19 and 21 of the International Covenant on Civil and Political Rights (ICCPR) respectively. We note in that regard, that the Constitutional Court does not appear to have addressed the question of the applicability of, or compatibility with, these fundamental guarantees, despite the fact that these rights are enshrined in the Spanish Constitution. Such consideration is critical to the legality of the Constitutional Court's decisions, not only as a matter of national, but also of international law, with which this Opinion is concerned. Spain, having ratified both the ECHR and the ICCPR, is obliged to comply with these international instruments. That includes decisions by its Constitutional Court.

10. In our view, there can be little doubt that a restriction on what Parliamentarians may debate and resolutions they may adopt in Parliament give rise to an interference in the fundamental rights to freedom of expression and assembly. Further, these rights must be seen in the light of the right of the people to have their will freely expressed in the legislature, as guaranteed by Article 3 of Protocol No. 1 to the ECHR and Article 25 of the ICCPR. In that regard, our view is that a restriction of the content of debate and the issues on which resolutions may be adopted within the Catalan Parliament could also amount to a restriction on the substantive content of the right to assembly, which necessarily entails the exercise of free expression rights.

11. As regards the legality of the decisions of the Constitutional Court to quash resolutions adopted by the Catalan Parliament and in particular, the quashing of such resolutions by way of its enforcement powers, that is, on the basis that relevant resolutions constituted acts of disobedience in respect of its earlier judgments (rather than breaches of any other free-standing legal provision), we consider that this approach raises serious questions. First, measures that interfere with fundamental rights must be prescribed by law, which means not only that they must have a legal basis but also that that legal basis is accessible and foreseeable. This normally requires clear legislative measures, albeit that in some circumstances case law may provide a sufficient basis. In the context of something as serious as restrictions on the content of discussions and the adoption of resolutions by a Parliament, we consider that if permissible at all, such measures would most certainly have to be prescribed by way of legislation, in order better to secure legal certainty. The scope of such measures necessarily requires democratic debate by a legislature to determine whether and if so what restrictions are necessary and proportionate to any legitimate aim. That is not an assessment that can be made by the judiciary.

12. Secondly, and relatedly, we are concerned that here the Constitutional Court appears to have exercised quasi-legislative powers by interpreting one of its judgments as providing a legal basis for a general prohibition on any discussion or resolution in Parliament touching on or related to Catalan independence, including the setting up of a study group and the adoption of that group's findings (the Constituent Process Committee). We consider that there are strong rule of law reasons why such a prohibition should have to be adopted by the legislature, which would need to consider the terms, necessity and proportionality of such a restriction, as already stated.

13. Accordingly, in our view serious questions arise as to the role of the Constitutional Court and in particular, whether its rulings go beyond the judicial, straying into the legislative sphere, so

undermining the general principle that underpins the rule of law; the separation of powers and in particular, the separation of the legislature and the judiciary.

14. In terms of assessing whether the interferences with freedom of expression and assembly were necessary and proportionate (even assuming they were prescribed by law), we consider that significant weight must be given to the fundamental importance of freedom of speech in a democracy, particularly within the context of debate within a Parliament. From the decisions of the Constitutional Court referred to above, it is clear (albeit not explicit since these fundamental rights were not examined by the Constitutional Court) that the only potential legitimate aim under Articles 10(2) and 11(2) of the ECHR is "maintaining the authority and impartiality of the judiciary." Nothing in the decisions of the Constitutional Court suggests that the Court had in its mind any other legitimate aim.

15. We express real doubts that this being so, the decisions of the Constitutional Court to suppress and sanction Parliamentary debate could be necessary and proportionate to such a legitimate aim. Moreover, we note the wide scope of the warnings given by the Constitutional Court to Parliamentarians and others and the threat of criminal liability. We further note that the Court's approach could also infringe the immunity of Parliamentarians provided for in Article 57.1 of the Statute of Autonomy.

16. Accordingly, in our view, the Constitutional Court's approach to the permissible limits of discussion and action within the Catalan Parliament does not seem in conformity with the requirements of Articles 10 and 11 of the ECHR and Articles 19 and 21 of the ICCPR.

17. As to the legality of the criminal charges against Ms Carme Forcadell, the Parliamentary Board (which pursuant to Article 37.1(a) of the Rules, is made up of the President, two vice presidents and four secretaries) and others, it seems that for charges to be laid against the background of the decisions referred to above, and having regard to the crucial role of free speech of politicians, particularly within Parliament, and assembly rights, a very strong justification indeed would be needed, even assuming that the charges could be said to be 'prescribed by law'.

18. Finally, concerning the arrest and detention of Ministers and fining of members of the Electoral Board, we note the serious nature of these actions. Real questions arise as to whether the detentions were lawful under Article 5 of the ECHR. Further, as regards the fining decisions, the question arises as to the right to a fair trial under Article 6 of the ECHR.

(ii) The criminal sanctions imposed in relation to assisting in voluntary consultations/referenda

19. The second issue we have been asked to consider is the criminal sanctions that were imposed in relation to the holding a 'citizen participation process' on 9 November 2014, that is, a voluntary consultative process whereby the views of the public were tested.

20. The crime of holding an illegal referendum was introduced in the Criminal Code by the Organic Law 20/2003 of 23 December 2003 (art 506bis.2 of the Criminal Code). This provision was however removed from the Statute book in 2005. Accordingly, at the relevant time of the 'offences' set out above, the legislature had decided that it should not be a crime to hold a referendum. We understand that that remains the position today: there is no criminal offence of holding a referendum. This explains why the defendants were not prosecuted for that offence. Rather, they were charged and found guilty of the offence of disobeying an order of the Constitutional Court, as provided in Article 410 of the Criminal Code.

21. We are not in the position to be able to analyse whether Article 6 of the ECHR was complied with in relation to these proceedings and make no judgment on that question. However, we consider that serious issues do arise not only under Articles 10 and 11 but also Article 7 (no

punishment without law) of the ECHR and Article 15 of the ICCPR. As regards whether the criminal charges complied with the requirement that they be prescribed by law, as stated above, we have already noted that it is not criminal in Spanish Law to organise a referendum or public consultation. In circumstances where such a criminal offence did exist and was then removed from the Code, real questions arise as to the legality of the Constitutional Court creating such an offence through the offence of 'disobedience' or 'contempt of court'. In our view, such a wide reading of the offence of 'disobedience' or 'contempt of court' amounts to the Constitutional Court legislating to make acts criminal, which the legislature has decided should not be criminal.

(iii) The Organic Law of 2015 amending Organic Law of Constitutional Court 2/79 ("LOTC")

22. The third issue we consider is the Organic Law 15/2015, which amended the Organic Law 2/79 of the Constitutional Court ("LOTC"), and the additional powers that it has afforded to the Constitutional Court to take action of its own motion to execute and enforce its own judgments. The new amendments were challenged by the Basque and Catalan governments but the Constitutional Court rejected those challenges, albeit not unanimously; there were dissenting opinions of significant weight.

23. Articles 87 and 92 of the LOTC provide the Constitutional Court with a vast potential power, enabling it to take steps to ensure the effective implementation of its judgments, which may be wide ranging in scope and potential impact. It is clear from the actions of the Constitutional Court in relation to resolutions of the Catalan Parliament (including its imposition of sanctions on members of the Government and other individuals) that the Constitutional Court has now exercised powers that extend beyond the normal role of a Constitutional Court; namely the assessment of the legality or constitutionality of particular measures. It is unclear whether the exercise of such powers derives from the amendments in *Ley Orgánica del Tribunal Constitucional* 15/2015 ("LOTC"), or is simply the use or creation of a power that could equally have been derived from the LOTC prior to its 2015 amendments.

24. What matters however, and is clear from its decisions, is that the Spanish Constitutional Court now considers its function to be much wider than assessing the legality or constitutionality of particular measures. It now interprets its powers in such a way as to encompass an obligation to enforce its own judgments on the constitutionality of issues relating to independence in such a way to "maintain the Spanish State". As such, its rulings have taken on a political and legislative function, to which it has given effect through its executive enforcement powers. As noted above, we are concerned that this potentially involves judicial overreach that threatens the core pillars of a democracy: the separation of the legislature, the executive and the judiciary.

* * *

A. INTRODUCTION

25. In this Opinion we address the legality of the measures surrounding the referendum in Catalonia, in particular, since 2015 and in the period prior to it taking place on 1 October. Our focus is on respect for fundamental rights as an essential part of the rule of law (*Etat de droit*). In that regard, we consider the controls imposed on the Catalan Parliament and public officials, including the human rights implications of prosecutions of officials and politicians in relation to steps taken towards independence.

26. In light of urgency of the matters to which this Opinion is addressed, we have not been able to cover the numerous individual incidents and issues that arise. Nor do we address the very recent decision by the Spanish Government to invoke Article 155 of the Constitution and apply direct rule. Rather we have concentrated on three key issues. **First**, controls imposed on Parliamentary debate, including by way of criminal sanctions. **Secondly**, the imposition of criminal sanctions on individuals alleged to have assisted in the holding of the referendum or citizen consultation and **finally**, legal questions that arise out of the Constitutional Court having power to implement and enforce its own rulings, such as to give it in effect legislative and executive functions.

27. Accordingly, whilst we are aware of numerous other issues that have arisen, such as the threatened prosecution of mayors, offences relating to the independence flag, controls on meeting and assembly in relation to Catalan independence not only in Barcelona but also in Madrid, we have not sought to address these. These are all matters that self-evidently warrant further investigation and analysis over the coming months. For the avoidance of doubt, we do not express any opinion on the issue of self-determination itself.

28. We have been commissioned to carry out this work by Esquerra Republicana. The team is composed of the former president of the European Court of Human Rights, Jean-Paul Costa from France, Françoise Tulkens, former judge and vice-president of the European Court of Human Rights from Belgium, Jessica Simor QC, lawyer from the United Kingdom and Wolfgang Kaleck, lawyer from Berlin.

29. We make it clear that we approach these difficult questions from a position of independence; none of us has any connection with Catalonia or any political position on the issues. We seek to provide a solely legal analysis of the situation, conscious of the highly political nature of the context.

30. Finally, since starting our work in August this year the referendum has taken place. Through the media, we witnessed numerous incidents of police violence, which in our view prima facie raise serious concerns regarding violations of individual rights under Article 3 of the European Convention on Human Rights ("the ECHR"). What happened on that day will no doubt now be the subject of detailed national and international investigations. The UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, called for this on 2 October 2017 urging "*the Spanish authorities to ensure thorough independent and impartial investigations into all acts of violence*". He called on "*the Government of Spain to accept without delay requests by relevant UN human rights experts to visit.*" As he noted "*police responses must at all times be proportionate and necessary.*" Whilst we are not in a position to address the specific details of what happened, it is questionable whether any physical force at all could be necessary to prevent individuals from assembling, and indeed from placing ballots in a ballot box. In that regard, we note the very strict requirements of Articles 2 and 3 of the ECHR, which prohibit the State from using force unless strictly necessary. This does not mean strictly necessary to achieve any objective chosen by the State, it means strictly necessary to prevent risk to life or harm to others (ECtHR, *Izci v. Turkey* judgment of 23 July 2013, §

55). Accordingly, we do not accept that it can be strictly necessary to use physical force to break up peaceful demonstrations or prevent the peaceful placing of voting cards in a ballot box in any circumstances. The lawfulness and legitimacy of a vote may be disputed. That however, does not provide a legal justification for the use of physical force to prevent people assembling and voting. *Prima facie* therefore, the use of violence on 1 October 2017 raises serious issues under Article 3 of the ECHR, potentially also, under Article 2 (ECtHR (GC), *Makaratzis v. Greece* judgment of 20 December 2004, §§ 49-55) and possibly Article 11 (ECtHR (GC), *Kudrevicius and Others v. Lithuania* judgment of 15 October 2015).

B. RECENT HISTORICAL BACKGROUND

31. Catalonia is an autonomous or 'self-governing' community within the Kingdom of Spain as provided for in Articles 137 and 143 of the Spanish Constitution of 1978. Section 2 of the Spanish Constitution provides that the Spanish Nation is "*indissoluble*" and "*national sovereignty belongs to the Spanish people*", whilst at the same time 'recognising and guaranteeing', the "*right to self-government of the nationalities*".

32. The Generalitat de Catalunya is the institution in which the self-government of Catalonia is politically organised. It consists of the Parliament, the President of the Generalitat and the Executive Council or Government of Catalonia.

33. On 30 September 2005, the Parliament of Catalonia approved the new Statute of Autonomy (Estatut d'Autonomia de Catalunya) ("the Statute of Autonomy"_, which contained within its preamble a definition of Catalonia as a 'nation'. The Spanish Congress approved the new Statute in March 2006 and was approved by referendum on 18 June 2006. The Statute supplanted the Statute of Sau, which dated from 1979.

34. Four years later, on June 28 of 2010, pursuant to a constitutional appeal against the Statute filed by PP (Partido Popular, the conservative Spanish party, at that time led by Mariano Rajoy, Spain's current Prime Minister), the Constitutional Court of Spain assessed the constitutionality of articles of the Statute, holding fourteen to be unconstitutional and providing for a constitutional interpretation of 27 others: STC 31/2010.[3] In addition, the Court held that: "*1. The interpretation of the references to "Catalonia as a nation" and to "the national reality of Catalonia" in the preamble of the Statute of Autonomy of Catalonia have no legal effect*."

35. Its decision precipitated demonstrations in Barcelona on 10 July 2010 under the slogan in Catalan "Som una nació. Nosaltres decidim" ("We are a nation. We decide").

36. The Statute of Autonomy of Catalonia provides Catalonia's basic institutional regulations under the Spanish Constitution of 1978 ("the Constitution"). It defines the rights and obligations of the citizens of Catalonia, the political institutions of Catalonia as a self-governing community, their competences and relations with the rest of Spain, and the financing of the Government of Catalonia.

[3] https://www.tribunalconstitucional.es/ResolucionesTraducidas/31-2010,%20of%20June%2028.pdf A summarised version of the decision in English is available at https://boe.es/boe/dias/2010/07/16/pdfs/BOE -A-2010-11409.pdf.

Resolution 5/X and Constitutional Court decision STC 42/2014 – the first referendum or public consultation.

37. On 27 September 2012 the Parliament of Catalonia adopted Resolution 742/IX, which noted the need for the people of Catalonia to be consulted in order to freely and democratically determine their collective future. On 25 November 2012 elections were held, the result of which was taken to confirm the willingness of the people to such an approach. Accordingly, on 23 January 2013 the Catalan Parliament passed **Resolution 5/X**: 'The Declaration on the Sovereignty and Right to Decide of the People of Catalonia' (*Catalan:* Declaració de sobirania i el dret a decidir del poble de Catalunya). The declaration asserted that Catalonia is a sovereign entity and agreed:

> "to initiate the process to exercise the right to decide so that the citizens of Catalonia may decide their collective political future in accordance with the following principles: sovereignty,… democratic legitimacy,… transparency,… dialogue,…social cohesion,… Europeanism,… legality,… role of the Catalan Parliament [and]… participation".

38. On 8 May 2013 that resolution was automatically suspended by the Constitutional Court of Spain under Article 161.2 of the Constitution and Article 77.2 LOTC pursuant to the request of the Spanish government. On 25 March 2014, in its decision **STC 42/2014**, the Court declared the resolution to be 'unconstitutional'. Importantly, despite the resolution having no direct legal effect (it being nothing more than a statement by the Parliament), the Court decided that because it "declare[d] the sovereignty of the people of Catalonia" it *could* have legal effects and for that reason must be understood as *having* such legal effects:

> "given that…it could be interpreted as a recognition in favour of those who are invited to carry out a process in relation to the people of Catalonia of attributions inherent to sovereignty that exceed those arising from the authority recognized by the Constitution in favour of the nationalities covered by the Spanish State. Secondly, the assertive nature of the challenged Resolution…does not suggest that its effects in parliamentary matters will be strictly limited to politics given that it demands the execution of specific actions…
>
> In short, the Court considers that, without prejudice to its marked political nature, Resolution 5/X is legal, and furthermore, has legal effect."

39. On 27 September 2014 the Catalan Parliament adopted Law 10/2014 and decree 129/2014, which provided for a popular consultation on the future of Catalonia to be held on 9 November 2014. On 29 September the Government of Spain filed a motion before the Constitutional Court leading to the immediate suspension of the measures in accordance with section 161(2) of the Constitution.[4]5 As result the plan to hold a referendum was abandoned and on 14 October, the Catalan Government proposed instead a "process of citizen participation". This 'citizen participation process' was announced by Mr. Artur Mas I Gavarró, in his capacity as the President of the Generalitat of Catalonia. At the same time, the web-page created by the Department of Governance and Institutional Relations of the Generalitat of Catalonia reflected that announcement,

[4] http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf
[5] "(2) The Government may appeal to the Constitutional Court against provisions and resolutions adopted by the bodies of the Self-governing Communities, which shall bring about the suspension of the contested provisions or resolutions, but the Court must either ratify or lift the suspension, as the case may be, within a period of not more than five months". Spanish Constitution: https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf

stating: “9n/2014. You Participate. You decide. On November 9 2014 the Government of the Generalitat of Catalonia opens a citizen participation process in which the Catalans and person residing in Catalonia may state their opinion on the political future of Catalonia.”

40. On 31 October 2014 the Government of Spain challenged the actions of the Generalitat of Catalonia relating to the call to Catalans and person to state their opinions by way of a “citizen participation process”. On 4 November 2014 the Constitutional Court ordered the suspension of “the actions of the Generalitat of Catalonia related to the call to Catalans and persons residing in Catalonia to state their opinion on the political future of Catalonia on November 9 … through a “citizen participation process” contained in the web-page participa2014.cat/es/inex.html and the other preparatory acts and actions, performed or underway, for the holding of such a participation process, as well as any other action not yet legally formalised, related to such a participation process.”

41. On being informed of the above-mentioned order, on the afternoon of the same day, 4 November 2014, the Government Council met and decided to seek its quashing, on the basis that the proposed citizen participation process was not unlawful, which decision was assumed by Mr. Mas and Mrs. Ortega and Rigau. The Government Council also decided to maintain the call of October 14 for the vote on 9 November 2014.

42. Accordingly, it proceeded with the "citizen participation" (known as the 9N Consulta). Two questions were put to vote: ‘Do you want Catalonia to become a State?’ and ‘Do you want this State to be independent?’ The vote took place on 9 November at a total of 6,698 polling sites distributed among 1,317 voting centres mostly at institutions under the control of the Department of Education but also at different public and private establishments. Between 10 and 25 November voting remained possible at the Territorial Delegations of the Government of the Generalitat in the territory of Catalonia. More than 2.4 million people voted representing 33% of the electorate. Of those who voted 80.91% (or 1,897,274) voted in favour of independence.[6]

43. By its decision **STC 32/2015** of 25 February 2015, the Court declared Law 10/2014 and decree 129/2014 that called for a referendum, unconstitutional. On 11 June 2015 in its decision **STC 138/2015**, it held that the non-formal call for a public participation process (the 9N *Consulta*) and all the acts relating to that vote were also unconstitutional.

44. Criminal proceedings were brought against **Mr. Francesc Homs I Molist**, (Minister for the Presidency of the Generalitat 27 December 2012 (relinquishing the post on 16 November 2015)) for the offence of disobedience under Article 410.1 of the Criminal Code and administrative malfeasance (prevaricación), in respect of his role in the citizen participation process of 9 November 2014. He was convicted of disobedience in the Spanish Supreme Court on 22 March 2017. This conviction is subject to an appeal before the Constitutional Court (a *recurso de amparo*).

45. Criminal proceedings were also brought against the former President of Catalonia, **Mr. Artur Mas i Gabarró** (former President of Catalonia); **Mrs. Joana Ortega** (former Head of the Department of Governance and Institutional Relations of the Generalitat), and **Mrs. Irene Rigau i Oliver** (former Minister for Education). These proceedings were brought the High Court in Catalonia and resulted in all three being convicted on 13 March 2017 for disobedience in relation to the role that they played in the citizen participation process of 9

[6] Generalitat of Catalonia, *Definitive results of 9 October 2014 participation process*, available at http://web.gencat.cat/ca/actualitat/detall/Resultats-definitius-del-proces-de-participacio-del9N- 00001.

November 2014. Appeals are pending before the Supreme Court of Catalonia in these cases.

46. In all four cases, the Defendants were disqualified from exercising the functions of public officers for periods ranging from thirteen months to two years and were fined as follows: Mr. Homs and Mrs. Ortega €30.000e, Mr. Mas €36000 and Mrs. Rigau €24000.

Resolution 1/XI, the 'constituent process' and Constitutional Court decision STC 259/2015

47. On 27 September 2015 elections were held in Catalonia, in which parties formed groupings for and against independence, albeit that one group, Catalunya Sí que es pot, refused to define themselves for or against independence and went on to obtain 11 seats and 9% of the vote. The election was announced as being a plebiscite on independence. A majority of the seats in the Catalan Parliament were won by pro-independence parties, albeit they did not obtain a majority of the votes cast.

48. Consequently, pursuant to Article 165 of its Rules of Procedure, on 9 November 2015 the Parliament sitting in plenary, approved **Resolution 1/XI**, which provided for the initiation of steps towards the creation of an independent State in the form of a republic.[7] That Resolution provided as follows:

> 1. The Parliament of Catalonia notes that the democratic mandate obtained at the recent elections on 27 September 2015 is based on a majority of seats occupied by parliamentary forces whose object is that Catalonia should become an independent state, and on an ample sovereigntist majority of votes and seats in favour of beginning a non-subordinate constituent process.
>
> 2. The Parliament of Catalonia solemnly declares the start of the process to create an independent Catalan state in the form of a republic.
>
> 3. The Parliament of Catalonia proclaims the start of a participative, open, integrating and active citizen's **constituent process** to lay the foundation for the future Catalan Constitution.
>
> 4. The Parliament of Catalonia urges the future Catalan government to adopt the necessary measures to give effect to these declarations.
>
> 5. The Parliament of Catalonia considers it appropriate to begin within thirty days the passing of legislation on the constituent process, the Catalan social security system and the Catalan Tax Agency.
>
> 6.The Parliament of Catalonia, as the repository of sovereignty and the expression of the constituent power, reiterates that this House and the process of democratic disconnection from the Spanish State shall not be subject to the decisions of the institutions of the Spanish State, in particular the Constitutional Court, which it considers devoid of legitimacy and jurisdiction following its ruling of June 2010 on the Statute of Autonomy of Catalonia previously voted on by the people in a referendum, among other rulings.
>
> 7. The Parliament of Catalonia shall adopt the necessary measures to begin this process of disconnection from the Spanish state in a democratic, massive, sustained

[7] It was adopted by 72 votes in favour and 63 votes against.

and peaceful way, in order to empower citizens at every level, and on the basis of open, active and integrating participation.

8. The Parliament of Catalonia urges the future Catalan government to comply exclusively with those rules and mandates emanating from this legitimate and democratic House in order to safeguard fundamental rights which may be affected by decisions of the institutions of the Spanish state, such as those specified in the annex to this resolution.

9. The Parliament of Catalonia declares its will to begin negotiations with a view to giving effect to the democratic mandate to create an independent Catalan state in the form of a republic, and it agrees to make this known to the Spanish State, the European Union and the international community as a whole.

49. The Annex included measures relating to energy poverty, housing, health, education, public freedoms, local government, refugees, the right to abortion, financing of a social emergency plan and debt management.

50. On 11 November 2015 the Spanish Government challenged the Resolution before the Constitutional Court pursuant to Article 161.2 of the Constitution and Articles 76 and 77 of the LOTC under **case no. 6330-2015**, resulting in its immediate suspension.[8]

51. The Speaker of the Parliament lodged pleadings in representation and defence of Parliament, arguing that the doctrine established in **STC 42/2014**, namely that resolutions and declarations of the Parliament could be suspended as unlawful, did not accord with the system of responsibility and control provided in Parliamentary rules. The Parliament argued that:

> "[r]econsidering the doctrine established in STC 42/2014 is…essential to preserve the balance between institutions, so that the Parliament is guaranteed the exercise of the functions attributed to it in the framework of the Constitution and the Statute of Autonomy, without the Constitutional Court being able to interfere therein when such exercise lacks the legal nature necessary to legitimise it.
>
> Thus, the Parliament asks the Constitutional Court to exercise the necessary self-restraint to ensure that it does not overstep its bounds and invade the Parliament's own sphere of action. What is at stake here, in its opinion is one of the capital issues posed in contemporary constitutional states, namely the relation between the constitutional justice and popular representation."

52. Accordingly, the Catalan Parliament argued that the challenge should not be admitted by the Court because there was no subject matter that was appropriate for a declaration of unconstitutionality.

53. The Spanish Government argued that Resolution 1/X was in breach of Articles 1, 2, 9.1, 23, 164 and 168 of the Constitution; the principle of Constitutional loyalty and the duty of fidelity to the Constitution; and Articles 1, 2.4 and 4.1 of the Statute of Autonomy. Essentially, the argument was that the Resolution as a whole represented a "clear and unilateral breach of the Constitutional order". The judgment summarises the argument made by the Spanish Government in the following terms:

[8] See footnote 4 above

> "The statements made in the Resolution do not express political aspirations that could be redirected into democratic or constitutional channels. The attribution of constituent power to the Parliament of Catalonia is linked to a unilateral imposition which entirely disregards all constitutional and democratic channels. Moreover, the mentions of a "citizen-led, participative, open, inclusive, and active constituent process to lay the foundations for the future Catalan constitution" reflect plebiscitary dynamics that go beyond the scope of the Constitution and the law."

54. Parliament, represented by the Speaker, argued that it had adopted Resolution 1/XI in the discharge of its duty to further political and governmental activity (Article 55.2 Statute of Autonomy and Article 164 of the *Reglamento del Parlamento de Cataluñ̃a* (Parliament Regulations)), the Resolution expressing the political mandate provided by the electorate, who had voted in favour of groups whose manifestos promoted the adoption of such a resolution. Thus, it was argued that the Resolution had "*no other scope than to express a determination, aspiration or desire of the Parliament*" and was wholly political, providing no binding authority. In that regard, it was argued that the Constitutional and statutory framework does not and cannot prohibit the expression and defence of political projects.

55. On 2 December 2015 the Constitutional Court adopted **Decision STC 259/2015**[9] under **case no. 6330-2015**, by which it declared Resolution 1/XI to be unlawful under the Constitution. In so doing, it upheld its earlier ruling of 25 March 2014 in STC 42/2014 in respect of Resolution 5/X of 23 January 2014, in which the Constitutional Court held that a non-binding declaration or resolution, could nevertheless produce legal effects, albeit non-binding legal effects (see § 37 above).

56. The Court held that the Resolution, having been adopted by the Parliament pursuant to its statutory duty to control and further political and governmental action (Article 55.2 Statute of Autonomy, through the parliamentary process established in the corresponding regulations, Articles 164 and 165 Parliament Regulations), constituted an act performed by the Parliament:

> "that, whilst clothed as a political act, also has an undeniable legal nature. Moreover, the Resolution represents the conclusion of a Parliamentary process, as it constitutes a completed expression of the Parliament's determination to commence or open a specific political process, regardless of subsequent parliamentary control and any results of such control. It has moreover been issued by a body with the capacity to express the Autonomous Community's institutional intent".

57. Further, the Court held that despite having no legally binding consequences and despite its "markedly political nature", the Resolution could still be considered to be a measure with 'legal effects'. This, it said, was because its expressed intention (to begin the process of "uncoupling" from the Spanish State) which:

> "could be understood as the acknowledgment that the bodies and entities which the Resolution entrusts with carrying out these processes – the Parliament and the Government of the Autonomous Community – have "powers inherent to sovereignty that go above and beyond the powers derived from the autonomy afforded by the Constitution".

[9] https://www.tribunalconstitucional.es/ResolucionesTraducidas/STC%20259%20-%202015%20%209N%20(English).pdf

58. Finally, the Court considered that because the Resolution provided for certain actions to be taken, albeit that it did so on a purely declaratory basis, it had "the capacity to produce legal effects."

59. The Court held that the Resolution violated Articles 1.1, 1.2, 2, 9.1 and 168 of the Constitution. In summary, its position was that "*the unconditional supremacy of the Constitution*" was the safeguard of democracy, being a source of legitimacy, as a result both of its content and because it contained procedures for reform, namely those provided in Articles 167 and 168. Accordingly, the Court considered that its role was "*to safeguard the Constitution's unconditional supremacy*", which it considered to be "*nothing more than another way of acquiescing to the will of the people expressed as a constituent power*." In this regard, the Court emphasised that "*the people of Catalonia do not constitute a 'legal entity entitled to compete with the holder of the national sovereignty which was exercised to establish the Constitution*,"…in other words, "*the citizens of Catalonia cannot be confused with the sovereign people*." The Court noted that "*[t]he sovereignty of the nation, vested in the Spanish people, necessarily entails the unity of the nation*." The Court further stated:

> "The indissoluble unity of the Spanish nation proclaimed by Article 2 of the Constitution is coupled with the recognition of nationalities' and regions' right to autonomy. The right to autonomy is similarly proclaimed as part of the very core of the Constitution, together with the principle of unity. Through the exercising of that right, the Constitution guarantees the Autonomous Communities' capacity to adopt their own policies within the constitutional and statutory framework. It is the Constitution itself that obliges us to reconcile the principles of unity and of autonomy of the nationalities and regions —principles which, naturally, are also duly set forth in the Statute of Autonomy of Catalonia: "Catalonia, being a nationality, exercises self-government as an Autonomous Community in accordance with the Constitution and the present Statute, which is its basic institutional legislation" (Article 1 EAC).

Resolution 5/XI and Constitutional Court ATC 141/2016 – the Constituent Process Study Committee

60. On 20 January 2016 the Catalan Parliament adopted **Resolution 5/XI**, pursuant to which it set up a Commission to study the constituent process (Constituent Process Study Committee),[10] as envisaged by Resolution 1/XI, which had been declared unlawful on 2 December 2015 by the Constitutional Court: STC 259/15: §§55-59 above.

61. On 1 February 2016 the Prime Minister of Spain brought an interlocutory application pursuant to the LOTC (Articles 87, 92.1, 3 and 4) under **case no. 6330-2015** for the enforcement of STC 259/2015 in respect of the Constituent Process Study Committee. That application for enforcement (incident of implementation) was accepted on 19 July 2016 by way of Auto del Tribunal Constitutional[11] **ATC 141/2016**.[12]

62. The Constitutional Court noted that the LOTC provided it with powers "*to resolve incidences of implementation*" (Article 92.1) and, in general, to adopt "*the measures of*

[10] Set up on 28 January 2016, as confirmed in the Official Gazette of the Parliament of Catalonia, number 48, 3 February 2016.
[11] Such a decision involves the analysis of an act (in this case the constitutionality of Resolution 5/IX) by reference to a previous decision, in this case that Resolution 1/XI declared unconstitutional in Decision 259/2015. It also allows the Court to find that the public officials are in breach of its previous decision authorising it to invoke the special powers granted to it under Article 92.4 of LOTC.
[12] Published in Official State Gazette No. 196 on 15 August 2016.

implementation necessary to guarantee effective compliance with its resolutions" (Article 92.3). Accordingly, it considered that it had to deal with the request for enforcement made pursuant to Article 92.3 and weigh up the "*various constitutional values at stake*" in order to decide whether to apply enforcement measures. It noted that whilst it would have been permissible for a Constituent Process to be set up that had as an aim, the various possible alternatives available to the Parliament under the Constitution to achieve its political aims:

> "[w]hat is not constitutionally admissible is that the parliamentary activity of "analysis" or "study" be geared towards giving continuity and support to the aim proclaimed in Resolution 1/XI – the opening of a constituent process in Catalonia directed at the creation of the future Catalan constitution and of an independent Catalan state in the form of a republic, which was declared unconstitutional by STC 259/2015."

63. The Court reiterated that the democratic legitimacy of the Parliament of Catalonia:

> "cannot be opposed to the unconditional primacy of the Constitution. The constitutional text reflects the notable demonstrations of the democratic principle, the exercise of which, therefore, does not fit outside it [STC 42/2014]. Thus the legal framework, with the Constitution at its apex, can in no case be considered as a limit of democracy, but as its very guarantee" [STC 259/2015]

64. Accordingly, it held that the Constituent Committee could not stand unless it was understood as being conditional on the fulfilment of the requirements of the Constitution and "*the procedures for its reform and, in general the framework that applies to political activity, as defined by the Court*."

65. On that basis, the Court warned "*the powers involved and the officials under their responsibility, of their duty to prevent or paralyse any initiative aimed at evading these mandates*".

66. In that regard, it held that the creation of the Constituent Process Committee was an attempt to bypass or evade the duty of all public powers to fulfil the resolutions of the Constitutional Court, as provided in Article 87.1 LOTC.

Resolution 263/XI and Constitutional Court decision ATC 170/2016

67. During the session of Parliament of 27 July 2016 and in accordance with relevant rules of the Catalan Parliament, the Groups Junts pel Sí and CUP though their representatives Mr Jordi Turull i Negre and Ms Anna Gabriel i Sabaté proposed to the Parliament Board that the conclusions of the Constituent Process Study Committee be put to a vote before the Plenary. The Speaker of the Parliament warned the groups of the decision of the Constitutional Court of 19 July 2016 and asked them whether, despite that decision, they maintained the proposal. They confirmed they wanted to do so.

68. On the same day Parliament ratified the report and conclusions of the Constituent Process Study Committee by way of **Resolution 263/XI**. The conclusions of the Constituent Process Study Committee are set out in the Constitutional Court ruling of 6 October 2016, decision **ATC 170/2016**[13] (see §76 below). In summary, the Committee set out a series of phases aimed towards the separation of Catalonia from Spain.

[13] Published in the Official State Gazette No. 276 on 15 November 2016.

69. On 1 August 2016, a further interlocutory application was introduced by the Prime Minister of Spain in respect of Resolution 263/XI, again as an application to enforce STC 259/2015 and ATC 141/2016 and accordingly within the same case number: no. 6330/2015. The same day the Court suspended Resolution 263/XI in accordance with 161.2 Spanish Constitution and cautioned the officers involved "especially the Parliamentary Board, of their responsibility to "prevent and paralyze any initiative that implies ignoring or evading the mandates set forth."

70. The Prime Minister, through the State Attorney General not only requested that Resolution 263/XI be declared null and void but also that the Constitutional Court by order, impose on the President of the Parliament the obligation to abstain from carrying out any actions aimed at complying with the said resolution, as well as preventing or putting a stop to any initiative that involves ignoring or evading STC 259/15 and ATC 141/2016, warning of potential criminal liability. Further, he requested that a prohibition be imposed on the authorities from calling together the bodies of the Parliament of Catalonia to discuss and vote on any initiative that directly or indirectly sought to achieve the aims of Resolution 263/XI. The Prime Minister asked that in relation to all these warnings, the recipients should be told that measures under Article 92.4 of the LOTC would apply. This new provision, introduced by Organic Law 15/2015 provides that:

    "4. In the event it is noticed that a decision pronounced in the exercise of its jurisdiction may not be being complied with, the Court, of its own motion or at the request of the parties to the suit in question, shall require the institutions, authorities, public employees or private persons responsible for the enforcement to inform at that respect within the time limit set out. Once the report is received or when the time limit expires, should the Court find that its decision is being fully or partially unfulfilled, it may adopt any of the following measures:

    a) Impose a penalty payment from three thousand to thirty thousand Euros to the authorities, public employees or private persons failing to comply with the Court's decision, with the possibility to reiterate the fine until the order is fully enforced.

    b) Agree the suspension from their duties of any public authorities or Administration employees that are responsible for non-compliance, during the time needed to ensure the Court's decision enforcement.

    c) Substitute enforcement of decisions delivered in constitutional processes. In this case, the Court may request the cooperation of the National Government so that, within the terms established by the Court, the necessary measures are adopted to ensure compliance with such decisions."

71. Finally, the Attorney General asked the Court to take statements from individuals in order to support the President of the Parliament of Catalonia being held criminally liable for failing to comply with Article 87.1 of the LOTC in relation to ATC 141/2016 on the basis that he had included in the plenary session of the Parliament on 27 July 2016 the possibility for the Parliament to discuss the findings of the Constituent Process Study Committee. The State Prosecutor also presented pleadings on 10 August 2016, submitting that "*the findings of the Constituent Process Study Committee ratified by resolution 263/XI…radically opposed what was resolved by the Constitutional Court in STC 259/15 and ATC 141/2916*."

72. The Parliament lodged its defence pleadings on 2 September 2016. It claimed that resolution 263/XI, which ratified the report of the Constituent Process Study Committee, did not contravene STC 259/2015 and further, that "*the Parliament of Catalonia has the*

capacity to study and analyse any matters that it considers of interest to the society that it represents, including what may be a constituent process of a future independent Catalonia." In so far as STC 259/2015 and STC 42/2014 restricted the ability of the Parliament to do this, that restriction was not absolute, nor could it prevent study activities. Further, in so far as measures were sought by the Attorney General to restrict subjects of debate in Parliament under "*the pretext of ensuring compliance with the resolutions of the Constitutional Court could involve distortion of the very essence of Parliamentarianism and a destructive effect on the democratic principle that Parliament represents and expresses*." The Parliament argued that preventing Parliamentary debate in relation to what were mere proposals was incompatible with the fundamental right to political participation as recognised in Article 23 of the Spanish Constitution. Further, that the measures sought lacked sufficient legal certainty; they related to any Parliamentary "action", "initiative" or "call" and there was a potential for personal liability of the Presiding Board and Secretary General in the case of non-compliance. In that regard, it was argued that the provision relied upon, Article 92.4 of the LOTC, was itself the subject of challenge before the Constitutional Court and moreover, could not be relied upon when the relevant measure to be enforced was a judgment that had merely annulled a provision. Having regard also to the right to freedom of expression, it was argued that the imposition of penalties and certainly criminal penalties could not be lawful. Accordingly, the Parliament sought the dismissal of the interlocutory application.

73. Similarly, the President of the Parliament, Ms Carme Forcadell i Lluís in response to the Court order of 1 August 2016 argued that the Court could not hold that the findings of the Constituent Process Study Committee and Resolution 263/XI were in breach of a judgment of the Constitutional Court STC 259/2015 in relation to Resolution 1/XI. She argued that there was no necessary connection between the two, and for the Court to approach the matter in this way put members of Parliament in a position of complete legal uncertainty, hindering their ability to take initiatives that might be understood as related even directly to Resolution 1/XI. She submitted that if such an approach was taken by the Court it risked undermining democratic processes. As regards her decision to allow a vote on the ratification of the report of the Constituent Process Study Committee, this she submitted she was obliged to agree to, having warned the Parliament of the existence of ATC 141/2006. In that regard, she noted that once the Parliamentary session had begun, her role was restricted to directing discussion and ensuring compliance with the Rules of Procedure; the decision to change the agenda was made by Plenary such that it was not open to her under the Rules to prevent it.

74. The Court considered that the issue before it was as follows:

> "whether what was resolved in STC 259/2015, which declared Resolution 1/XI unconstitutional and null, and in ATC 141/2016, which admitted the interlocutory application for enforcement made concerning Resolution 5/XI, was ignored or contradicted by the Parliament of Catalonia on issuing its Resolution 263/XI, of 27 July 2016, which ratified the report and the findings of the Constituent Process Study Committee."

75. The Court considered that that question had to be answered by reference to Articles 87.1 and 92 of the LOTC, provisions concerning interlocutory enforcement, on the basis that the Constitutional Court is responsible for ensuring compliance with its own judgments and "*adopting the measures necessary to protect its jurisdiction, including the declaration of nullity of any actions and resolutions that contravene or undermine it as set out in Articles 41 and 92.1 LOTC*." The Court noted that it was already authorised prior to the reform brought about by the LOTC 15/2015 to decide on specific enforcement measures

such as the imposition of penalty payments, without prejudice to any other liability that may apply (former article 95.4 LOTC). In that regard, it had the power to take witness statements to determine whether there had been non-compliance by a public authority, civil servant or holder of public office. Accordingly, the Court considered that the powers set out in the new Article 92.4 of the LOTC to demand penalty payments and take witness statements had existed in the law prior to its amendment.

76. By its decision **ATC 170/2016** of 6 October 2016 in case no. 6330-2015[14] the Court granted the interlocutory application for enforcement in relation to Resolution 263/XI, holding that the resolution contravened the Court's ruling in STC 259/2015 and its warning in ATC 141/2016. It held that the resolution expressed the majority intention of the Parliament of Catalonia to proceed with separation from the Spanish State and the creation of an independent Catalan State and that it did so outside of the procedures provided for constitutional reform in the Spanish Constitution. In this regard, the Court repeated that:

> "The democratic legitimacy of the Parliament of Catalonia "cannot be opposed to the unconditional supremacy of the Constitution. The test in the Constitution reflects the statements relevant to the principle of democracy, the exercising of which, therefore, cannot take place outside it"….Therefore, it is not constitutionally admissible for parliamentary activity to be aimed at providing continuity and support for the objective proclaimed in resolution 1/XI,…which was declared unconstitutional by STC 259/2015."

77. Further, the Constitutional Court issued interlocutory orders against the President of the Parliament, the members of the Presiding Board of the Parliament and the Secretary General of the Parliament under Articles 87.1(2) and 92.4 LOTC warning them of their duty to abstain from carrying out any actions aimed at ensuring implementation of Resolution 263/XI and their duty to prevent or put a stop to any legal or material initiative that directly or indirectly aims at or involves ignoring or evading the nullity of that resolution.

78. Finally, whilst not determining whether the conduct of the President of the Parliament constituted a criminal offence, the Court decided to take witness statements in relation to this issue so that the Public Prosecutor's office, "*if it considers it necessary can take the appropriate action before the competent Court concerning the liability that may have been incurred by the President, Ms. Carme Forcadell i Lluís and any other persons...*"

Resolution 306/XI and Constitutional Court decision ATC 24/2017

79. On 6 October 2016 by **Resolution 306/XI** the Catalan Parliament voted in favour of holding a binding referendum on Catalonian independence.[15] The Public Prosecutor challenged the resolution on the same day and it was suspended by the Constitutional Court on 13 October 2016.

80. On 19 October 2016 the Prosecutor's Office charged the President of the Parliament, **Ms. Carme Forcadell i Lluís**, before the Civil and Penal Court of the High Court of Justice of Catalonia with the offence of disobedience under Article 410.1 of the Criminal code and with administrative malfeasance under Article 404 for having tabled a motion that had been put forward by parties in the Catalan Parliament regarding the conclusions of the Constituent Process Study Committee and for allowing a vote on that motion (see §§ 67

[14] Published Official State Gazette 15 November 2016 number 276.
[15] Official Gazette no. 237 14 October 2016 p. 19.

to 69 above). The claim was that this involved an "express forceful rejection of the Constitution itself".

81. On 14 February 2017, in its decision **ATC 24/2017**, again in case no. 6330/2015, the Constitutional Court declared Resolution 306/XI to be unconstitutional. The Constitutional Court invited the Public Prosecutor's office to file a criminal complaint against President Ms. Carme Forcadell and other members of the Board and again cautioned the Parliamentary Board of their responsibility to "*prevent and paralyze any initiative that implies ignoring or evading the mandates set forth*".

82. On 23 February 2017 a second charge was lodged against her and against other members of the Parliamentary Board of Catalonia: **Mr. Lluis M Corominas I Díaz** (first Deputy Speaker); **Mrs Anna Simó I Castelló**, first Secretary and **Mrs. Ramona Barrufet I Santacana** for the crime of disobedience under Article 410.1 of the Criminal Code. This related to the decision of the Speaker and the Parliamentary Board formally to admit two proposals by Parliamentary groups, Unitat Popular-Crid Constituent and Juns pel Sí (37713 and 37714 respectively), to call for a binding referendum on the independence of Catalonia in Parliament on 5 October 2016, which was adopted by Resolution 306/XI (see § 79 above). The Prosecution submitted that:

> "With their decisions allowing the approval of the repeated proposals, the President of the Parliament of Catalonia, Ms. Carme Forcadell i Lluís, and the members of the Mesa of the Parliament, Lluis M. Corominas i Díaz, First Vice-president , Ms Anna Simó i Castelló, First Secretary, and Ms Ramona Barrufet i Santacana, Fourth Secretary, evidenced their unambiguous and irreversible will to push forward their by the strength of the accomplished facts, with total contempt for the Constitution of 1978, of the legislation emanated…"
>
> STC 31/2015, highlights that the Constitution attributes to the State, as an exclusive competence, the "permission for the announcement of popular consultations by way of referenda" (art. 149.1.32 CE).
>
> The behaviour of Ms Carme Forcadell who , with her vote, allowed the debate and vote of the proposals registered under numbers 37714 and 37713 evidence even more her stubborn and wilful will to breach the constitutional mandates contained in Court decisions No. 259/2015, 31/2015, 32/2015, 138/2015.

83. The claim was not brought against Mr Joan Josep Nuet i Pujals, 5th member of the Parliamentary Board who voted to allow the debate but was a member of a party that does not support independence. Subsequently, on 24 May 2017 he was also charged by the High Court for his participation in the decision.

Law 19/07 and Constitutional Court decision STC 114/2017 (ATC 4334/2017)

84. On 6 September 2017, the Catalan Parliament passed the Law on the Referendum on Self Determination to facilitate the holding of an independence vote on 1 October 2017: **Law 19/2017**. By **Resolution 807/XI** the principal and alternate members of the electoral Syndicate of Catalonia[16] were appointed by the Parliament of Catalonia.

85. On 7 September 2017 the Spanish government submitted a claim to the Constitutional Court challenging the constitutionality of Law 19/2017, which led to its automatic

[16] Mr. Marc Marsal i Ferret; Mr. Jordi Matas i Dalmases; Mrs. Marta Alsina i Conesa; Mrs. Tania Verge i Mestre; Mr. Josep Pagés Masso and Mrs. Eva Labarta i Ferrer.

suspension. The matter was opened on the same day with a new case no. 4334/2017. In its order of the same date, the Constitutional Court specifically referred to the President of the Generalitat of Catalonia, Mr. Carlos Puigdemont i Casamajó; the Secretary of the Government of Catalonia, Mr. Victor Cullell i Comellas; all Ministers of the Government;[17] the President of the Parliament of Catalonia and of the Parliamentary Board, Mrs. Carme Forcadell i Lluís; the members of the Board of Parliament,[18] the Senior Counsel of the Parliament of Catalonia, Mr. Antoni Bayona i Rocamora, the Secretary General of the Parliament of Catalonia, Mr. Xavier Muro i Bas and the Head of the Department of Publications and Mrs. Silvia Casademont i Colomer, Coordination Technician for the production of publication of the Department of Editions. The Law was deemed unconstitutional on 17 October 2017 in STC 114/2017.

86. The order warned them not only of their duty under Article 87.1 of the LOTC to comply with all judgments of the Constitutional Court but also, specifically ordered them to prevent or suspend any initiative that potentially could result in non-compliance with the suspension of Law 19/2017, that is, with suspension of the referendum. Thus, the Court warned them of their duty to: "*abstain from initiating, processing, informing or rendering, in the sphere of their respective competencies, any resolution or act that allows for the preparation and/or holding of the referendum on self-determination of Catalonia*…" and moreover, warned them of the criminal consequences of non-compliance.

87. At the request of the Spanish Government, the Order was personally notified to: Mr. Marc Marsal i Ferret; Mr. Jordi Matas i Dalmases; Mrs. Marta Alsina i Conesa; Mrs. Tania Verge i Mestre; Mr. Josep Pagés Masso and Mrs. Eva Labarta i Ferrer, appointed principal and alternate members of the electoral Syndicate of Catalonia by Resolution 807/XI, who were advised:

> "of the duty to prevent or suspend any initiative that potentially involves ignoring or avoiding the ordered of suspension. In particular, to abstain from proceeding to the appointment of the members of the demarcation electoral syndicates, from creating any register and/or file necessary for the holding of the self-determination referendum and any act and/or activity in application of article 18 of Law 19/2017, as well as from initiating, processing, informing or rendering any resolution in furtherance of the execution of the provisions contained in the referendum law, or from promoting or processing any norm for that purpose, warning them of the full nullity of such actions performed and the eventual liabilities, including criminal, they may incur in the event of a disobedience with such requirement."

88. On 13 September 2017, at the request of the State Attorney General, the above Order was notified to Mrs. Maria Carme Vilanova Ramon, President, Mr. Vicens Bitriá Águila, member and Mr. Armand Simon Llanes, secretary, and the Electoral Syndicates.[19]

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[17] The head of the Department of the Vice Presidency and Economy and Treasury, Mr. Oriol Junqueras i Vies; the Counsellor to the Presidency, Mr. Jordi Turull i Negre; the Counsellor for International Affairs, Institutional Relations and Transparency, Mr. Raul Romeva i Rueda; the Counsellor of Education, Mrs. Clara Ponsati i Obiols; the Counsellor for Territory and Sustainability, Mr. Josep Rull i Andreu; the Counsellor of Governance, Public Administrations and Housing, Mrs. Meritxell Borrás i Solé; the Health Counsellor, Mr. Antoni Comín i Oliveres; the Counsellor for Labour, Social Issues and Family, Mrs. Dolors Bassa i Coll; Counsellor of the Interior, Mr. Joaquin Forn i Chiariello; Counsellor of Culture, Mr. Lluís Puig i Gordi; Counsellor of Business and Knowledge, Mr. Santi Vila i Vicente; Counsellor of Justice, Mr. Carles Mundó i Blanch; Counsellor of Agriculture, Livestock, Fishery and Food, Mrs. Meritxell Serret i Aleu.

[18] Mr. Lluís Guinó i Subirós, First Vice President; Mr. José María Espejo-Saavedra Conesa, Second Vice President; Mrs. Anna Simó i Castelló, First Secretary; Mr. David Pérez Ibáñez, Second Secretary; Mr. Joan Josep Nuet i Pujals, Third Secretary; Mrs. Ramona Barrufet i Santacana, Fourth Secretary;

[19] Mr. Roc Fuentes i Navarro, president, Mrs. Susana Romero Soriano, member and Mr. Antoni Fitó i Baucells, secretary, of the Electoral Syndicate of Barcelona; Mr. Jordi Casadevall Fusté, president, Mr. Josep Maria Llistosella i Vila, member and Mr. Jordi Díaz Comas, secretary, of the Electoral Syndicate of Girona; Mrs. Mariona Lladonosa

89. Further, on that date, the Court found that it had detected non-compliance with its order of 7 September and notified specified individuals,[20] requesting that they provide statements informing the Court of the measures adopted to comply with the suspension of Resolution 807/XI of the Parliament of Catalonia.

90. On the same day the Barcelona Public Prosecutor issued an order requiring the Catalan police Mossos d'Esquadra and the Municipality Police of every town and city to take any action needed to stop the referendum. Prior to this, on 8 September 2017, the Superior Public Prosecutor's Office of Catalonia had issued an order to all police units requiring action to be taken by police officers in relation to any steps preparatory to the referendum, requiring the police to report such incidents urgently to the Head Prosecutor as amounting to criminal acts. Further, the Order provided that police officers:

> "shall proceed directly to adopting the necessary measures to intervene in the assets or instruments designed to prepare for or hold the illegal referendum, confiscating ballot boxes, ballot envelopes, instruction manuals for the members of the electoral boards, electoral print outs, electoral propaganda, IT devices, as well as any other dissemination, promotion or execution material for the illegal referendum."

91. During the week of 4 September, the Catalan President Carles Puigdemont wrote to all 948 mayors in Catalonia asking for their support to organise the vote, of which around 712 agreed. On 13 September the Spanish public prosecutor ordered an investigation into 712 Catalan mayors, requiring prosecutors to summon them to provide evidence and to arrest them if they refused to do so.[21] During and following this period, police raids took place and materials were seized, including at private premises, for example, at newspapers and printing companies. Several printing companies were raided: in Badalona, L'Hospitalet, Sant Feliu de Llobregat and Barcelona (15 September 2017), Constantí (8 September 2017), Òdena (22 September) and a local newspaper in Valls (9 September). Private correspondence is said to have been seized in Terrassa (19 September 2017), Osona (20 September 2017).

92. On 8 September, the Public Prosecutor filed a third complaint against Carme Forcadell and other members of the Parliamentary Board for allowing the vote on the Law on the Referendum, which was admitted and added to case 1/2016 of High Court of Catalonia, charging them with misappropriation of public funds.

> With this bill of law, a veneer of legal cover and normalcy is attempted to be given to the holding of a secessionist referendum that is known to be not only contrary to law but also in blatant violation of the orders of the Constitutional Court, evidencing once again the stubborn, unequivocal and irreversible will of the Government and of the parliamentary groups Junts pel Sí and CUP, to carry out their political project via the force of consummated facts, with total disregard of the Constitution of 1978, the laws emanating therefrom, and the judgments contained in the STC of December 2, 2015, in the SSTC 31/2015 and 32/2015 of February 25, 138/2015 of June 11, 51/2017 of May 10 and 90/2017 of July 5, as well as in AATC 141/2016, July 19, 170/2016 of October 6 and 24/2017 of February 14, proceeding to drive the constituent process

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Latorre, president, Mr. Alexandre Sárraga Gómez, member and Mr. Simeó Miquel Roé, secretary, of the Electoral Syndicate of Lleida; and finalmente Mr. Xavier Faura i Sanmartin, president; Mrs. Montserrat Aumatell i Arnau, member and Mrs. Marta Cassany i Virgili, secretary, of the Electoral Syndicate of Tarragona.

[20] Mr. Marc Marsal i Ferret; Mr. Jordi Matas i Dalmases; Mrs. Marta Alsina i Conesa; Mrs. Tania Verge i Mestre; Mr. Josep Pagés Masso; Mr. Josep Costa i Roselló and Mrs. Eva Labarta i Ferrer, principal and alternate members of the Electoral Syndicate of Catalonia.

[21] https://www.elconfidencial.com/espana/cataluna/2017-09-13/referendum-alcaldes-ayuntamientos-cataluna-fiscalia-maza_1442873/

pre-ordained in Resolution 1/XI, which resolution cannot possibly fit into the jurisdiction of the Parliament and Government of Catalonia, in the territorial organization of the State, and in the established procedures for constitutional and statutory reform, thereby constituting a path that is purely factual [not legal].

93. On the same day the President of the Catalan Parliament, Ms. Carme Forcadell, filed an application before the Constitutional Court that the Judges recuse themselves. This she did because there were media reports that the Constitutional Court was preparing to suspend her from office based on Article 92.4 of LOTC under case no. 6330-2015, to which she had been made a party. The Court rejected the application the following day on the basis that no substitute judges existed. On 11 September 2017 Ms. Carme Forcadell appealed the decision not to admit a recusal proceeding. The appeal was rejected by Constitutional Court on 13 September 2017.

94. On 19 September 2017 the Constitutional Court issued a decision in case 6330-2015 holding that the decisions of the Parliamentary Board taken on the 6 September, by which Parliament was allowed to vote on the proposals for the referendum law, constituted disobedience/non-implementation of its earlier decision STC 259/2015.

95. In its decision, the Constitutional Court invited the Prosecutor to consider filing a new criminal complaint against the members of the Parliamentary Board on the basis that by allowing Parliament to vote on the proposed Law (19/2017) providing for a referendum, they had acted in breach of their duty to abide by the decisions of the Constitutional Court (art. 87.1 LOTC) and to prevent or stop any initiative involving circumventing statements contained in the STC 259/2015 and ATC 141/2016, 170/2016 and 24/2017.

96. The Court further held that the function of the President of the Catalan Parliament to direct debate and comply with and enforce the Rules of Procedure of the House (Article 39.1 RPC), had to be discharged in compliance with the decisions of the Constitutional Court, on the basis that these are binding on all public authorities, including office holders (art. 87.1 LOTC).[22]

97. Accordingly, it held that:

> "the guarantee of constitutional order, was seriously violated by the agreements of the Parliament of Catalonia dated 7 September 2017 referred to in the present incident of implementation, in particular the decisions by its President and members of the Parliamentary Board (First Vice - President, the First Secretary, the Secretary and the Secretary third quarter), to enable the plenary of the House to approve the proposed law …despite its obvious contradiction with the pronouncements and warnings contained in the STC 259/2015 and the AATC 141/2016, 170/2016 and 24/2017, which requires this Court to exercise the powers entrusted to it by the Constitution to preserve its jurisdiction and compliance with resolutions (STC 259/2015, FJ 4; AATC 189/2015, FJ 3, 141/2016, FJ 7, 170/2016, FJ 9, and 24/2017 FJ 12).

[22] The Court considered that the provisions of articles. 37.3.(e) and 111.1 RPC empowered the Board of the Parliament, acting under the direction of the President (art. 37.2 RPC) to decide that the bill presented by the parliamentary groups and CUP-CC JxS should not be allowed to proceed on the basis that it contravened the repeated pronouncements and warnings of the Constitutional Court in relation to the "constituent process" contained in resolutions, as had already been advised to the Bureau by the Secretary-General and the Senior law clerk of the Parliament. It should also be remembered that the Tables of the Chambers are empowered to refuse to accept the proposals or proposals presented by the groups of parliamentarians whose contradiction with the law or unconstitutionality are "palmarias and evident ", without implying any violation of the fundamental right of parliamentarians authors of the proposal (Article 23.2 EC), as this Court has had occasion to declare repeatedly (SSTC 124/1995, dated 18 July, FJ 2, 10/2016, February 1, FJ 4, and 107/2016, of 7 June, FJ 3)

It is not for this Court to decide whether the conduct of the President of the Parliament of Catalonia and members designated Mesa (First Vice - President, Secretary first, the third Secretary and Secretary fourth), constitute a criminal offence, but that the circumstances referred to above are referred to the Public Prosecutor's Office so that, if it deems it appropriate, it promotes the exercise of criminal proceedings that it deems appropriate."

98. At 8 am on 20 September 2017 fourteen members of the Catalan Government were arrested and detained by the Guardia Civil for around 50 hours.

99. On 19-20 September the Constitutional Court imposed fines of €12,000 per day on the five members of national electoral colleges and the two substitute members and €6000 per day on members of the district electoral colleges and the two substitute members on the basis that they had failed to comply with its warnings.[23] These fines were enforceable by the tax authorities directly against the individuals' assets. The original warning decision, the finding of a breach of that decision and the imposition of a fine were all carried out in the absence of the individuals affected. The Constitutional Court's decision to impose the fines were published in the Spanish Official Gazette of 22 September 2017, which meant that no personal notification was required for it to have legal effect.

100. On 27 September 2017 the High Court of Justice of Catalonia issued a decision ordering the police to close all the electoral colleges, subject this not affecting civic life.

101. On 1 October 2017, the referendum took place. There were a number of injuries.

The prevention of the sitting of Parliament and Constitutional Court decision ATC 4856/2017

102. On 4 October 2017, the Parliamentary Groups Junts pel Sí and Canditatura d'Unitat Popular Crida filed a written request that the Parliamentary Board schedule a Plenary session of the Catalan Parliament for 9 October 2017 to assess the results of the referendum of October 1. This Written Request was made in accordance with Articles 71(2) and 169 of the Rules of Procedure of the Catalan Parliament. Article 37.1(b) of the Rules provides that the Parliamentary Board is the body authorised to "adopt the decisions and measures required for the organization of the parliamentary work". In accordance with Article 37.3(d) of the said rules the Parliamentary Board decided to admit the written request for consideration. In accordance with Article 81 of the said rules the agenda of any Plenary Session is set by the President of the Parliamentary Board in agreement with the Board of Spokesperson.

103. The Board of Spokesperson met and decided to accept the request and asked the President to schedule the Plenary of the Parliament at 10 am on 9 October.

[23] 'Imponer multa coercitiva diaria de doce mil euros a don Marc Marsal i Ferret; don Jordi Matas i Dalmases; doña Marta Alsina i Conesa; doña Tania Verge i Mestre; don Josep Pagés Masso; don Josep Costa i Roselló y doña Eva Labarta i Ferrer, miembros de la Sindicatura Electoral de Cataluña y de seis mil euros diarios a doña María Carme Vilanova Ramón, presidenta; don Vicens Bitriá Águila, vocal y don Armand Simon Llanes, secretario, todos ellos de la Sindicatura Electoral de Arán; don Roc Fuentes i Navarro, presidente; doña Susana Romero Soriano, vocal y don Antoni Fitó i Baucells, secretario de la Sindicatura Electoral de Barcelona; don Jordi Casadevall Fusté, presidente; don Josep María Llistosella i Vila, vocal y don Jordi Díaz Comas, secretario de la Sindicatura Electoral de Girona; doña Mariona Lladonosa Latorre, presidenta; don Alexandre Sárraga Gómez, vocal y don Simeó Miquel Roé, secretario de la Sindicatura Electoral de Lleida; y finalmente a don Xavier Faura i Sanmartin, presidente; doña Montserrat Aumatell i Arnau, vocal y doña Marta Cassany i Virgili, secretaria de la Sindicatura Electoral de Tarragona miembros de las sindicaturas de demarcación.'

104. The decision to allow the request was appealed by some Parliamentary Groups (Socialist, Popular and Ciutadans). After consulting the Board Spokesperson, the Parliamentary Board rejected the appeal.

105. On 5 October sixteen deputies of the Socialist Parliamentary Group filed an application before the Constitutional Court, seeking an injunction to prevent the Parliamentary session from taking place. The Constitutional Court issued an injunction on the same day suspending "the October 9, 2017 ordinary session of the Full Parliament called by the Decision of the Catalonian Parliamentary Board of October 4, 2017": ATC 4856/2017. The Constitutional Court had never before suspended a Plenary Session of the Parliament. In fact it had rejected the possibility of doing so in its previous decisions, and most recently in its decisions in 2015 (ATC 189/2015 and 190/2015). Indeed, in its decision of ATC 190/2015 the Constitutional Court states "*this Court has emphasized, as one of the foundations of the democratic system, that Parliament is the natural seat of political debate and that the eventual outcome of the parliamentary debate is an issue that should not prematurely condition the very viability of the debate (...) In this case, the injunctive request goes beyond the proper function of the remedy as it seeks to review of constitutionality of a resolution that has not been adopted and whose final content is unknown*".

106. In its decision, the Constitutional Court advised the Parliamentary Board "*of its duty to prevent or suspend any initiative that implies ignoring or eluding the agreed suspension*" and warned them of the "*possible liabilities, including criminal, they may incur if they do not obey this requirement*".

107. Under Article 93 of the LOTC an appeal against a Constitutional Court decision, be it *ex parte* or otherwise, must be filed within 3 days of the decision; it does not have suspensive effect; all parties must be given 3 days from the date of the request for an appeal to make submissions; and, thereafter the Court is required to issue a decision within 2 days of receipt of submissions. Accordingly, no appeal could be heard and be granted by 10 am on 9 October, the time the Plenary Session of the Parliament was planned for (the Constitutional Court worked on Friday 6 October until 3 pm, does not work weekends and will reopen on Monday 9 October at 9.30 am).

108. Accordingly, the Parliamentary Board and the deputies that made the Written Request for the Parliamentary session decided that they had no option but to comply with the Constitutional Court's injunction. On 6 October 2017 an appeal against the Constitutional Court's decision was filed, which has not yet been heard. On 10 October, the Parliament did however, sit.

109. On 17 October 2017 Jordi Cuixart and Jordi Sànchez, the heads of the Catalan National Assembly (ANC) and independence group Omnium were arrested and ordered by the High Court to be held without bail pending an investigation for alleged sedition. The sedition investigation had been commenced on 22 September claiming that Jordi Sanchez, the leader of Catalan National Assembly (ANC) movement, and Jordi Cuixart, who heads the Omnium Cultural association, were heavily involved in organising the massive protest aimed at hindering a Guardia Civil investigation in Barcelona into the build-up for the 1 October illegal referendum. The Judge considered that the actions being investigated sought to "illegally change the organization of the State", and as a result fall under the jurisdiction of the National Court. Bail was refused.

C. LEGAL ANALYSIS

110. We turn now to consider the human rights implications of the above facts. As explained in the introduction we deal with three main issues: (1) restrictions on Parliamentary debate, (2) criminal sanctions in relation to the holding of referendums and citizen participation processes and (3) the Organic Law 15/205 amendment to the LOTC.

I. The control of Parliamentary debate and the adoption of resolutions

111. As set out in the facts above, on repeated occasions, the Constitutional Court has held that the Catalan Parliament is prohibited from debating the question of Catalan independence, from voting on any motion or resolution relating to independence and from appointing a body or group of individuals to consider and advise in relation to independence (the Constituent Commission). In all of these cases the Constitutional Court has concluded that such actions contravened its decisions in STC 259/15 (see p. 15 above) and ATC 141/2016 (see p. 17 above) and has therefore imposed its orders as 'enforcement' decisions in relation to those judgments. Accordingly, as set out above, the Constitutional Court has quashed non-binding resolutions by the Catalan Parliament, issued warnings backed by criminal sanctions and imposed criminal sanctions and financial penalties in relation to the activities of office holders within Parliament. Indeed, members of the Government and civil servants have been arrested and detained.

The requirements of fundamental rights

112. In our view such restrictions raise serious issues regarding Spain's compliance with the fundamental rights to freedom of speech and freedom of association guaranteed by Articles 10 and 11 of the ECHR, Articles 19 and 21 of the ICCPR and Articles 11 and 12 of the Charter of Fundamental Rights of the European Union respectively. In our view there can be little doubt that the politicians and parties speaking within regional assemblies and elsewhere are protected by Articles 10 and 11 of the ECHR. Further, issues arise regarding potential infringements of the right to elect a legislature able freely to express the opinion of the people, as guaranteed by Article 3 of Protocol No. 1 to the ECHR and Article 25 of the ICCPR. In this regard, we refer to Article 3 of Protocol No. 1 ECHR not because it provides for a right to hold or and participate in a referendum. Such a right does not in principle fall within its scope: see ECtHR *Hilbe* v. *Liechtenstein* (dec.), 7 September 1999, *McLean and Cole* v. *United Kingdom* (dec.), 11 June 2013; *Moohan* and *Gillon* v. UK (dec.), 13 June 2017, §§41-42 (Scottish Independence referendum).[24] Rather, we refer to it because we consider that the right to elect a legislature able freely to express the opinion of the people means that those in the legislature must be able to debate issues freely. This is supported moreover, by the fact that Article 25 of the ICCPR, which is more extensively drafted than Article 3 of Protocol No. 1 to the ECHR, does apply to referendums: *Gillot* v. *France*, communication of 15 July 2002.

113. We note in that regard that the Constitutional Court does not appear to have addressed the question of compliance with these fundamental rights when quashing resolutions, applying restrictions backed by warnings of criminal liability and imposing criminal sanctions, despite these rights being enshrined within the Spanish Constitution (Articles 20 and 21). Such consideration is, however, critical to the legality of the Constitutional Court's decisions as a matter not only of national but also of international law, with which this Opinion is concerned. Spain, having ratified both the ECHR and the

[24] Albeit that the Court has not ruled out that an referendum based electoral system could do so: *Moohan* and *Gillon* v. UK (dec.), 13 June 2017, §42

ICCPR, is obliged to safeguard the rights that they guarantee. That obligation necessarily includes decisions by its Constitutional Court. According to the case-law of the European Court of Human Rights, the rulings of domestic courts, including Constitutional Courts must be compatible with the provisions of the ECHR and its Protocols: see for instance ECtHR (GC), *United Communist Party of Turkey and others v. Turkey*, 30 January 1998 (violation by Turkey of Article 11 of the ECHR due to the fact that the Turkish Constitutional Court had dissolved a political party, a measure held to be disproportionate).

114. Article 10 of the ECHR and Article 19 ICCPR provide for the right to free expression. Whilst such expression may be subject to restrictions provided by law, they must be confined to those permitted, which moreover, must be interpreted narrowly. In the case of Article 19 of the ICCPR, the restrictions must be strictly necessary for the purposes of ensuring respect for the rights or reputations of others, the protection of national security or of public order or of public health or morals; and, in the case of Article 10 of the ECHR, additionally for the purposes of territorial integrity (which could arguably be one of the legitimate aims pursued by the Constitutional court of Spain) or public safety (ECtHR (GC), Sürek v. Turkey judgment of 8 July 1999, § 52; ECtHR, *Döner and Others v. Turkey* judgment of 7 March 2017, § 102), for the prevention of disorder or crime and for the prevention of the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. As far as we are aware, the Constitutional Court did not examine the necessity for the restrictions it imposed by reference to fundamental rights, but rather, proceeded on the assumption that they were required in order to maintain the authority of the Constitutional Court.

115. Article 11 of the ECHR and Article 21 of the ICCPR provide for the right to freedom of assembly and association. Again, whilst that right may be restricted, such restrictions must be prescribed by law and must be necessary and proportionate, in pursuit of a legitimate aim. Thus, such restrictions must be required in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others, including the prevention of crime. An essential factor to be taken into consideration in determining whether a restriction is permissible is whether it responds to a call for the use of violence (ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* judgment of 20 October 2001, § 90). Importantly, "*an automatic reliance on the very fact that an organisation has been considered anti-constitutional … cannot suffice to justify under Article 11 § 2 of the ECHR a practice of systematic bans on the holding of peaceful assemblies. The Court must rather scrutinise the particular grounds relied on to justify the interference and the significance of that interference*" (*ibid.*, § 92).

116. While the participation of civil society in political decision-making is certainly essential for the proper functioning of democracy, to date, the European Court of Human Rights has not guaranteed a right to such participation (ECtHR, *Costel Popa v. Romania* judgment of 26 April 2016), nor can it be said that the right to participate in political decision-making is implicitly present through the guarantees provided under Articles 10 and 11 of the ECHR. Nevertheless, it is not excluded that the European Court could take into account the extent of civil participation and consultation as one of the factors which it examines under its proportionality exercise under Articles 10 or 11.

117. We consider that a restriction on what Parliamentarians may debate and resolutions that they may adopt in Parliament is likely to give rise to an interference in both their right to freedom of expression and freedom of assembly. These rights must moreover, be viewed in the light of the right of people to have their will freely expressed in the

legislature as guaranteed by Article 3 of Protocol No. 1 to the ECHR and Article 25 of the ICCPR. In that regard, our view is that a restriction on the content of debate and the issues on which resolutions may be adopted within the Catalan Parliament, amounts to a restriction on the substantive content of the right to assembly, which necessarily entails the exercise of free expression rights.

118. Freedom of speech has repeatedly been recognised by the European Court of Human Rights as the cornerstone of a democracy; a prerequisite for its existence and a guarantor of its continued health and vitality: see ECtHR (GC), *Animal Defenders International v. the United Kingdom* judgment of 22 April 2013, § 100; and ECtHR (GC), *Delfi AS v. Estonia* judgment of 16 June 2015, § 131:

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ..."

119. Free speech by politicians, particularly albeit not only within Parliament, is at the heart of this. In the legislature the elected representatives of the people must be able to express their views freely in order to discharge their function, namely the expression of the free will of the people as guaranteed by Article 3 of Protocol No. 1 to the ECHR and Article 25 of the ICCPR: *Castells v Spain*, 23 April 1992; *Piermont v France,* 27 April 1995, § 76; *Jerusalem v Austria*, 27 May 2001. The case-law of the European Court of Human rights is assiduous in its protection of freedom of speech and expression of members of Parliament, especially if they are subject to sanctions such as fines. For a recent example, see ECtHR (GC), *Karacsony and others* v. *Hungary* judgment of 17 May 2016, §§ 137-144 and 148-162. In *Cordova v. Italy (n° 1)*, 30 January 2003, the ECHR stated:

> "59. Whilst freedom of expression is important for anybody, it is especially so for an elected representative of the people; he or she represents the electorate, draws attention to their preoccupations and defends their interests. In a democracy, the parliament and comparable bodies are the essential fora for political debate" (see also ECtHR, *Jerusalem* v. *Austria*, judgment of 27 May 2001, § 84).

120. In that regard, we do not see any distinction between the right and importance of freedom of expression within the Catalan Parliament and that same right within the national Parliament. Politicians, whether representing individuals within a devolved or national Parliament are entitled to the same level of protection for their rights to free expression. Indeed, there are many examples of recent cases of the European Court of Human Rights where a violation or alleged violation of the ECHR originated in the acts of a local or regional authority (see ECtHR (GC), *Mouvement Raëlien v. Switzerland* judgment of 13 July 2012) Therefore, it does not seem to us relevant, that the Catalan Parliament exercises devolved powers and represents the electorate of an autonomous region, rather than that of a nation state.

121. The case law of the European Court is clear in that regard that the right to elect the legislature is not confined to national parliaments but depends on the constitutional structure of the state, encompassing regional legislatures such as the German and Austrian Länder: ECtHR, *Mathieu-Mohin and Clerfayt* judgment of 2 March 1987, § 53. In

that leading judgment, the European Court considered access to the elections for the legislature of the then "Flemish Council" engaged Article 3 of Protocol 1. Similarly, in the case of *Jan Timke v. Germany*, the European Commission of Human Rights held that the federal structure of the German State, meant that the diets of the German Länder, constituted "legislatures" within the meaning of Article 3 of Protocol No. 1 to the ECHR. Indeed, even in the context of a municipal council the European Court has held that particular respect is required for the right to freedom of expression: ECtHR, *Jerusalem v Austria*, judgment of 27 May 2001, § 40. As the European Court noted in that case:

> "[i]rrespective of whether the applicant's statements were covered by parliamentary immunity, the Court finds that they were made in a forum which was at least comparable to Parliament as concerns the public interest in protecting the participants' freedom of public expression. In a democracy, Parliament or such comparable bodies are the essential fora for political debate. Very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein."

For a recent example, where the case concerned a municipal council and a period of local elections, see ECtHR, *Kosc* v. *Poland*, 1 June 2017.

122. It follows that politicians, whether members of regional or national assemblies must be guaranteed a high level of protection, subject only to narrow restrictions. As the European Court reiterated in *Otegi Mondragon v Spain*, 15 March 2011, which concerned the conviction of a member of the Basque Parliament for having insulted the King:

> "50. There is little scope under Article 10 § 2 for restrictions on freedom of expression in the area of political speech or debate – where freedom of expression is of the utmost importance – or in matters of public interest. While freedom of expression is important for everybody, it is especially so for an elected representative of the people. [The Applicant] represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interference with the freedom of expression of a member of parliament calls for the closest scrutiny on the part of the Court (see *Castells v. Spain*, 23 April 1992, § 42)."

The legality of the quashing of resolutions adopted by the Catalan Parliament

Prescribed by law

123. Set out above, are the occasions and basis on which the Constitutional Court held that resolutions and laws adopted by the Catalan Parliament were unlawful and had to be quashed. We note that:

a. Laws providing for referendums were held to be unlawful. First, by its decision STC 32/2015 of 2 December 2015, the Constitutional Court held a law adopted by the Catalan Parliament (Law 10/2014 and decree 129/201) providing for a referendum on independence to be unconstitutional: see §43 above. Law 19/2017 adopted by the Catalan Parliament on 6 September 2017, which provided for a referendum of 1 October 2017 was suspended by the Constitutional Court on 7 September 2017: see §84 above. The law was deemed unconstitutional: STC 114/2017, 17 October 2017 in case no. 4334/2017: §85 above.

b. Resolutions relating to the process of determining independence were declared unlawful. By its decision STC 259/2015 of 2 December 2015 in case no. 6330-2015 (by which the Spanish Government challenged the legality of Resolution 1/XI advocating steps towards independence), the Constitutional Court quashed the Resolution 1/XI. The Court relied on its earlier decision in STC 42/2014, to hold that despite the markedly political nature of the resolution, it should nevertheless be considered to have legal effect because it mandated certain actions by Parliament: see §§ 36 and 37 above.

c. Subsequently, case no. 6330-2015 remained open, which we understand to be the normal practice in Spain. It was in the context of this 'live' case therefore, that the Spanish Constitutional Court exercised its powers of executive enforcement to hold that subsequent acts by the Catalan Parliament, including the adoption of resolutions amounted to disobedience to its earlier decision STC 259/2015. Thus, the Constitutional Court adopted 'enforcement decisions' or measures or implementation pursuant to Articles 87.1 and 92 of the LOTC 15/2015 of 16 October amending the 1979 LOTC declaring subsequent resolutions of the Catalan Parliament null and void:

    i. ATC 141/2016 in relation to Resolution 5/XI, by which Parliament set up a Commission/study group to consider the constituent process: §§60 to 66 above; and

    ii. ATC 170/2016, in respect of Resolution 263/ XI by which the Catalan Parliament decided to ratify the report and findings of that Commission: §§68-78 above; and

    iii. ATC 24/2017 in relation to Resolution 306/XI by which the Catalan Parliament voted in favour of holding a referendum: §81 above

124. The expression "prescribed by law" in the second paragraph of Articles 10 and 11 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects: ECtHR (GC), *Rotaru v. Romania* judgment of 4 May 2000, § 52; ECtHR (GC), *Maestri v. Italy* judgment of 17 February 2004, § 30; ECtHR, *Karademirci and Others v. Turkey*, 25 January 2010, § 42. The measure must be foreseeable, that is, formulated with sufficient precision to enable the citizen (in this case the members of Parliament) to regulate his conduct. The level of precision required will depend on the context: ECtHR (GC), *Delfi AS v. Estonia* judgment of 16 June 2015, §§ 121-122.

125. As regards the Constitutional Court's quashing of the original law providing for a referendum in 2014 in STC 32/2015 (see § 43 above) and the injunctive relief provided in relation to Law 19/17 providing for the referendum of 1 October 2017, it is clear from Article 149.1.32 of the Spanish Constitution that the Spain has exclusive competence in this regard. That is repeated in Article 122 of the Statute of Autonomy. Accordingly, both the finding of illegality in 2015 and the injunctive relief in 2017 were based on law, which was sufficiently foreseeable.

126. However, the position is less clear in so far as it relates to measures taken by the Constitutional Court in relation to the adoption of non-binding Resolutions by the Catalan Parliament regarding matters relating to potential independence. The initial decision STC 259/2015, by which the Court found Resolution 1/XI (which began the political process towards independence) to be unlawful under the Constitution, was based on the Court's earlier decision in 42/2014, in which it held that resolutions could have legal effects

sufficient to render the measures suitable for constitutionality proceedings. According to Article 2(a) of the LOTC 2/1979 of the Constitutional Court, the Court will hear an issue of "unconstitutionality against, Laws, normative provisions or acts with the force of Law". It is for the Court to set the boundaries of its jurisdiction: Article 4 ibid. We are not in a position to take a clear view as to whether it is sufficiently clear in Spanish Law that a resolution may be challenged and quashed by the Constitutional Court. However, we note with some concern that controls on the adoption of resolutions, which express an intention to do something but do not involve it in fact being done, does give rise to issues of legal certainty; real questions arise as to the point at which a resolution is to be adjudged as having 'legal effects' sufficient to render it subject to an constitutionality appeal to the Constitutional Court. We reach no clear conclusion on this point because Article 161.2 of the Spanish Constitution clearly envisages that the Government may contest resolutions before the Constitutional Court. Our difficulty arises however, as to the foreseeability of such a challenge being accepted by the Constitutional Court as a matter over which it has jurisdiction pursuant to Article 2 of the Organic Law.

127. Finally, we turn to consider the enforcement of implementation measures in relation to STC 259/2015 and in particular, the decisions by the Constitutional Court that subsequent resolutions by the Catalan Parliament amounted to disobedience to STC 259/2015. We consider that this approach raises serious issues in relation to the requirement that a measure be prescribed by law. Prohibitions on discussion and the adoption of Resolutions by a Parliament if permissible at all, which we consider below, should be clearly prescribed by law; imposing those restrictions through Constitutional Court 'enforcement mechanisms', appears to lack the clarity and certainty required. This is borne out by what happened here.

128. STC 259/2015 declared resolution 1/XI, by which the Catalan Parliament resolved to commence a process towards independence, to be unlawful. For it subsequently to be interpreted as amounting to a prohibition on any discussion or resolution in relation to independence, including the setting up of a study group and the adoption of that group's findings, is to give it a wide scope, equivalent to a ban in legislation on all Parliamentary discussions relating to independence and any related steps. Such controls would require to be clearly prescribed and adopted by the legislature. We consider that serious questions arise in this regard as to the role of the Constitutional Court and in particular, whether its rulings go beyond the judicial to enter the legislative sphere. Further, we consider that that raises serious issues regarding the foreseeability of such restrictive measures.

Necessary and proportionate for a legitimate aim

129. We are concerned here with the necessity and proportionality of measures aimed at restricting the scope of any debate and the adoption of resolutions within the Catalan Parliament regarding the issue of independence, including, for example, Resolution 5/XI by which the Catalan Parliament resolved to set up a Constituent Process to study independence. We have already set out above our concerns in relation to the legality of such restrictions. Here we analyse whether the Constitutional Court properly analysed whether such restrictions are necessary and proportionate.

130. Our starting point is that the Spanish Constitution is clear that the power to call referendums is that of Spain, as provided in Article 149.1.32 of the Spanish Constitution. That is repeated in Article 122 of the Statute of Autonomy. We are not concerned however, with whether that is lawful or proportionate, which is a separate matter of international law. Accordingly, we do not examine the Constitutional Court decisions in so far as they find that the laws providing for referendums were unlawful under the

Spanish Constitution. Rather, we are concerned here with the control of debates, processes and resolutions related to independence conducted by those in Parliament.

131. In this context, we consider that significant weight must be given to the fundamental importance of freedom of speech in a democracy and its particular importance in the context of debate within a Parliament.[25] As set out above, the European Court of Human Rights has consistently reiterated the importance of freedom of speech within a Parliament.

132. We note that in none of the Constitutional Court decisions is there analysis of the proportionality of prohibiting such debate. Rather, in ATC 141/2016 the Constitutional Court proceeds on the basis that its:

> "task is to monitor the effective fulfilment of its judgments and resolutions and to resolve the related incidences of implementation, adopting whatever measures it considers necessary to preserve its jurisdiction, including the declaration of nullity of those acts and resolutions that contravene or undermine it ….arts 87.1 – first paragraph – and 92 LOTC have as their aim to guarantee the defence of the institutional position of the Constitutional Court and the effectiveness of its sentences and resolutions, protecting its jurisdictional field in the face of any later intrusion of a public power that could undermine it."

133. Thus, whilst explicitly reiterating its well established doctrine (for example in STC 135/2004) as to "*the impossibility of mere proposals subject to examination and later discussion being considered unconstitutional*" and recognising that as a matter of principle that is "*applicable to the parliamentary creation of a study group*", the Court held that that "*this doctrine has to be understood as subordinated to the special concurrent circumstances*", which the Court considered meant that the "*creation of the Commission could be understood as an attempt to give...validity to the so-called constituent process in Catalonia, the unconstitutionality of which had been declared by STC 259/2015*". In our view, this legal reasoning of the Constitutional Court contains an internal contradiction. Whilst noting that it did not have jurisdiction to consider proposals, which would later be subject to discussion, including the creation of study groups to make such proposals, the Court nevertheless accepted the Spanish Government's application, holding Resolution 5/XI to be unlawful as in breach of STC 259/2015. Thus, it said that Parliamentary activity within a study group could only be lawful if it did not give continuity and support to the aim proclaimed in Resolution 1/XI, which had been declared void by STC 259/2015. It added that the Study Group's activity could only be lawful if it "*was conditioned on fulfilment of the Constitution and, especially, of the procedure for its reform*". Accordingly, the Court not only held that the resolution was in breach of its decision in STC 259/2015 but also:

> "warned the powers involved and their officials, especially the Presiding Board of the Parliament, of their obligation to prevent or paralyse any initiative that amounts to ignoring or evading the listed mandates."

134. The Constitutional Court took the same approach in its implementation decisions ATC 170/2016 in respect of resolution 263/XI, finding that in ratifying the findings of the Constituent Study group, the Parliament acted in breach of its decision in STC 259/15 and ATC 141/2016. Accordingly, it declared that resolution null and void and issued personal warnings against the President of the Parliament, the other members of the Presiding Board of the Parliament, the Secretary General of the Parliament requiring them to

[25] Article 9 of the UK Bill of Rights 1689 provides that "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court of place out of Parliament."

abstain from carrying out any actions aimed at or involving evasion of the nullity finding and warning them of potential liability should the order be breached. Further the Court sought witness statement so that the Public Prosecutors office could consider whether the President of the Parliament, and any other persons were liable.

135. As already stated, the Court did not in the above decisions have any regard to fundamental rights. However, the only objective, which the decisions claim to pursue that might conceivably constitute a legitimate aim under Articles 10(2) and 11(2) of the ECHR, is "*maintaining the authority and impartiality of the judiciary*." The Constitutional Court does not suggest that any of the other legitimate aims were relevant. As already pointed out, territorial integrity of Spain could arguably, albeit under certain conditions, constitute such legitimate aim, but the Court did not even mention it.

136. It is far from clear to us that it was necessary or proportionate for the Constitutional Court to go so far as to restrict the issues that the Catalan Parliament could lawfully discuss, study and vote on by way of resolutions, in order to maintain the authority of the judiciary. Indeed, the Constitutional Court itself noted that it was exceptional to restrain debates within a Parliament. We therefore express real doubts that the Constitutional Court acted in a way that was necessary and proportionate in adopting measures that interfered with the free debates in Parliament and warning Parliamentarians not to debate issues. Indeed, we note the wide breadth of the warnings given by the Constitutional Court to Parliamentarians and others and the threat of criminal liability. Such an approach appears indeed to us likely to infringe the immunity of Parliamentarians provided for in Article 57.1 of the Statute of Autonomy, which provides that: "Members of Parliament are inviolable with regard to the votes and opinions they may express in exercise of their function." Furthermore, Parliamentary immunity is common to all democracies (see ECtHR, *A. v. the United Kingdom* judgment of 17 December 2002). The clear intent of the Constitutional Court was to restrict free debate within Parliament and to prohibit any discussion of the possibility of taking any steps towards independence that potentially contravened the Constitution, including procedural contraventions. That is a vast (and indeed unidentifiably wide) restriction on free speech.

137. Accordingly, in our view, the Constitutional Court's approach to the permissible limits of discussion and action within the Catalan Parliament was not in conformity with the requirements of Articles 10 and 11 of the ECHR and Articles 19 and 21 of the ICCPR. Further, we consider that serious issues also arise under Article 3 of Protocol No. 1 to the ECHR and/or Article 25 of the ICCPR (the right to elect the legislature), for the same reasons.

The legality of the criminal charges against Carme Forcadell, the Parliamentary Board and others

138. As set out at paragraphs 80 to 82 above, criminal proceedings have been lodged in relation to the conduct of Parliamentarians since October 2016. We are aware that there are other proceedings that have also been brought in relation for example, to members of the Electoral Commission. None of those proceedings have reached a conclusion. Accordingly, our views concern only to the fact that the relevant charges have been laid. The same issues arise as discussed above in relation to debates within Parliament. However, there is the additional point that the singling out of individuals, who under the Statute of Autonomy are supposed to have inviolable rights to speak freely in Parliament and to be immune from suit in that regard: see Article 57.1, raises particularly grave concerns. It seems to us that for charges to be laid against that background and having regard to the crucial role of free speech of politicians, particularly within Parliament, a very strong justification indeed would be needed, even assuming that the charges could be

said to be 'prescribed by law'. Accordingly, in our opinion the criminal charges set out above are likely to be in breach of freedom of expression and assembly rights as well as the right of the people to freely elect their legislature.

The arrest and detention of Ministers and fining of members of the Electoral Board

139. As set out in paragraphs 98 and 99 above on 20 September 2017 fourteen members of the Catalan Government were arrested and detained by the Guardia Civil for around 50 hours. On 19-20 September the Constitutional Court issued fines of €12,000 and €6000 per day on the basis that the relevant individuals had failed to comply with its warnings.[26] These fines were enforceable by the tax authorities directly against the individuals' assets.

140. We note the serious nature of these actions. Real questions arise as to whether the detentions were lawful under Article 5 of the ECHR. According to Article 5 § 1, authorised deprivations of liberty, among which "the lawful arrest or detention of a person for non-compliance with the lawful order of a court" (b), must be "in accordance with a procedure prescribed by law" (ECtHR (GC), *Del Río Prada v. Spain* judgment of 21 October 2013, § 125). The requirement of lawfulness is not satisfied merely by compliance with the domestic law; domestic law must itself be in conformity with the ECHR (ECtHR, *Pleso v. Hungary* judgment of 2 October 2012, § 59). Moreover, in the present situation, the proper information as to the reasons for the detention as required by Article 5 §2 of the ECHR remain unclear.

141. Further, as regards the fining decisions, we consider that these may well give rise to a breach of the right to a fair trial under Article 6 of the ECHR. Indeed, fines of an enormous magnitude, and likely amounting to criminal charges applying the autonomous definition in the European Court of Human Rights' constant case law (ECtHR, *Engel and others v Netherlands* judgment 8 June 1976; reaffirmed in ECtHR (GC), *Kyprianou v. Cyprus* judgment of 15 December 2005, and ECtHR (GC), *Jussila v. Finland* judgment of 23 November 2006) appear to have been handed down without the defendants being notified or heard by the Court, let alone properly represented with sufficient facilities to prepare their defence.

142. Finally, for the reasons set out in paragraphs 130-137 above we consider that the imposition of criminal charges in these circumstances is likely to violate individual rights under Articles 10 and 11 of the ECHR.

II. The criminal sanctions imposed in relation to assisting in the voluntary consultation /referendum

143. The second issue we have been asked to consider is the criminal sanctions that were imposed in relation to the holding of a 'citizen participation process'/ 9N *Consulta*, that is, a voluntary consultative process whereby the views of the public were tested. The relevant facts regarding how that vote came to take place are set out in paragraphs 37 to 42 above.

Criminal proceedings in relation to the holding of the public participation process (9N Consulta)

144. In early 2016 criminal proceedings were commenced against **Mr. Francesc Homs I Molist**, Presidential adviser and Spokesperson for the Government for the Generalitat of

[26] See footnote 23 above

Catalonia alleging crimes of grave disobedience under Article 410.1 of the Criminal Code, administrative malfeasance under Article 404 and embezzlement of public funds under Article 433. These proceedings were brought in the Supreme Court and deemed as received on 11 January 2017. The allegation was that Mr. Homs had openly refused to comply with the ruling of the Constitutional Court of 4 November 2014, referred to in paragraph 41 above.

145. The hearing took place between 27 February and 1 March 2017 and judgment was given on 22 March 2017. Mr. Homs was found guilty of the offence of disobedience under Article 410.1 of the Criminal Code, and suspended from elective office for one year and one month, with a fine of €30,000. By decision of 6 April 2017 the Supreme Court refused a request for clarification of the judgment. An appeal was lodged before the Constitutional Court on 25 May 2017 and is still pending.

146. The appeal argues that:

a. **The Defendant was deprived of his right to an effective judicial hearing, including a right to appeal, a right to produce evidence, a process that respected the presumption of innocence, the right to equality before the law and the right to freedom of expression**. The following are relied on:

i. That despite an investigation and proceedings being brought against others for the same offence,[27] which allegedly took place between 4 and 9 November 2014, the prosecutor only commence proceedings against Mr. Homs he was elected Deputy of the Cortes Generales of the Spanish Parliament/Congress, and took up his seat on 7 January 2016. This was an act of political opportunism.

ii. Further, it meant that as a result of rules on Parliamentary immunity, which Mr. Homs could not waive, [ex article 71.3 Constitution] he had to be tried in the second division of the Supreme Court from which no review appeal is available, save to the Constitutional Court. Whilst the Constitutional Court may be sufficient in most cases to comply with article 24.2 of the Constitution and Article 6 of the ECHR, Article 2 of Protocol No. 7 to the ECHR and Article 14.5 ICCPR: STC 51/1985; 55/1950, 166/1993 and ECtHR, *Saiz Oceja and Others v. Spain*, partial admissibility decision of 30 November 2004, here the relevant crime relates to alleged disobedience to an interlocutory decision of the Constitutional Court, such that those provisions are necessarily breached.

iii. The elements of the offence were modified by the Supreme Court to fit the facts contrary to Article 24 and 14 of the Constitution and 6(2) of the ECHR.

iv. The admission of evidence was unlawfully refused contrary to Articles 241.1 and 10.2 of the Spanish Constitution and Article 14.5 ICCPR.

v. Equivalent proceedings in analogous circumstances were not commenced against Spanish Government officials for disobeying Court decisions.

[27] Note that the Board of Prosecutors of the Superior Prosecutor's Office of Catalonia met on 17 November 2014 and unanimously determined that a prosecution of the President of the Generalitat and members of his Government would not be feasible because the acts did not meet the requirements of 'disobedience' under the Criminal Law. That decision was at some point and a procedure was filed against President Mas, Mrs. Ortega and Mrs Rigau. However, the Public Prosecutor's office decided not to investigate Mr. Homs. Further, when a class action suit was started, the Prosecutor issued a report, refusing to investigate Mr. Homs.

b. **That the subjective element was not proved by reference to the Defendant's state of mind but was deemed to exist by reference to external facts, in breach of the presumption of innocence.** The subjective element of the offence, namely that Mr. Homs had to be shown to have full knowledge of the need to comply was wrongly held by the Court to have been met on the basis of two factors only: (a) the Constitutional Court order suspending Decree 129/2014; (b) the appeal for reversal of the interlocutory order of 4 November, lodged by the Catalan Government on 7 November 2014. Neither of these factors can logically produce a conclusion that the Defendant had the necessary *mens rea*/subjective intent, contrary to the right to be presumed innocent.

c. **That the offence did not exist prior to the conviction of the Defendant**, since until his conviction, the case law provided that a crime under Article 410.1 required that the rule or order disobeyed be one that was specifically directed at the individual concerned.

d. **That the refusal of the Court in the course of brief provisional conclusions on 6 February 2017 to admit exculpatory evidence on the basis that the evidence was irrelevant, was in breach of his rights under Article 24 of the Constitution and Article 14.5 ICCPR**. Specifically, the refusal to admit testimonial statements from: His Excellency Mr. Mariano Rajoy Brey (President of the Government); His Excellency Mr. Rafael Catala Polo (Minister of Justice), of Mr. Eduardo Torres Dulce Lifante (General Prosecutor of the State at the time of the events) and His Excellency Mr. Franciso de los Cobos Uriel (President of the Constitutional Court). [see p. 25 for reasons these statements were relevant]

147. On 16 October 2016 criminal proceedings were commenced against **Mr. Artur Mas i Gabarró** (former President of Catalonia); **Mrs. Joana Ortega** (former Head of the Department of Governance and Institutional Relations of the Generalitat), and **Mrs. Irene Rigau i Oliver** (former Minister for Education), raising the same allegations as made against Mr. Homs. The charges were also disobedience contrary to Article 410.1 of the Criminal Code and malfeasance contrary to Article 404. These proceedings were brought in the High Court of Justice of Catalonia rather than in the Supreme Court since none of these individuals were immune from proceedings before that Court.

148. The Court found as a fact that Mr. Mas had announced the public participation process. Further, it found that Mrs. Ortega, had assumed the tasks of coordinating all public actions and provided, together with President, the different administrative procedures geared toward organising the vote, whilst "*by mutual agreement with …Mrs. Rigau, then Head of the Department of Education of the Generalitat of Catalonia, they decided that part of the schools where the voting would be held would be high schools owned by the Department…and that for the control and treatment of the vote, a set of personal computers would be used, which would be acquired for the account of the Department of Education*".[28]

149. The Court held that: "*Mr. Mas, as President of the Generalitat, not only failed to issue any type of resolution or make any announcement suspending the anticipation process scheduled for November 9, but he also, together with the defendants Ortega and Rigau, each of them within their sphere of institutional responsibility, aware that they were disobeying what is set forth in the ruling of the Constitutional Court, engaged in the following conduct that allowed the holding of the view, on the scheduled date, throughout the territory of Catalonia*." The conduct alleged to constitute 'disobedience' to the Order

[28] Judgment 1/2016 para. 4 of Proven Facts

of the Constitutional Court was as follows: (i) keeping active the official website, (ii) maintaining the institutional publicity campaign, (iii) maintaining mass mailing of official correspondence; (iv) allowing the distribution of necessary material for the vote, such as boxes, ballots etc; (v) allowing the installation of the necessary computer programmes for the vote; and (vi) in relation to Mrs. Ortega organising insurance for the 1,317 volunteer staff for the vote; (vii) making the material infrastructure available for controlling the vote and its result, (viii) providing a press centre for the provision of the official results of the vote.

150. All three were found guilty of disobedience. Mr. Mas was sentenced to two years suspension and a fine. Mrs Ortega was subject to suspension for one year and nine months and to a fine. Mrs. Rigau was subject to suspension for one year and six months and to a fine. [see p. 89 of judgment]

151. All three defendants have lodged appeals before the Supreme Court where the cases are still pending.

The relevant criminal provisions

152. The offence of grave disobedience as provided in Article 410.1 of the Criminal Code provides:

> "Authorities or civil servants who openly refuse to duly fulfil court resolutions, decisions or orders of higher authority, handed down within the scope of their respective powers and complying with the legal formalities, shall be punished with a fine from three to twelve months and special barring from public employment and office.
>
> 2. Notwithstanding what is set forth in the preceding Section, no criminal liability shall be incurred by authorities or public officers due to not fulfilling an order that constitutes a manifest, clear and absolute breach of a provision of an Act of Parliament or of any other general provision."

153. The offence of administrative malfeasance as provided in Article 404 of the Criminal Code provides:

> "The authority or public officer who, being aware of the injustice thereof, were to hand down an arbitrary resolution in an administrative matter, shall be penalised with the punishment of special barring from public employment and office for a term of seven to ten years."

The Crime of Disobedience

154. The crime of holding an illegal referendum was introduced in the Criminal Code by Organic Law 20/2003 of 23 December 2003 (art 506bis.2 of the Criminal Code),[29] but

[29] 506 bis
1. The public authority or official who, manifestly lacking the competence or attributions to do so, calls or authorize the calling of general, autonomic or local elections or plebiscites via referendums in any of the modalities set forth in the Constitution, will be punished with the penalty of imprisonment from three to five years, and the absolute disqualification for a term of three to five years that is additional to the imposed term of imprisonment.
2. The public authority or official who, without issuing the call or authorization referred to in the previous paragraph, facilitates, promotes or ensures the process of general, autonomic or local elections or plebiscites via referendums in any of the modalities set forth in the Constitution, which have been called by a person that manifestly lacks the competence or attributions to do so, once the illegality of the process has been decreed, will be punished with

was then expressly abolished and removed from the Criminal Code in 2005. Accordingly, at the relevant time of the 'offences' set out above, it was not a crime to hold a referendum. We understand that that remains the position today.

155. Accordingly, the Defendants above were not prosecuted for that offence; instead they were charged and found guilty of the offence of disobedience to an order of the Constitutional Court, as provided in Article 410 of the Criminal Code.

156. The Court has stated that the elements of the crime of disobedience are:

a. The issuance, declaration or passing of a judgment or procedural resolution, or an order by Authority or administrative official; which judgment resolution or order has been rendered by a competent judicial or administrative agency in compliance with legal procedural rules, that contains an express, specific and strict mandate to do or not to do a specific act.

b. An open refusal by the authority or official to whom the resolution or order is addressed to perform or not to perform the act mandated or prohibited respectively by the relevant resolution/order.

c. A knowledge by the Defendant of the obligation to act or not act generated by the resolution of the Court of the superior administrative agency and an intention not to comply, revealed by explicit or implicit manifestations of repeatedly disobeying the order. This element requires that the resolution or order, with all due legal formalities, was clearly notified to the person who is obliged to obey it.

Legal analysis of possible breaches of ECHR

157. We are not in the position to be able to analyse whether Article 6 of the ECHR was complied with and make no judgment on that question. However, we consider that serious issues do arise not only under Articles 10 and 11 of the ECHR but also under Article 7 (no punishment without law) of the ECHR and article 15 of the ICCPR.

158. As regards whether the criminal charges complied with the requirement that they be prescribed by law, we note that it is not criminal in Spanish Law to arrange a referendum or public consultation. In circumstances where such a criminal offence did exist and was then removed from the Statute book, real questions arise as to the legality of the Constitutional Court creating such an offence through the offence of 'disobedience' or 'contempt of court'. In our view, such a wide reading of the 'disobedience' or 'contempt of court' in effect empowers the Constitutional Court to legislate to make acts criminal that the legislature has decided should not be criminalised. Here, the Constitutional Court found that a law adopted by the Catalan Parliament to provide for a referendum in 2015 was unconstitutional and quashed that law. It subsequently held that those involved in organising a voluntary participation process committed the criminal offence of disobedience; they were in contempt of court. Whilst contempt of court is a necessary part of any judicial system, we consider that it cannot and should not be used in such a way as to write legislation that binds all state servants and officials. In that context we

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the penalty of imprisonment from one to three years and the absolute disqualification for a term of one to three years that is additional to the imposed term of imprisonment.

521 bis

Those who, in the event of general, autonomic or local elections or plebiscites via referendums in any of the modalities set forth in the Constitution which have been called by a person that manifestly lacks the competence or attributions to do so, participate as auditors or facilitate, promote or ensure its holding after the illegality of the process has been decreed, will be punished with the penalty of imprisonment from six months to a year or a fine from 12 to 24 months.

express significant doubts as to the legality, including clarity and foreseeability of the charges pursuant to which the Defendants were prosecuted.

159. Furthermore, as with the laws and resolutions in 2016-2017, discussed above, the relevant courts did not analyse the necessity and proportionality of these measures in the context of the infringements of the individuals' fundamental rights under Articles 10 and 11 of the ECHR. It follows that no legitimate aim has been referred to, nor has any assessment of the real need for criminal charges, having regard to the interferences at issue. For the same reasons as set out above, we are concerned at the disproportionate nature of the charges, and the penalties imposed. In the sphere of freedom of expression, there are clear indications of the European Court of Human Rights' resistance to the idea of excessive use of penalties (see ECtHR, *Du Roy and Malaurie v. France* judgment of 3 October 2000, § 36; ECtHR (GC), *Cumpana and Manare v Romania* judgment of 17 December 2004, § 115.

III. The Organic Law 2015 amending Organic Law 2/79 ("LOTC")

160. The third issue we have been asked to consider is the Organic Law of 2015 and the new powers that it afforded to the Constitutional Court to take action of its own motion to execute and enforce its own judgments.

The amendments brought about by the Organic Law

161. On 3 October 2015 Royal Assent was granted to Organic Law 15/2015, which provided for the amendment of Organic Law 2/1979, namely, an extension of the powers of the Constitutional Court in relation to the execution and enforcement of its judgments. Prior to those amendments the Constitutional Court already had certain powers of execution, namely Article 87, which provided that all public powers were bound by its judgments; Article 92.4, which provided for certain measures of execution in relation to its decision and Article 95 which provided for the possibility of penalties ranging from €600-3000 on any person failing to execute a request from the court within the specified time frame, which could be applied repeatedly up until the point of compliance.

162. The amendments provided by the 2015 Law added the following enforcement/execution powers.

163. First, Article 87 was amended so as to provide a power to the Court personally to notify any person or authority of its binding decision. It provides:

> 1. All public authorities are obliged to comply with the resolutions of the Constitutional Court. In particular, the Constitutional Court may order the personal notification of its resolutions to any authority or public employee when deemed necessary.
>
> 2. The Courts and Tribunals shall have as their urgent priority to provide the jurisdictional assistance requested of them by the Constitutional Court. For such purposes, the judgments and resolutions of the Constitutional Court shall be instruments of enforcement.

164. Secondly, by Article 92 the Constitutional Court was made executor of its own decisions, for which it is able to request the assistance of any public administrative. Further, the new Article 92 gave the Court significant and exceptional powers in relation to the annulment of decisions contradicting its own, without any need for proceedings on the merits; the imposition of significantly increased coercive penalties, the suspension of

officials, the power to suspend acts of its own motion and without hearing parties. It provides:

> 1. The Constitutional Court shall oversee the effective enforcement of its resolutions. It may determine within the judgment or decision, or in subsequent acts, the person or entity who shall be responsible for the execution, the enforcement measures required and, where applicable, resolve enforcement issues.
>
> The Court may also declare the nullity of any resolutions that oppose those rendered by the Court in the exercise of its jurisdiction with respect to their execution, after hearing the Public Prosecutor and the entity that issued such opposing resolutions.
>
> 2. The Court may request the assistance of any public administration or public authority in order to ensure the effectiveness of its decisions, which assistance shall be rendered with priority and urgency.
>
> 3. The parties may promote the issue of enforcement as established in section 1 to propose to the Court the adoption of the necessary enforcement measures to guarantee the effective enforcement of its decisions.
>
> 4. If it becomes aware that a resolution rendered in the exercise of its jurisdiction is not being complied with, the Court, of its own volition or at the request of any of the parties to the proceeding where it was rendered, shall require of the institutions, authorities, public employees or private persons responsible for such compliance to render a report to the Court within the term the latter establishes. Once the report is received or upon the expiration of the term, should the Court find that its decision is being totally or partially disobeyed, it may adopt any of the following measures:
>
> a) The imposition of a coercive fine of three thousand to thirty thousand Euros to the authorities, public employees or private persons that fail to comply with the resolutions of the Court, able to reiterate the fine until they fully comply with the resolution.
>
> b) The ordering of the suspension of the authorities or public employees of the Administration responsible for the disobedience, from their duties, for the time required to ensure compliance with the decisions of the Court.
>
> c) The substitute enforcement of decisions delivered in constitutional processes. In this case, the Court may request the cooperation of the National Government so that, within the terms established by the Court, the necessary measures are adopted to ensure compliance with such decisions.
>
> d) Require the timely testimony of private persons to establish the corresponding criminal liability.
>
> 5. Under circumstances of special constitutional transcendence, in the case of the execution of resolutions ordering the suspension of the challenged provisions, acts or actions, the Court, of its own volition or at the request of the Government, shall adopt the necessary measures to ensure proper enforcement without hearing the parties. In this same resolution, it shall grant a hearing for the parties and the Public Prosecutor's Office for a common term of three days, after which the Court shall render a resolution lifting, confirming or modifying the previously adopted measures.

165. Thirdly, the Law introduced into Article 80 the ancillary application of the Contentious Administrative Jurisdiction Act. Article 80 provides:

> "As a supplement to this Law, the precepts of the Organic Law of the Judiciary and the Criminal Procedure Act shall apply, in the matter of appearance in court, recusal and abstention, publicity and form of the acts, communications and acts of jurisdictional assistance, business days and times, computation of terms, deliberation and vote, expiration, waiver and withdrawal, official language and bailiffs.
>
> In the matter of execution of resolutions, as a supplement to this Law, the precepts of the Law of Administrative Disputes Jurisdiction shall apply."

166. These amendments were challenged by the Basque and Catalan governments in two different cases on the basis that the 2015 Law was not adopted in accordance with the correct procedure (the abridged legislative procedure was used whereby the State Council, the General Council of the Judiciary and the Prosecutor Council were not able to provide reports on the proposed Law) and was in any event unlawful, as contrary to the Constitution. In summary, it was argued in the Basque case that the Law attributed competences to the Constitutional Court that were impermissible having regard to the relative powers of constitutional bodies (Articles 161, 164 and 117.3 Constitution); breached the principle of criminal legality (Article 25); was contrary to the provisions relating to the granting of privileges (Articles 71, 102 and Article 32 of the Statute of Autonomy of the Basque region); contrary to the fundamental right to participate in politics (Article 23 Constitution); contrary to the principle of political independence for the Autonomous Communities (Article 143 and 155 Constitution).

167. The Constitutional Court gave judgment in the Basque case on 26 April 2016 [Case 85/2016]. It rejected the challenge holding that whilst the Constitution did not explicitly provide for the Constitutional Court to have self-executing powers:

> "[t]he Constitutional Court has been configured in the Constitution as an authentic jurisdictional body exclusively entrusted with exercising constitutional jurisdiction, which is why, as a quality inherent to the administration of (constitutional) justice, the Court also holds one of the powers making up the exercise of this competence: the enforcement of its resolutions, given that the judge should also be able to ensure that its decisions are performed. Otherwise the Court, the only one of its kind, would lack one of the essential characteristics of its jurisdictional function and, consequently, the necessary power to guarantee the supremacy of the Constitution (Art. 9.1 CE), as its supreme interpreter and ultimate guarantor (Art. 1.1 LOTC)". (PAGE 40)

168. Further, the Constitutional Court rejected the submission that the power of suspension was the power to impose a criminal penalty. It stated:

> "… the fact that the authority or public official suspended from office may not carry out that office does not indicate its punitive nature. Nor is it determinative that suspension can be a sanction in disciplinary laws applicable to civil servants, or as a punishment in the Criminal Code…
>
> The purpose of the measure is not to inflict punishment in light of illegal or illicit conduct, as would be the failure to fulfil the duty binding all public powers and citizens to fulfil.
>
> The legislator of the organic law of the Constitutional Court, further to the broad entitlement conferred by the reservation in favour of laws foreseen in Art. 165 CE, has

configured in Art. 92.4 b) LOTC a measure to suspend authorities or public officials from office, as a measure intended to ensure the full enforcement of Constitutional Court resolutions, by removing the party that is hindering their due observance, i.e. the authority or public official in charge of fulfilling the resolution that, however, is reluctant to do so and persists in this attitude. This necessary removal to stop the hindered fulfilment of the resolution will allow the Court to adopt the necessary and pertinent measures in each case to guarantee its effectiveness. Thus, no matter how serious the consequence of the suspension measure in dispute, for the authority or public official subject to the same, for the time necessary to ensure that the Court's pronouncement is observed, the purpose is not strictly of repression, retribution or punishment- characteristics of punitive measures- but to respond to the need to guarantee the effectiveness and fulfilment of Constitutional Court resolutions, binding all public powers and citizens". [pp. 49-50]

169. In one of the dissenting opinions, Magistrate Adela Asua Batarrita noted that the restrictions on the Constitutional Court provided in the Constitution, in particular its lack of executive powers, had been deliberated, deriving from the Constitution of 1931 and the models provided by the German and Italian Constitutions. Further, she noted that the Court had failed to tackle a fundamental aspect of the challenge, namely whether suspension of the functions of a President of a Parliament or of another authority, was compatible with the fundamental right to exercise public office as provided in Article 23.2 of the Constitution and the inviolability of Parliament as provided in Article 66.3 of the Constitution and several Statutes of Autonomy. As regards the power in Article 92.4 of the LOTC to suspend public servants in order to secure enforcement of its decisions, she noted as follows:

> "..affording the Constitutional Court power of a materially penalising character as in respect of authorities and public servants, even when exercised in respect of behaviour related non-compliance with resolutions of this Court, breaches the typical character of the Constitutional Court, as a body of a jurisdictional nature whose competences extend to the control of norms, to the resolution of conflicts and to the guarantee of the fundamental rights. This Court, unlike those established in the Constitutions of other States, lacks competences for criminal, or constitutional or legal infringement proceedings, against officers of constitutional bodies, of the higher bodies of the Autonomous Communities or of other authorities and public servants…. this without forgetting the delicate constitutional implications that would be created by the suspension of authorities whose legitimacy comes directly or indirectly from the ballot". (p.7)

170. Moreover, referring to the doctrine from the case of *Engel* in the European Court of Human Rights, and the case of *Le Compte, Van Leuven and De Meyere v Belgium* of 23 June 1981, she noted that the purpose pursued by the sanction (suspension) could not be determinative of whether the sanction was punitive. She noted that:

> "in Spanish legal legislation, there is no suspension of functions…that does not have penalizing (disciplinary) or criminal nature. Secondly, our procedural legislation does, [including] in the regulatory Law of the contentious-administrative jurisdiction… Third…, as far as we know, in general no law in similar States to ours where constitutional jurisdiction exists, provide for the suspension of functions of authorities and public servants as an instrument for ensuring compliance with the constitutional resolutions". (p. 10 – check translation – I had to re-write)

171. A further dissenting opinion was provided by Magistrate Fernando Valdés Dal-Ré, who considered that Article 92.4(b) and (c) should have been held to be unconstitutional.

Magistrate Juan Antonio Xiol Rivers also dissented in relation to the same provisions. In his opinion, measures of suspension involved not enforcement but "*the repression of behaviour or reluctance to comply with a resolution…this measure of suspension becomes boundless in time when linking it not to the resolution having been definitely fulfilled, but with the need that the authority or public servant ceases in his will not to comply*". Further, he noted that the Article 92.4 effectively handed over to the Constitutional Court executive functions in dealing with conflicts within the state, thus compromising its role as a body intended to guarantee the Constitution. In effect, he considered that the Constitutional Court had been afforded with powers that were intended to be exercised by the Government."

172. The judgment in the Catalan challenge was given on 15 December 2016 (despite the proceedings having been commenced prior to the Basque challenge), upholding the Law: Case 215/2016. The same three judges as set out above gave dissenting opinions. Magistate Juan Antonio Xiol Rivers noted that the 2015 amendments, which it was said had been introduced to 'deal with new situations' had been introduced specifically to deal with the position in Catalonia:

> "..it may be readily inferred that these new situations intending to avoid or ignore the effectiveness of Constitutional Court resolutions are directly related to various decisions adopted by the *Generalitat*, to particularly include the Catalonian Parliament". … [This] is clearly linked to the "constituent process in Catalonia" ["procés constituent a Catalunya"], and exclusively aimed at endowing the Constitutional Court with the necessary instruments to face what it considers Catalonia's defiance in refusing to follow its resolutions.
>
> The intervention made by the Parliamentary Group, behind this legislative initiative, is unequivocal. It states that "actual facts have evidenced that the level of non-fulfilment and defiance of [Constitutional Court] resolutions have been gradually increasing; and it is obvious that this situation has arisen nearly at the same time as the secessionist movement in Catalonia, exclusively aimed at destroying Spain". (pp. 69-70)

Legal analysis

173. Articles 87 and 92 of the LOTC as amended by Organic Law 15/2015 provide the Constitutional Court with a vast potential power, enabling it to take steps to ensure the effective implementation of their judgments, which may be wide ranging in scope and potential impact. It is clear from the actions of the Constitutional Court in relation to resolutions of the Catalan Parliament and its sanctions against individuals, including members of the Government that whether or not as a result of the amendments in Organic Law 15/2015, the Constitutional Court in Spain has now taken on functions that extend beyond the normal role of a Constitutional Court in assessing the legality or constitutionality of particular measures.

174. It is clear from its decisions that it now considers its function to be much wider than that and importantly, to encompass an obligation to enforce its judgments on the constitutionality of issues relating to independence in such a way to "maintain the Spanish state". As such, its rulings have taken on a political and legislative function, to which it has given effect through its executive enforcement powers. We are concerned that this involves overreach that threatens the core pillars of a democracy: the separation of the legislature, the executive and the judiciary.

175. We have already alerted to the dangers that this entails for the requirement that any measure restricting fundamental rights must be prescribed by law, see paragraphs 115 and 124 above.

176. Finally, we note that the Venice Commission provided a Report in relation to the Law on 13 March 2017.[30] In that Report, the Commission states that it was informed during its meetings in Madrid that "the new procedure under the Amendments to the LOTC was likely to be invoked before measures were taken as a last resort under Article 155 of the Constitution, which enables the Government, following approval by the Senate, to take all measures necessary to compel the self-governing community concerned to meet its obligations or to protect the general interest."[31] This statement raises potential concerns about the use of a Constitutional Court enforcement procedure as a means of controlling political action and the difficulties that the amendment to the Organic Law raises, in so far as it may link political and judicial action, as we have alerted to above.

177. As the Venice Commission notes, the task given to the Constitutional Court under Article 92 of the LOTC (as amended) is exceptional for European Constitutional Court and that this task is usually attributed to other state powers.[32] "While some Courts have the task of monitoring the execution of their judgments or may assign the task of execution to a specific organ or body, no other Court seems to have the overall responsibility of ensuring the execution of its judgments itself." Accordingly, it recommended that:

> "Attributing the overall and direct responsibility for the execution of the Constitutional Court's decision to the Court itself should be reconsidered, in order to promote the perception that the Constitutional Court only acts as a neutral arbiter, as judge of the laws."

178. We agree with that view.

179. Further, the Venice Commission noted the five-fold increase in fining power under the LOTC and the lack of clarity in the law as to who is potentially liable to pay such penalties for non-compliance, noting that the LOTC should "provide for different treatment when penalty payments concern respectively public authorities, office holders and individuals."[33] Moreover, whilst the Constitutional Court claims that the penalties do not have a criminal character, the Commission rightly notes that under the ECHR in so far as the measures affect private individuals they are criminal in nature because of their severity.[34] We agree with the Venice Commission on all these points. It follows that where such sanctions are imposed, the full protection of Article 6 is required, which again, the Venice Commission rightly sets out.[35]

180. Further, the Venice Commission notes with serious concern the suspension powers available to the Constitutional Court and the impossible contradiction caused by a temporary suspension measure, which is subject to the relevant individual executing the relevant decision of the Constitutional Court. As noted, in the case of suspension, the power of the public official to execute the relevant decision is removed.[36]

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[30] http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)003-e
[31] Se §12. On 21 October 2017 the Spanish Government invoked Article 155 of the Constitution and suspended Catalonia's Government.
[32] §§38 and 71
[33] §47
[34] §49.
[35] §50
[36] §58-59

181. In addition, there is perhaps the even more important point that the suspension of members of Parliament interferes with democracy and contradicts the inviolable nature of their position, as guaranteed by Article 71 of the Constitution. At the time of its report, the Commission recorded the Government contention that the suspension power would not be used:

> "The Government Comments point out that with the exception of administrative-parliamentary duties as member of the Bureau of Parliament, the Amendments do not envisage the suspension of Members of Parliament. However, as pointed out above, the wording of the Amendments remains imprecise."

D. CONCLUSION

182. This Opinion was commissioned before the crisis that has engulfed Spain following the voting that took place on 1 October. We are conscious therefore that there are significant issues that remain to be resolved, not least the violence that took place at the hands of the Spanish police on 1 October 2017 and the likely infringements of Articles 3 and 8 of the ECHR.

183. Nevertheless, our objective in providing this Opinion has been to set out the legal issues in the run up to the referendum on 1 October. In summary, we consider that numerous issues of serious concern arise as regards Spain's compliance with provisions of European and International human rights law. In summary, we consider that:

184. In taking measures to control and restrict debate in the Catalan Parliament and its adoption of non-binding Resolutions, as well as the bringing of criminal charges against officials and politicians for their involvement in Parliamentary decision-making, the Spanish Government and the Spanish Constitutional Court interfered with the rights both of those elected to represent people in Catalonia, and of the electors, who had a right to the free expression of their will within Parliament. We do not go so far as to say that restrictions on free speech could never be justified, and as set out in paragraph 1 of our Executive Summary, it is clear that the Spanish state has the right to respond within the confines of its Constitution, subject to compliance with international human rights norms. We are concerned however, in that regard, as to the lack of analysis by the Constitutional Court of the necessity or proportionality of the measures it took. In addition, we consider that there are real questions as to whether the measures taken by the Constitutional Court were based on sufficiently clear and precise laws, so as to comply with the 'prescribed by law' requirement in Articles 10, 11 and Article 3 of Protocol No. 1.

185. The same applies in relation to the criminal charges brought in relation to the holding of the 9N Consulta in 2014. Whilst we are not in a position to express a view regarding compliance with the Defendants' fair trial rights, we do consider that there was insufficient clarity as to the nature and existence of the relevant offence. In circumstances where there was no offence of holding a referendum because the legislature had in 2005 repealed just such an offence, its creation through the use of the 'crime of disobedience' raises issues as to clarity of law in the context of interferences with freedom of expression and assembly that such charges necessarily entailed, and also as to the retrospectivity of criminal charges, prohibited by Article 7 of the ECHR. Moreover, we question whether such sanctions can be legitimate, necessary and proportionate when viewed in the context of the right to freedom of expression and assembly.

186. Finally, having reviewed the amendments to the LOTC enacted in 2015, we agree with the concerns of the Venice Commission regarding these provisions. For the Constitutional Court to have powers to enforce its own judgments is exceptional in Europe. It is problematical in so far as it involves the Court in executive as well as judicial functions, and moreover, as shown here, potentially engages the Court in a legislative function.