



**Resolution 2381 (2021)<sup>1</sup>**

Provisional version

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

Parliamentary Assembly

1. The Parliamentary Assembly stresses the crucial importance, in a living democracy, of politicians being able to freely exercise their mandates. This requires a particularly high level of protection of politicians' freedom of speech and freedom of assembly, both in parliament and when speaking to their constituents in public meetings or through the media, including social media.
2. The European Convention on Human Rights (ETS No. 5, "the Convention") protects everyone's freedom of speech, including the right to make statements that "shock or disturb" those who do not share the same opinions, as established in the case law of the European Court of Human Rights ("the Court").
3. The Assembly also notes that freedom of speech is not unlimited and should be enforced while ensuring full respect of the rule of law. Hate speech condoning violence against certain persons or groups of persons on the grounds of race, origin, religion or political opinions, as well as calls for the violent overthrow of democratic institutions are not protected. Politicians even have a special responsibility, due to their high visibility, to refrain from such abuses.
4. Everyone, and in particular politicians, has the right to make proposals whose implementation would require changes of the constitution, provided the means advocated are peaceful and legal and the objectives do not run contrary to the fundamental principles of democracy and human rights.
5. This includes calls to change a centralist constitution into a federal or confederal one, or vice versa, or to change the legal status and powers of territorial (local and regional) entities, including to grant them a high degree of autonomy or even independence.
6. 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.
7. The Assembly recalls its [Resolution 1900 \(2012\)](#) "The definition of political prisoners". It considers that any politicians who are detained for having made statements in the exercise of their political mandates that respect the limits of freedom of speech recalled above fall under the said definition and should be released without delay.
8. Concerning more specifically Turkey, the Assembly recalls its [Resolution 2156 \(2017\)](#) and [Resolution 2376 \(2021\)](#) "The functioning of democratic institutions in Turkey" and notes that numerous politicians are incarcerated for statements they made in the exercise of their political mandates.
  - 8.1. Some stand accused or have even been convicted and handed long prison terms on the basis of criminal provisions penalising links to and support for terrorist organisations for merely referring to the inhabitants of the south-eastern region of Turkey as "Kurds", or to the region in question as the

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1. *Assembly debate* on 21 June 2021 (16th sitting) (see [Doc. 15307](#), report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Boriss Cilevičs; and [Doc 15321](#), opinion of the Committee on Equality and Non-Discrimination, rapporteur: Mr Pere López). *Text adopted by the Assembly* on 21 June 2021 (16th sitting).



“Kurdish region”, or for advocating greater autonomy for this region, or for criticising the actions of the security forces in this region, or even merely requesting information on these actions in the form of parliamentary questions.

8.2. Others have been prosecuted for insult to the President, or to other representatives of the State, for merely criticising, as opposition politicians, the policies pursued by the government in different fields, including the management of the economy and the fight against corruption.

8.3. These cases are particularly egregious as they have arisen after numerous findings by the Court of violations of freedom of speech in similar circumstances. In the case of Mr Demirtaş, the president of one of the main opposition parties, the authorities openly defy a judgment by the Court, which ordered Mr Demirtaş’ immediate release. Also, the incriminated political statements often date back several years, to when the position of the government was more tolerant with regard to the Kurdish issue and the politicians in question could not predict that their statements would one day be considered as criminal. Typically, these prosecutions take many years, during which the accused politicians are either in pre-trial detention, or otherwise prevented from exercising their political mandates.

8.4. While reiterating its unequivocal condemnation of PKK terrorism, as much within as outside Turkey, in line with [Recommendation 1266 \(1995\)](#), [Resolution 1754 \(2010\)](#), [Resolution 1925 \(2013\)](#) and [Resolution 2156 \(2017\)](#), the Assembly notes that the unclear wording and overly broad interpretation of Turkish legislation concerning the fight against terrorism, and the harsh penalties, including prison terms, handed down in actual practice for insult or defamation by criminal courts appear to violate the Convention as interpreted by the Court.

8.5. 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.

8.6. The Assembly notes that the independence of the Turkish courts has been put more and more into doubt. Instances of public accusations made by senior officials that were soon followed by the arrest and prosecution of the individuals concerned confirm the perception of the judiciary’s lack of independence.

8.7. The Assembly recalls that the parliamentary immunity of 139 mainly opposition members of parliament was withdrawn in 2016 in a collective procedure not allowing for individual members to defend themselves. To achieve this, the parliament even adopted an ad hoc temporary change of the constitution suspending the normal protections to the detriment of this group of parliamentarians.

8.8. The Assembly finally notes that politicians belonging to opposition parties, journalists and civil society activists were excluded *de facto* from extraordinary pardons and reductions of prison terms motivated by the need to reduce prison overcrowding in the face of the Covid-19 pandemic.

9. As regards more specifically Spain, the Assembly recognises that Spain is a living democracy, with a culture of free and open public debate, and that the mere expression of pro-independence views is not a ground for criminal prosecution. The Assembly fully respects the constitutional order of Spain. Nevertheless, several senior Catalan politicians were prosecuted and eventually convicted to long prison terms for sedition and other crimes, *inter alia* for statements made in the exercise of their political mandates, in support of the unconstitutional referendum on the independence of Catalonia in October 2017 – organised by application of the “disconnection laws” approved by the Parliament of Catalonia in September 2017 and found to be unconstitutional by the Spanish Constitutional Court – and calling for participation in the mass protests surrounding this event.

9.1. Incriminatory statements included public speeches supporting the unconstitutional referendum in October 2017 on the independence of Catalonia and calling for participation in several demonstrations, as well as votes in the Catalan Parliament expressing the same support or allowing debates on this topic to be included in the agenda of parliament. The Assembly notes that the referendum had previously been ruled unconstitutional by the Spanish Constitutional Court, which had also warned the politicians in question against organising it.

9.2. Some of the politicians in question were also found guilty of abusing public funds and other resources, in particular by allowing public buildings to be used as polling stations.

9.3. The Assembly notes that the crime of organising an illegal referendum, punishable by up to 5 years in prison, was abrogated by the Spanish legislature in 2005. In this reform of the Criminal Code, the crime of sedition, punishable by up to 15 years in prison, which requires an element of violence (“tumultuous uprising”) remained unchanged. The organisers of the illegal referendum on 1 October 2017 were convicted of sedition.

9.4. It is undisputed that none of the politicians in question called for violence. To the contrary, it is recognised, also by the prosecution, that they called on demonstrators to refrain from any violent acts. Indeed, on several occasions, hundreds of thousands of demonstrators turned out without there being any violent incidents, thanks also to the restraint exercised most of the time by the Catalan and Spanish security forces, who were also deployed in large numbers.

9.5. The Assembly warmly welcomes the fact that the criminal provisions on rebellion and sedition have become subject to intense debate in the political and legal spheres in Spain, in particular as regards the need to update and restrict the definition of the crime of sedition. They were enacted in response to the frequent attempts at military takeover in the past. Doubts were therefore expressed as to their application to the organisers of peaceful demonstrations. This required novel interpretations such as the notion of “violence without violence” developed by the prosecution, according to which the sheer number of demonstrators exercised psychological coercion on the police officers facing them, and a very wide meaning given to the term of “tumultuous uprising” required for the crime of sedition.

9.6. The Assembly further notes that, even after the conviction of the leading Catalan politicians involved in the 2017 unconstitutional referendum, the Spanish judicial authorities have also prosecuted the next set of Catalan leaders and a number of lower-ranking Catalan officials involved in the events in 2017. The Spanish authorities also continue to pursue the extradition of Catalan politicians living in other European countries, despite several setbacks in German, Belgian and United Kingdom courts. It finally notes on a positive note that several high-profile prosecutions, of the head of the Catalan police force and of members of the Catalan election commission, recently ended in acquittals.

9.7. Reportedly, the Spanish authorities have made the application of the milder prison regime usually applied to non-violent offenders or the consideration of a pardon subject to the prisoners expressing regrets for their actions and/or an undertaking not to commit further crimes, as is the case for all convicts under Spanish law. The prisoners in question consider that they cannot be obliged to disown their deeply held political convictions.

9.8. The Assembly finally respects the independence of the Spanish tribunals to solve pending appeals, respecting as well the right to appeal to the European Court of Human Rights in due course.

10. In view of the above, the Assembly invites:

10.1. all member States of the Council of Europe to:

10.1.1. ensure that everyone, including politicians, enjoy freedom of speech and assembly in law and practice and refrain from imposing any restrictions not covered by the Convention as interpreted by the Court;

10.1.2. notably examine their relevant criminal provisions and their application in practice, in light of the judgments and decisions of the Court also vis-à-vis other countries, to ensure that their provisions are drafted sufficiently clearly and narrowly and that they do not lead to disproportionate penalties;

10.1.3. free without delay any and all politicians who fulfil the Assembly’s definition of political prisoners in line with [Resolution 1900 \(2012\)](#);

10.2. the Turkish authorities to:

10.2.1. urgently release Mr Selahattin Demirtaş, thereby implementing the European Court of Human Rights’ judgment and the decision of the Committee of Ministers;

10.2.2. take urgent steps to restore the independence of the judiciary, and in particular of the criminal courts, and refrain from making public allegations that could be interpreted as instructions to the courts by senior officials;

10.2.3. refrain from systematically prosecuting politicians for terrorism-related offenses whenever they refer to the Kurdish people or the Kurdish region as such or criticise the actions of the security forces in this region;

- 10.2.4. re-examine all cases of politicians prosecuted or even convicted because of statements they made in the exercise of their political mandate; and to terminate any prosecutions and release those detained on such grounds, provided the politicians' statements concerned did not call for or condone violence or the overthrow of democracy and human rights;
- 10.2.5. uphold and strengthen the privileges and immunities of members of parliament in the face of politically motivated prosecutions, in particular when they concern statements made by politicians in the exercise of their political mandate;
- 10.2.6. 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 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 Assembly Resolution 2347(2020) "New crackdown on political opposition and civil dissent in Turkey: urgent need to safeguard Council of Europe standards;
- 10.2.7. refrain from discriminating against political opponents in deciding on early releases from detention prompted by the need to reduce prison overcrowding due to the Covid-19 pandemic;
- 10.2.8. promote a culture of open debate in the political sphere, on all issues, including sensitive ones, without the use or threat of criminal sanctions against politicians who are peacefully exercising their political mandates and to treat even fundamental opposition as a necessary and welcome part of a living democracy;
- 10.2.9. sign and ratify the Framework Convention for the Protection of National Minorities (ETS No. 157) and co-operate with its monitoring mechanism;
- 10.3. the Spanish authorities to:
  - 10.3.1. reform the criminal provisions on rebellion and sedition in such a way that they cannot be interpreted so as to undo the decriminalisation of the organisation of an illegal referendum, intended by the legislature when it abolished this specific crime in 2005, or lead to disproportionate sanctions for non-violent transgressions;
  - 10.3.2. consider pardoning or otherwise release from prison the Catalan politicians convicted for their role in the organisation of the October 2017 unconstitutional referendum and the related peaceful mass demonstrations, and consider dropping extradition proceedings against Catalan politicians living abroad who are wanted on the same grounds;
  - 10.3.3. drop the remaining prosecutions also of the lower-ranking officials involved in the 2017 unconstitutional referendum and refrain from sanctioning the successors of the imprisoned politicians for symbolic actions merely expressing their solidarity with those in detention;
  - 10.3.4. ensure that the criminal provision on misappropriation of public funds is applied in such a way that liability arises only when actual, quantified losses to the State budget or assets can be established;
  - 10.3.5. refrain from requiring the detained Catalan politicians to disown their deeply held political opinions in exchange for a more favourable prison regime or a chance of pardon; they may however be required to undertake to pursue their political objectives without recourse to illegal means;
  - 10.3.6. enter into an open, constructive dialogue with all political forces in Catalonia, including those opposing independence, in order to strengthen the quality of Spanish democracy through the authority of the rule of law, good governance and total respect of human rights, without recourse to criminal law, but in full respect of the constitutional order of Spain and reach a compromise that enables Spain, a strong European democracy, to settle political differences, including on sensitive issues;
  - 10.3.7. 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.