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Should politicians be prosecuted for statements made in the exercise of their mandate?

Committee Opinion¹

Committee on Equality and Non-Discrimination

Rapporteur: Mr Pere LÓPEZ, Andorra, Socialists, Democrats and Greens Group

A. Conclusions of the Committee

1. The Committee on Equality and Non-Discrimination welcomes the draft resolution prepared by the Committee on Legal Affairs and Human Rights.
2. The committee supports in particular the notion that a particularly high level of protection of politicians' freedom of speech and freedom of assembly is required to ensure that politicians freely exercise their mandates. This applies to all politicians, from parliamentarians to members of elected bodies at local, regional, and national level, as well as those who are active in politics without an official mandate. Enforcing these fundamental freedoms is instrumental in protecting human rights, democracy, and the rule of law.
3. The committee underlines that freedom of speech and freedom of assembly and association must be protected and applied without discrimination based on any ground, as required by Article 14 of the European Convention on Human Rights (ETS No. 5). Preventing and sanctioning discrimination in the enforcement of these fundamental freedoms contributes to ensuring the high level of protection needed.
4. The committee takes the opportunity offered by the draft resolution prepared by the Committee on Legal Affairs and Human Rights to draw attention to the relevance of the Framework Convention for the Protection of National Minorities (ETS No.157), promote its enforcement and call on Council of Europe member States to sign and ratify it if they have not already done so.
5. In the light of the above, the committee wishes to propose several amendments aiming at strengthening the draft resolution and at integrating additional details in the information that it presents.

B. Proposed amendments to the draft resolution

Amendment A (to the draft resolution)

In paragraph 3, after the word "unlimited", insert the following words:

“, and should be enforced while ensuring full respect of the rule of law.”

Explanatory note

The amendment aims to highlight the importance of the rule of law, in addition to freedom of speech which is mentioned in paragraph 3.

1. Reference to committee : [Doc. 14802](#), Reference 4428 of 1 March 2019. Reporting committee: Committee on Legal Affairs and Human Rights. See [Doc. 15307](#). Opinion approved by the committee on 17 June 2021.



Amendment B (to the draft resolution)

After paragraph 5, insert the following paragraph:

“The Assembly considers that freedom of expression and freedom of assembly and association must be enforced without discrimination on any grounds, as stipulated by Article 14 of the Convention.”

Explanatory note

The amendment aims to recall the prohibition of discrimination stipulated by the Convention at Article 14.

Amendment C (to the draft resolution)

After paragraph 7.4, insert the following paragraph:

“The Assembly condemns the removal and imprisonment of at least 47 democratically elected mayors from office (including the mayors of Diyarbakir, Van, Mardin and Kars), based on questionable evidence and their arbitrary replacement by unelected trustees appointed by the central government;”

Explanatory note

The amendment aims to strengthen the draft resolution by condemning the arbitrary interference of Turkey's central Government in local politics and the criminal prosecution of local politicians which appears to be linked to statements made in the exercise of their mandate.

Amendment D (to the draft resolution)

In paragraph 8.5, after the words “in Spain” insert the following words:

“, in particular as regards the need to update and restrict the definition of the crime of sedition”.

Explanatory note

The amendment aims to complement paragraph 8.5 and pave the way for amendment G on paragraph 9.3.1.

Amendment E (to the draft resolution)

After paragraph 9.2.5, insert the following paragraph:

“recognise as elected the six mayoral candidates who received the highest number of votes during the local elections of 31 March 2019 but have been denied the mayoral mandate, and reinstate the three mayors who were suspended by the decision of the Supreme Election Council of 11 April 2019, or implement an alternative solution which respects the will of the voters, as recommended by the Venice Commission, officially European Commission for Democracy through Law (Venice Commission) in its opinion on “Turkey – The replacement of elected candidate and mayors” adopted on 19 June 2020 and in line with the Assembly [Resolution 2347\(2020\)](#) “New crackdown on political opposition and civil dissent in Turkey: urgent need to safeguard Council of Europe standards.”

Explanatory note

This amendment introduces a paragraph which invites the Turkish authorities to redress the illegitimate measures taken in relation to mayors and mayoral candidates during and in the aftermath of the local election of 31 March 2019.

Amendment F (to the draft resolution)

After paragraph 9.2.7, insert the following paragraph:

“sign and ratify the Framework Convention for the Protection of National Minorities (ETS No. 157) and co-operate with its monitoring mechanism.”

Explanatory note

The amendment aims to promote the Framework Convention as a tool for promoting full and effective equality between persons belonging to a national minority and those belonging to the majority in all fields, including political life.

Amendment G (to the draft resolution)

Replace paragraph 9.3.1 with the following paragraph:

“reform the criminal provisions on rebellion and sedition; as regards specifically the crime of sedition, update and restrict its definition in such a way that it avoids disproportionate sanctions, especially for the case of non-violent expressions of dissent.”

Explanatory note

The provisions on rebellion and sedition in Spain’s Criminal Code are based on a wide and outdated definition. In comparison with other legal systems, the sanctions are disproportionately harsh and potentially breach the right to protest and express different ideas and political projects. The amendment aims to address such shortcomings.

Amendment H (to the draft resolution)

After paragraph 9.3.6, insert the following paragraph:

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

Explanatory note

The Council of Europe is the organisation for human rights and the rule of law. Both perspectives and, in particular, the principle of the equality of all citizens before the law, must be taken into account in the Assembly resolutions and recommendations.

C. Explanatory memorandum by Mr Pere López, rapporteur for opinion

1. The rapporteur of the Committee on Legal Affairs and Human Rights, Mr Boriss Cilevičs, has prepared a report drawing attention to the need of protecting freedom of expression in Council of Europe member States, in particular when it concerns the work of parliamentarians and politicians in general. Mr Cilevičs’ report focuses on developments that took place in Turkey and Spain but is based on the Council’s *acquis* in the area of freedom of expression that is applicable to all member States.
2. I wish to highlight that the wide scope of the title of the report makes it difficult to determine what the real objective of the report is. Although it is clear that its central theme is the protection of the right to freedom of expression by politicians and their ability to freely exercise their political mandates, which I support, I also believe that the Council of Europe must not fail in its efforts to protect the rule of law in the implementation of these mandates and that this perspective should not have a subsidiary or secondary character when analysing certain facts or realities. At the same time, it appears that an analysis of the global situation in Council of Europe member States may be necessary. I believe that we will all agree that the persecution of political leaders exercising their mandates is unacceptable in any Council of Europe member State.
3. While the report and the draft resolution focus on parliamentarians, I consider it useful to extend the scope of the text and include an explicit reference to other people who are active in politics, namely the members of elected bodies at local and regional levels, and those who conduct political work without an official mandate. All of them have a role to play in democratic life. They contribute to the political debate, have administrative responsibilities and represent their voters. Even though the first interlocutors of the Assembly are national parliaments, it is also worth mentioning politicians who are not parliamentarians and underline that they are entitled to their freedom of expression as well.
4. It is also important to take into account the case law of the European Court of Human Rights as regards the issues debated in the report, as well as the texts adopted by the Council of Europe’s European Commission for Democracy through Law (Venice Commission), in particular concerning the separation of powers and the need to respect independence of the judiciary.
5. Among the documents I used to prepare this document is an opinion of the Venice Commission on “The replacement of elected candidates and mayors”, prepared following a request made in 2019 by Mr Andreas Kiefer, Secretary General of the Congress of Local and Regional Authorities of the Council of Europe, and which was adopted on 18 June 2020. I consider this source relevant to the situation of Kurdish politicians in Turkey, but also because of its references to the principle of rule of law, which I believe is worth mentioning in the draft resolution that we are amending. As the Venice Commission highlights, the rule of law

is referred to in the Preamble to the Statute of the Council of Europe as one of the three “principles which form the basis of all genuine democracy”, together with individual freedom and political liberty, and has been consistently referred to in the major political documents of the Council of Europe, and in numerous conventions and recommendations. It is also mentioned as an element of common heritage in the Preamble to the European Convention of Human Rights (STE No. 5, “the Convention”).

6. I would like to underline that the continuous persecution of pro-Kurdish politicians in Turkey (in my opinion underestimated in the report, which does not fully reflect the appalling situation that the country is experiencing) and the specific events that took place in Catalonia on the occasion of the declaration of independence without valid legal effect are, unfortunately, far from being the only cases that deserve to be analysed within the Council of Europe’s geographical scope. I wish to highlight that serious situations of persecution are occurring in other Council of Europe member States, where the possibility for politicians to freely exercise their mandates cannot, unfortunately, be taken for granted. While the report focuses on Turkey and Spain, this does not mean that other Council of Europe member States are not concerned by this type of human rights violation.

7. In my opinion, the situation in Turkey deserves even more attention from the Assembly. The fact of presenting it in a parallel with the specific events in Spain may make it more difficult to grasp the hard reality of what is happening in Turkey. After studying the Turkish case in depth and exchanging calls and taking part in videoconferences with political leaders of the Peoples’ Democratic Party (HDP), I came to the conclusion that the systematic persecution of HDP politicians in Turkey since 2015, which has been documented by the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)², calls for a specific report, even more detailed than the one we are discussing. I will take the initiative to propose such a report in the near future. Meanwhile, I seize the opportunity offered by this opinion to complement the information contained in Mr Cilevičs’ report with details on recent developments. Among other things, what happened in Turkey after the local elections in 2019 is a reason for great concern.

8. At least 47 mayors and 11 deputy mayors have been imprisoned after the 2019 municipal elections and replaced by “trustees” appointed by national authorities; most of the mayors and deputy mayors had won the elections as representatives of the HDP party in areas with a large Kurdish-speaking population. In some cases, there were also mayors representing the Republican People’s Party (CHP) party in some cities or towns outside this region. In its resolution of 19 May 2021 on the 2019-2020 European Commission Reports on Turkey, the European Parliament indicates that the replacement and imprisonment had been decided “on the basis of questionable evidence”. The text rightly adds that “these unlawful decisions constitute a direct attack on the most basic principles of democracy, depriving millions of voters of their democratically elected representation”. In October 2020, the Assembly strongly condemned these dismissals and replacements of mayors, which contradict democratic principles.³

9. These worrying developments were also analysed by the Venice Commission in the opinion that I have already mentioned. The opinion highlights that the 2019 local elections were not conducted under the state of emergency declared after the failed coup attempt of July 2016, which had ceased after the parliamentary elections in 2018. However, the mass arrest and prosecution of more than 100 000 persons and the dismissal of more than 150 000 civil servants by emergency decrees “were still resonating in the society, affecting especially the judiciary where about one third of civil servants had been dismissed”. In addition, many of the measures adopted during the state of emergency were subsequently transformed into regular laws and their provisions were thus applicable in the 2019 local elections.

10. The election observation report of the Congress of Local and Regional Authorities also indicates that “dozens of local elected Mayors and Councillors (mostly from the HDP) in more than fifty towns, especially in the south-east of the country, were placed in pre-trial detention on grounds of accusations of terrorist links and were replaced with trustees appointed by the central authorities.” In addition, “around 125 000 persons were not eligible to run in the local elections on grounds of having been dismissed from office by state-of-emergency decrees, mostly due to terrorism-related charges.”⁴

2. See [Resolution 2121 \(2016\)](#) (para.7) and [Resolution 2156 \(2017\)](#) (para.11) “The functioning of democratic institutions in Turkey”, [Resolution 2260 \(2019\)](#) (para. 3) “The worsening situation of opposition politicians in Turkey: what can be done to protect their fundamental rights in a Council of Europe member State?”, [Resolution 2347 \(2020\)](#) (para.5) “New crackdown on political opposition and civil dissent in Turkey: urgent need to safeguard Council of Europe standards” and [Resolution 2376 \(2021\)](#) “The functioning of democratic institutions in Turkey”.

3. See [Resolution 2347 \(2020\)](#), para.5.

4. Congress election observation report of 31 October 2019, [CG37\(2019\)14](#).

11. These details and figures clearly show that politicians, particularly those from the HDP and from South-East Turkey, had to endure a climate of intimidation and persecution through the arbitrary interference of the central authorities, rendering impossible the conduct political activity for many of them.

12. These are only the latest episodes of a long story of discrimination and political marginalisation of Kurdish people in Turkey. In 2012, the online news outlet Open Democracy wrote that many expected Recep Tayyip Erdoğan's Government to step up democratic initiatives in Turkey, as his party had announced a policy called "Democratic Opening". "However, the South-eastern Kurdish region, home for an estimated 25 million Kurds, has chronicled another story since, one that echoes State racism, discrimination on ethnic grounds and brutal crackdown on dissent."⁵

13. Discrimination certainly affects political life, as "cases against HDP politicians provide the starkest evidence that authorities bring criminal prosecution and use detention in bad faith and for political purposes", according to Human Rights Watch's yearly report "Turkey – Events of 2019". But it also concerns education, culture, the media and other spheres. The same report states that "journalists working for Kurdish media in Turkey continue to be disproportionately targeted and there are severe restrictions on critical reporting from the southeast of the country", and it adds that hundreds of academics have been convicted of "spreading terrorist propaganda" for criticising the government's military operations in the southeast and calling for a peace process. They were later acquitted thanks to a ruling of the Constitutional Court.

14. It is clear the victims of the various human rights violations observed in Turkey which I have mentioned are associated with the Kurdish-speaking population living in the country, particularly in South-East Turkey. This calls for a more effective and consistent enforcement of the Council of Europe human rights protection system, particularly those provisions concerning the prohibition of discrimination and the protection of minorities. Article 14 of the Convention, under the title "Prohibition of discrimination", stipulates that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". The reference to "association with a national minority" ensures that this article applies not only to members of a particular national group, but also to those who take a stance in favour of the rights and interests of such a group. The persecution of Kurdish politicians should be considered both as a violation of their freedom of expression and assembly, and a form of discrimination on grounds of their association with the Kurdish minority. The report and draft resolution of the Committee on Legal Affairs and Human Rights offer therefore a good opportunity to draw attention to this provision of the Convention.

15. Is it also an opportunity to highlight the relevance of the Framework Convention for the Protection of National Minorities (ETS No. 157), a Council of Europe convention adopted in 1994 which sets out the rights enjoyed by individuals belonging to national minorities and the corresponding obligations to be respected by the State Parties. The Framework Convention is the first binding legal text on this matter and its implementation is monitored by the Advisory Committee. Enforcing the Framework Convention would radically improve the situation of the Kurdish minority in Turkey. However, Turkey has not even signed this text despite a long-standing request from the Assembly made in the framework of the Assembly post-monitoring dialogue with Turkey from 2004 to 2017.⁶ I am therefore proposing an amendment to the draft resolution to invite the Turkish authorities to sign, ratify and ensure the implementation of the Framework Convention.

16. In addition to the serious political consequences on democracy, the arbitrary replacement and imprisonment decisions that I mentioned have had a severe impact on citizens and their life conditions, since harsh budget cuts have been applied to the municipalities concerned. This means that citizens have not been able to access basic and fundamental services, even during the pandemic period. This also applies to cities run by mayors of opposition parties who have not been removed, including Istanbul, Ankara, Izmir and other municipalities in the South-East of the country. "Political, legislative, financial and administrative measures [were] taken by the government to paralyse" those municipalities, notes the European Parliament. Furthermore, women's shelters and other infrastructure providing services to women have been closed by the central government. This has coincided with Turkey's withdrawal from the Convention on preventing and combating violence against women and domestic violence (CETS No. 210) in what appears to be an attack on women's rights and gender equality, after years of gradual backsliding in this area and the loss of much of the progress previously achieved.

5. Rozh Ahmad, "Purge of the Kurds, the dark side of Turkey's "democracy"", Open Democracy, 5 November 2012.

6. In paragraph 14.2 of its [Resolution 1925 \(2013\)](#) "Post-monitoring dialogue with Turkey", the Assembly urged the Turkish authorities to sign the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages.

17. As regards the parts of the report and draft resolution on Spain, I would like to develop some considerations about the country's criminal code provisions on sedition and rebellion. I can only welcome the draft resolution's call on the Spanish authorities to reform such provisions and also the fact that the Spanish Government and authorities have indeed brought this issue to public debate. The definition of these crimes and the relevant sanctions do need to be updated: a comparison with similar provisions in other European criminal law systems shows sanctions in Spain are particularly severe and that the current definition of sedition is too vague, which may lead to uncertainty in its application. The definition should therefore be reworded to obtain a clear and more restrictive provision. In particular, the need of respecting freedom of expression should be taken into account when redrafting the relevant articles of the criminal code, especially when there is no use of violence.

18. The time allocated for the preparation of this opinion did not allow me to conduct research and to exchange with relevant interlocutors. Despite the constraints, I have endeavoured to contribute in a constructive manner and to formulate amendments that may complement and add value to the draft resolution. In addition, as I have previously mentioned, I intend to promote a motion for a resolution that would lead the Assembly to work further on the situation in Turkey and provide additional indications on how to address it.