

assemblea

Barcelona, 15 October 2020

Elisenda Paluzie
President of the Catalan National Assembly
Catalan National Assembly
Marina 315, Barcelona

Ms. Ursula von der Leyen
President of the European Commission
European Commission
Rue de la Loi/Wetstraat 200
1049 Brussels

Dear President von der Leyen,

My name is Elisenda Paluzie, and I am addressing you as the president of the Catalan National Assembly. You may recall my previous communication sent to you on the 17th of July, for which, incidentally, no reply reached me. The purpose of this letter is to convey our organization's bitter disappointment with the chapter on Spain in the European Commission's 2020 Rule of law report, published on the 30th of September.

The report not only fails to denounce the poor state of the protection of human rights in Spain, but we regret to observe that the European Commission, despite stating their gratitude "for the valuable contribution which helped in preparing the Report" did not include the input of 14 civil society organizations and institutions representing the Catalan minority, from the Catalan Ombudsman to the Catalan National Assembly, thus effectively ignoring the representation of 7,5 million European citizens.

In that sense, we feel obliged to reiterate that during the United Nations Universal Periodic Review on Spain, not only were the inputs on the situation in Catalonia then taken into account in the UN reports, but over 110 countries brought up questions and recommendations regarding the deterioration of protection of human rights in Spain. More importantly, 23 states, among them eight EU members, took the opportunity to address the violations of civil and political rights in Spain in the last five years, in relation to the repressive actions of Spanish authorities against the Catalan minority.

The deterioration of the situation of human rights in Spain, including the rights of freedom of expression, assembly and association, as well as the right to self-determination, is extremely alarming, and therefore, we find the European Commission's lack of consideration of these facts of acute concern.

Fittingly, this week is exceptionally important, since October 14th marks the first anniversary of the prison sentences against the Catalan leaders, and October 16th the third anniversary of the imprisonment of the civil society leaders -former Catalan National Assembly President Jordi Sánchez and President of Òmnium Cultural Jordi Cuixart- which the UN Working Group on Arbitrary Detentions denounced as arbitrary, and demanded their immediate release, which the Spanish authorities have ignored. The same day marks the first anniversary of the on-going pre-

trial detention of Spanish peaceful activist Dani Gallardo for demonstrating in Madrid in favour of the Catalan self-determination movement.

Moreover, today is the 80th anniversary of the execution of Catalan president Lluís Companys, a fact that the Spanish authorities have not apologized for despite it being the result of an unlawful Francoist political court martial.

As representatives of civil society, we must insist on the pressing importance of the facts that we the Catalan National Assembly, as well as the other 13 institutions and civil society organizations, have denounced, and how relevant they are for the rights of the Catalan minority and the rule of law. Many of these transgressions have deeply affected the political status quo in Catalonia, not only by deposing the government and imprisoning elected leaders -sentencing them to up to 13 years in prison for organizing a self-determination referendum- but also due to the violent repression against peaceful demonstrators in the streets, creating a chilling effect on political participation in Catalonia.

Furthermore, during the UN Universal Periodic Review to Spain, several organizations and member states recommended carrying out independent and impartial investigations into the excessive force used by security forces, establishing the corresponding criminal responsibilities and setting up a commission of inquiry.

Various stakeholders also recalled that, according to human rights mechanisms, “the overbroad definitions of terrorism-related offences, entailed in Law 4/2015 could pave the way for a disproportionate or discretionary enforcement of the law by authorities, an issue which has not been addressed by Spain”. In 2015 the UN Special Rapporteur on the right to freedom of expression, David Kaye, had said that “the wording of the law is problematic and the crimes, as defined, could criminalize those who convene peaceful demonstrations.”

Organic Law 4/2015, infamously known as the “Gag Law”, has been used by the Spanish judiciary to arbitrarily prosecute ordinary citizens on grounds of terrorism, as has been denounced by international human rights NGOs such as Amnesty International, Human Rights Watch and Article19, but also by institutions such as the Council of Europe and the United Nations, among others.

All these repressive actions are perpetrated especially against a national minority. In this regard, in March 2020, the UN’s Special Rapporteur on Minority Issues Fernand de Varennes denounced that the judicial persecution of Catalan political prisoners was aimed to intimidate them because of their political views, and added that “Spain has a legal obligation to protect the rights of the Catalan minority, especially with regard to freedom of expression, including political expression, as well as freedom of assembly and association, fundamental rights and participation in public life.”

The Spanish authorities have not addressed any of the previous recommendations. Their lack of respect for the rule of law only equates their inclination to summon it at every turn. Every human right violation committed by an EU member state erodes the legitimacy of the European institutions to criticize these practices in countries outside the Union, and acts as a precedent for countries inside and outside of the Union to justify their own transgressions.

With all this in mind, the Catalan National Assembly requests that the European Commission release a revised document of the country chapter of Spain in the 2020 Rule of Law report, taking

into consideration the evidence on the poor state of the rule of law in Spain, and including the input of the representatives of civil society.

The Spanish authorities' violations directly affect the foundations of European legitimacy. Where is article 2 of the Treaty of the European Union? If the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities are not respected, then the European project itself is in danger.

I would like to remind you of an article published at the Neue Zürcher Zeitung, titled "Ist Spanien ein «failed state» – und wie soll die EU mit seinem Mitglied umgehen?" (see Annex 1). European public opinion is becoming aware that the mismanagement of the COVID19 pandemic is taking place in a country endemically plagued by unresolved conflicts, blocked by political instability and confrontation in the government, in which Catalonia is a key player. The 4th ranking economy of the eurozone cannot save itself, and the consensual unity and efficacy needed to manage COVID aid is lacking.

I have taken the liberty to include below (Annex 2) the main recommendations of the Catalan National Assembly submitted for the 2020 Rule of Law Report. The accountability of EU member states falls on supranational institutions such as the European Commission, and European citizens need to know that their representation is taken into account if they are to trust these institutions.

Sincerely yours,

A handwritten signature in blue ink, appearing to read 'Paluzie', with a long horizontal line extending to the right.

Elisenda Paluzie

ANNEX

1. See Article by Friedrich L. Sell for the Neue Zürcher Zeitung "Ist Spanien ein «failed state» – und wie soll die EU mit seinem Mitglied umgehen?": <https://www.nzz.ch/meinung/eine-eu-finanzhilfe-fuer-spanien-ist-derzeit-nicht-verantwortbar-ld.1579042>

2. Inputs of the Catalan National Assembly for the European Commission's 2020 Rule of Law Report

- Appointment and selection of judges and prosecutors

The selection of judges and prosecutors to the Spanish General Council of the Judiciary, currently appointed by Parliament under a quota agreement between the main political parties, has been under political deadlock, with key positions still being occupied despite having expired over two years ago.

The current Chair of the Supreme Court's second chamber, Mr. Manuel Marchena, very close to the People's Party, was responsible for sentencing Catalan civic and political leaders to up to 13 years in prison for organizing a self-determination referendum (an activity which was dropped from the Criminal Code in 2005, and has been key in establishing "lawfare" as the main tool to stifle political dissidence by national minorities.

The membership of the Constitutional Court, supposedly independent from other State institutions, including the judiciary, has also been criticized because most of its members have direct or even open ties with one or other of the two main Spanish political parties. In recent years, this Court has become increasingly involved in political issues, especially during the Catalan struggle for self-determination, which led the Spanish Parliament to give special powers, later condemned by the Venice Commission.

- Promotion of judges and public prosecutors

The General Council of the Judiciary is a constitutional collegiate, autonomous body, composed of judges and other jurists, who exercise government functions within the Judicial [sic] with a view to guarantee the independence of the judges during the exercise of the judicial function before everybody.» (<http://www.poderjudicial.es/cgpj/en/Judiciary/General-Council-of-the-Judiciary/>). As the Council of Europe *Group of States against Corruption (GRECO)* has stated on several occasions, the process of promotion and election of judges is highly politicized.

In a report published in 2014 GRECO highlighted the importance of the legislative branch not being involved at any stage in these selection processes, precisely in a context of "increasing" cases of corruption. In its following reports, released in October 2016 and January 2018, GRECO highlighted the absence of "objective criteria" and "evaluation requirements" in the current model in Spain.

In 2018, a leak of mobile phone messages from the People's Party spokesman in the Senate, Mr Ignacio Cosidó, revealed his celebration after his party and the Socialist party had agreed

on the new composition of the Council, promoting Mr Manuel Marchena to Chair of the CGPJ and of the Supreme Court, stating they were also in control "behind the scenes" of the Supreme Court's second chamber.

- Allocation of cases in courts

The 2019 trial against the Catalan civil and political leaders was held in the Spanish Supreme Court in Madrid, despite the alleged crimes having been committed in Catalonia and all the defendants having lost their parliamentary immunity. Pursuant to the current legal framework, this case should have been heard in the High Court of Justice of Catalonia.

These are the fundamental rights violated by this decision, according to human rights specialists: (1) violation of the right to address the ordinary judge established by law, (2) the violation of the right to a fair trial, (3) the violation of the right to second instance, (4) the infringement of current penal legality, (5) the violation of the right to a legal defence (taking into consideration that all the accused were already jailed in Catalan prisons) and, finally, (6) their right to a trial in their own language. Likewise, the defence attorneys highlighted judicial decree 12/11/2014 which already established court competences in such territorial-based cases.

Despite this legal framework, previous case law and these violations of rights, the Supreme Court declared itself competent to judge the Catalan political prisoners corresponding to the crimes of which they were accused. This decision was later criticized by the United Nations Working Group on Arbitrary Detentions in special report 6/2019.

- Judicial independence

The body tasked with safeguarding judicial independence in Spain is the General Council of the Judiciary. As mentioned before, due the political links to the election of the members of this body, it has come under criticisms for its lack of neutrality, which is also apparent in the Constitutional Court. The Spanish Constitutional Court is responsible for the protection of rights and liberties included in the Spanish Constitution as well as confirming the constitutionality of all laws promulgated by the State.

The Constitutional Court's rulings have often been socially perceived as biased, especially when dealing with the Catalan autonomous government. In a decision taken in June 2010, this court declared a considerable number of articles included in the 2006 Statute of Autonomy of Catalonia unconstitutional. The same articles, although deemed unconstitutional, have been replicated in other regions' Statutes without any legal consequences.

In line with Spanish political interests, this court has been unleashing an unprecedented number of appeals against Catalan laws. Dozens of Catalan legislative initiatives have been declared unconstitutional, from laws on energy poverty to climate change. Most recently, the Constitutional Court endorsed application of Article 155 of the Spanish Constitution in Catalonia, effectively depriving this region of any real autonomy. This criticism has extended beyond national minorities, as several Spanish legal experts are also calling for an urgent reform of this Court.

- Independence/autonomy of the prosecution service

The criticism of the independence of the Spanish judiciary also extends to the Prosecutor's Office. Most recently, in November 2019, while Spanish President Pedro Sánchez was campaigning to be re-elected, he promised was to capture and extradite back to Spain former Catalan President Carles Puigdemont, exiled in Belgium. When questioned by journalists about his promise being ethically and legally appropriate, Mr Sánchez replied that the prosecution office is controlled by the executive.

Most of the recent scandals involving the prosecution service are related to the Catalan struggle for self-determination. The prosecution accused the Catalan political prisoners of crimes such as sedition, rebellion and embezzlement, despite providing no material evidence or legal basis for this other than highly biased police reports. Dozens of international organizations protested that the 25-year sentences requested by the Prosecutor's Office were more suited to authoritarian regimes than to a democracy.

The lack of independence in the Spanish judiciary and its high level of politicization have a negative impact on the standards of human rights protection, as has been shown by the violation of fundamental rights of the Catalan political prisoners, denounced by several international organizations such as Amnesty International.

In a public manifesto published on 19 November 2019 Amnesty denounced the violation of the right to presumption of innocence, the lack of violence during the events cited by the prosecutors, and the vaguely defined felonies of sedition and rebellion, which led to arbitrariness in the sentences. The organization considers the judgment a direct threat to the rights of peaceful demonstration and freedom of expression.

On 14 October 2019, the International Commission of Jurists published another warning about the threats to the rights of freedom of expression, assembly and association created by the sentence for the Catalan leaders. Following similar reasoning to Amnesty International, it denounced the arbitrariness of the crime of sedition as well as the procedures applied to the accused. The organization also stressed the obligation on Spain to respect the freedom of political expression, under Article 10 of the European Convention on Human Rights and Article 19 of the International Covenant on Civil and Political Rights.

In the 35th session of the Universal Periodic Review (UPR) in January 2020 a total of 22 delegations addressed the violations of civil and political rights in Spain over the last five years. In 2018 the UN Special Rapporteur on the Right to Freedom of Opinion and Expression voiced concern about the arrest of the Catalan civil leaders, considering it directly related to their calls for peaceful demonstration. He also expressed concern about the charges of rebellion being disproportionate and incompatible with Spain's obligations towards international human rights standards.

The UN Working Group on Arbitrary Detention published opinions 6/2019 and 12/2019, both concerning the detention of Catalan civil and political leaders. These confirmed that the acts for which they are imprisoned were an exercise of freedom of opinion, speech, assembly, association and political representation. Not only that, but the Working Group noted that some of the accused had been requested to renounce their pro-independence activism in exchange for their release. In conclusion, it demanded that the Spanish State

release all the prisoners, offer proportionate compensation and investigate all the violations of fundamental rights.

- Independence of the Bar (chamber/association of lawyers)

During the trial of the Catalan civil and political leaders, journalists contacted different lawyers' associations in order to gather their opinions on the procedure. Unfortunately, none of the reporters' requests were answered. Some lawyers believe that was pressure from the State authorities to control the judicial narrative.

What is more, the Commission for the Defence of People's Rights, part of the Barcelona Bar, published a letter criticizing the Bar's silence on the trial. They denounced discriminatory treatment towards the defendants, tolerance from Judge Marchena towards testimonies by police officers, as well as his authoritarian and arbitrary approach. Ms Maria Eugènia Gay, president of the Barcelona Bar, announced that this letter was "far from reality", without even allowing a basis for a debate.

Mr Gonzalo Boye, lawyer of exiled Catalan President Mr Carles Puigdemont, has been the victim of numerous threats by Spanish nationalists. Despite this, the Madrid Bar to which he belongs has denied him any kind of protection. Also, while Spain was requesting a European arrest warrant against the Catalan leader and the former government in exile, Mr Boye's offices were searched by the police based on alleged evidence of money laundering. On another occasion, Mr Boye was fined by the Spanish judiciary for demanding the publication of the minutes of meetings of the Central Electoral Board. Worse still, unknown individuals twice broke into his office overnight, stealing valuable legal information relating to his clients.

All these events demonstrate the difficulties facing the legal defence of political dissidents in Spain, as well as the lack of protection by the Bar of other members of the profession opposing public prosecutions of politicians and activists.

- Significant developments capable of affecting the perception that the general public has of the independence of the judiciary

This lack of independence is a perception shared by most of the Spanish society, as shown by the European Commission "EU Justice Scoreboard 2019" report. According to this paper, Spain is the fourth EU country from the bottom in judicial independence perception, with 55% of Spaniards considering it "bad or very bad".

The judicial process against the Catalan civil and political leaders has been another example of the crisis in the Spanish judiciary. In December 2017, the at that time Deputy Prime Minister of the Spanish government, Soraya Sáenz de Santamaría, boasted publicly that Mariano Rajoy's government had "decapitated" the leadership of the Catalan pro-independence movement, in a clear reference to the pretrial detention that was applied against the Catalan civil and political leaders. In addition, the far-right party Vox acted as public accusation, using the courts to give a successful impulse their electoral campaign, thanks to which they became the fifth largest political party in the Spanish Congress of Deputies.

Spanish media have also followed the State narrative, neither giving any opportunity to the defendants' views nor making any criticism of court independence. The Supreme Court judges were non-forgiving with the defendants, and openly sympathetic with the state officials testifying in the trial. Overall, it has proven a significant show of the lack of independence in their courts, especially when dealing with national minorities.

- Discrimination against national minorities

Another widespread case of discrimination in the Spanish judiciary has been the use of minority languages. Despite Article 3.2 of the Spanish Constitution conferring official status on languages like Catalan and Basque in the territories where they are spoken), alongside Spanish, the day-to-day practice bears no relation to this legal status. This is especially true of law enforcement and the judiciary. In this sense, there are no requirements for public officials in the judiciary to learn the co-official languages. Minority languages are allowed in regional courts only, being forbidden in the Supreme Court and other State institutions.

In this sense, a recent report by the UN Special Rapporteur on minority issues (Dr Varennes) reports his concern about the linguistic rights of the Catalan minority. From a Constitutional perspective, Varennes notes a number of omissions in the Spanish human rights legislation that may have a negative impact on minorities in particular, such as Article 14 of the Constitution and Article 23 of Organic Law No 4/2000, both dealing with equality and non-discrimination, which contain a limited number of grounds for prohibited distinctions that do not include language, an omission that is potentially inconsistent with a number of international treaty obligations for which this characteristic is fundamental. This could be of concern in relation to possible discriminatory practices against linguistic minorities.

In the areas inhabited mainly by linguistic minorities such as Catalonia, judicial interpretation and other developments have generally led to increasing obstacles to the use of minority languages in a range of public services. Article 231 of the Organic Law on the judiciary has been identified as one of the obstacles to the full implementation by Spain of its human rights obligations in relation to the use of co-official minority languages, since it stipulates that in judicial procedures, judges, magistrates, prosecutors, clerks and other officers are to use Castilian, and that co-official (minority) languages will be allowed only if no party objects. In most cases, this has led to criminal, civil and administrative judicial authorities proceeding officially in Spanish.

- Measures regarding the framework for civil society organizations

Since even before 2017 civil society organizations have been the target of administrative and judicial prosecution in Spain, along with their leaders. The former president of the Catalan National Assembly, Mr Jordi Sànchez, and the president of Òmnium Cultural, Mr. Jordi Cuixart, are also serving prison sentences despite calling for strictly peaceful protests.

In May 2019, the United Nations Working Group on Arbitrary Detention declared that their detention was arbitrary, in that it contravenes Articles 2, 9 to 11, and 18 to 21 of the Universal Declaration of Human Rights and Articles 3, 14, 19, 21, 22 and 25 of the International Covenant on Civil and Political Rights, and is registered in categories II, III and V.

In a similar vein, in his March 2019 report the United Nations Special Rapporteur on minority issues, Dr Fernand de Varennes, joined other Special Rapporteurs who had already expressed grave concerns about restrictions placed on civil society protesters belonging to the Catalan minority, about criminal charges against them, and the subsequent trials and sentences.

On the Catalan minority civil leaders imprisoned in connection with the October 2017 referendum, Varennes states that, as the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression also points out, non-violent political dissent by minorities should not give rise to criminal charges, since such restrictions should only be imposed where they are strictly necessary and proportionate.

In this regard, the Special Rapporteur on minority issues agrees with the conclusions drawn by the Working Group on Arbitrary Detention in its opinion No 6/2019. He notes the Working Group's conviction that the purpose of the criminal charges brought against those individuals was to intimidate them because of their political views.