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Gloss to the Judgment of the Spanish Supreme Court of 14 October 2019, *Causa Especial núm.: 20907/2017*, Judgment No. 459/2019

I.

The trial of the leaders of Catalonia's independence movement, formally named *Causa Especial* 20907/2017, started on 12 February 2019 in the Spanish Supreme Court. They were accused of actions against the territorial integrity of the Kingdom of Spain, but also of financial embezzlement linked to the illegal financing of the organization of the referendum on the independence of Catalonia. The defendants in the trial were twelve leaders of the independence movement, including the President of the Parliament of Catalonia, Carme Forcadell (from the left-wing ERC party), nine ministers of the Catalonian Government, including the Deputy Prime Minister and leader of the ERC, Oriol Junqueras, eight other ministers representing the ERC and the right-wing PDeCAT, and two leaders of the largest pro-independence social organizations, Jordi Cuixart (Òmnium Cultural) and Jordi Sánchez (ANC)[2].

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[2] Other key politicians, including, above all, Carles Puigdemont, fled arrests abroad and were not tried in that process.

Criminal liability had been extended to six other politicians, as well as to the leaders of the Catalonian police (Mossos d'Esquadra), but due to the lesser gravity of the charges, this case had been left to be adjudicated by a Catalonian court. Their trial started on 20 January

The case was examined by a panel of seven judges, with Judge Manuel Marchena as chairman and at the same time rapporteur[3].

The court proceedings ended on 12 June 2019 and a unanimous judgment was announced on 14 October 2019[4]. In the judgment, the defendants were found guilty, although they were all acquitted of the most serious charge, namely rebellion and participation in a criminal organization. Nine of the twelve defendants received prison sentences ranging from 9 to 13 years. The other defendants were sentenced to a fine. Moreover, the court punished the defendants with disqualification from holding public office or employment. The trial is considered to be the most important in the history of Spanish democracy, above all, because of its exceptionally strong political and systemic context and importance. This is primarily because criminal liability is an exceptional type of accountability for political action in democratic countries and should undoubtedly remain free of any political pressure and not be used as an instrument of political struggle. Meanwhile, the very events that constituted the basis of the charges, as well as their origins, the course of the trial, and the circumstances surrounding it make it difficult to isolate legal and political issues[5].

2020 and was suspended on 13 March 2020 due to the COVID-19 pandemic in Spain. The trial resumed on 8 June 2020.

[3] There was speculation in the Spanish media about an event in November 2018, when a Spanish senator from Partido Popular wrote in a private message to other senators from this party that his party would "control the Supreme Court Criminal Chamber from the inside out". This only heated up the atmosphere surrounding the trial, as did the fact that the hearing of this senator as a witness was not allowed by the court (see pages 123 to 124 of the judgment).

[4] The trial itself thus took 17 weeks, which was quite a short time in overall, given the vastness of the different types of procedural issues and the fact that the Supreme Court accepted both parties' motions for hearing a total of 558 witnesses, including the former Spanish Prime Minister Mariano Rajoy and many other leading politicians. The motions concerning Spain's king Philip VI and the former President of Catalonia, Carlos Puigdemont, have not been approved.

[5] The political parties which leaders were accused tried to put pressure on Madrid by organizing mass protests, demonstrations, and strikes and demanding the release of those who had been arrested. At the same time, demonstrations inspired by the Spanish right-wing parties (Partido Popolar, Vox, and Ciudadanos) were held in Madrid in support of a tough course toward Catalonia, during which severe sentences were demanded. In both Catalonia and Madrid this also had an implied meaning related to the upcoming parliamentary, regional, and local elections (April-May 2019).

The judgment discussed herein may seem quite extensive because it is 493 pages long, but it is not what makes it special. As José Luis Marti pointed out, the judgment in the case of terrorist attacks in Madrid, which had a similar number of witnesses and evidence, was 722 pages long. Notably, as the aforementioned author has pointed out, as many as 193 pages, i.e. about 40% of the entire judgment, contained the court's argumentation aimed to prove that no fundamental right of the accused had been violated, which allows us to describe this sentence as a "defensive sentence". As the author points out, this shows that the judges were fully aware that this judgment would be challenged before the Constitutional Court and the ECHR[6]. This is because the Supreme Court ruled in the first and only instance, which means that there will be no proceedings in the second instance to review the findings of facts.

As the number of legal issues raised by the Supreme Court and the number of controversies to be considered goes beyond the scope of this document, the author will refer to the charges that he finds of key importance to the judgment, namely rebellion, sedition, and disobedience, compared to the potential violation of the fundamental rights provided for in the Spanish Constitution, namely freedom of speech (Art. 20) and the right to peaceful assembly (Art. 21)[7]. The Supreme Court used the "progressive crystallization" method to determine the classification of the acts committed by the different defendants. The method consists of assessing the defendants' behavior, simultaneously with determination of facts, through the lens of the charges made and their classification from the most serious crimes, i.e. rebellion, conspiracy, and sedition, and, last but not least, disobedience and embezzlement[8].

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[6] J.L. Marti, *An Exotic Right: Protest and sedition in the Spanish Supreme Court's ruling on Catalan secessionism, VerfBlog*, 18 October 2019, https://verfassungsblog.de/an-exotic-right (22.09.2020). Cf.V. Ferreres Comella, *Constitutional Conflicts: A reply to José Luis Martí on the Spanish Supreme Court's judgment convicting Catalan secessionist leaders, VerfBlog*, 25 October 2019, https://verfassungsblog.de/constitutional-conflicts (22.09.2020).

[7] The defense also raised arguments concerning the violation of other freedoms and rights, including the freedom of political opinion (Art. 16(1)), the freedom of association (Art. 22), the right to political representation (Art. 23), the right to an impartial tribunal, the right of defense, and the right to a fair trial (Art. 17 and 24). Pleas concerning the right to self-determination were also raised.

[8] See pp. 248–257 of the judgment.

II.

The most serious charge against the defendants was that of rebellion, which under the Spanish Criminal Code (Art. 472) consists in a violent and public revolt aimed, among other things, to totally or partially revoke, suspend, or modify the Constitution, but also to, among other things, declare the independence of a part of the national territory[9]. In this case, it would therefore have to consist in an attempt at separating Catalonia from Spain by force, i.e. take the form of an armed uprising. It should be noted that according to the judgment of the Constitutional Court of 16 December 1987[10], "by definition, a rebellion is carried out by a group that illegally uses weapons or explosives to destroy or alter the constitutional order[11]. In assessing this charge, the court considered first and foremost whether the conduct under consideration was violent, assuming as self-evident that it was public in nature. The Supreme Court considered, above all, that until the fall of 2019, the independence movement in Catalonia, although it did indeed gain an impressive size, actually manifested itself in peaceful forms. This does not mean, however, that these events were not accompanied by any violence[12]. Evidence of such actions, associated with separatist activity, was presented at the trial and the Supreme Court found it convincing, but at the same time found that violence must be instrumental, purposeful, and directly intended, without intermediate steps, to achieve the ends that the rebels pursue. According to the Court, the acts planned and performed were wholly inadequate to impose de facto territori-

[9] Art. 473 adds: "1. Those who, inducing the rebels, have promoted or sustain the rebellion, and its ringleaders, shall be punished with a sentence of imprisonment from fifteen to twenty-five years and absolute disqualification for the same period; those who act as subaltern commanders, with a sentence of imprisonment from ten to fifteen years and absolute disqualification from ten to fifteen years; and mere participants, with a sentence of imprisonment from five to ten years and special disqualification from public employment or office for a term of six to ten years".

[10] 199/1987, BOE No. 7, 7 January 1988.

[11] This judgment was invoked in a petition signed by nearly 400 people (mostly law professors, as well as representatives of law firms and businesses), which argued that the defendants should not be held liable for the offenses of rebellion and sedition. R. Limon, Más de 300 juristas rechazan la rebelión y la sedición en el 'procés', El País of 23 January 2018, https://elpais.com/politica/2018/11/22/actualidad/1542906522_501939.html (12.09.2020).

[12] V. Ferreres Comella, op.cit.

al independence and the repeal of the Spanish Constitution in Catalan territory. This led the Supreme Court to acquit the defendants of the charge of rebellion. One may, however, consider whether the prosecutors[13] did not resort to the most serious charges, i.e. the accusation of rebellion, as a form of affirmation of Madrid's toughest stance against any attempt at secession, even realizing that this outcome of the trial would be rather difficult to achieve[14].

III.

As the charges of rebellion were rejected, according to the "progressive crystallization" method, the charge of sedition turned out to be crucial and, at the same time, probably most controversial. In the Spanish Criminal Code, this offense is laid down in Art. 544–549, in the part of the Code devoted to offenses relating to breaches of public order (Title XXII) and not, as in case of rebellion, in the part concerning offenses against the Constitution (Title XXI)[15]. At the same time, it is potentially the most severe offense in this title, because if it is committed by persons acting as public authorities, they carry a penalty of 10 to 15 years of imprisonment, as was the case with 7 out of the 9 persons accused of this offense (for other offenses under the Code, the maximum sentence is 5 years, even if the offense involves violence). According to the Art. 544 of the Criminal Code, "The following are guilty of an offense of sedition: those who, without incurring in the offense of rebellion, publicly revolt in a tumultuous manner, by force or outside of the legal channels, to prevent the application of the Law or to prevent any authority, official corporation or civil servant from legitimately exercising their functions or complying with agreements or administrative or judicial decisions". Article 545 adds that those who have announced, sustained, or directed the sedition or appear in it as its main perpetrators, shall be punished with a prison

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[13] On the prosecution's side, there were three entities: the Public Prosecutor's Office (Ministerio Fiscal), the counsel for the national Government (Abogacía del Estado), and, as private prosecutor (Acusación Popular), the Vox party. The Ministerio Fiscal and the Vox raised the charge of rebellion.

[14] See pp. 259–269 of the judgment.

[15] See p. 271 of the judgment.

sentence of eight to ten years, and ten to fifteen years if they are individuals in positions of authority. In both cases, absolute disqualification shall be imposed for the same duration. Outside of these cases, a prison sentence of four to eight years, and special disqualification from public employment or office for four to eight years, shall be imposed. In defining sedition, the Supreme Court emphasized that "it implies active behaviors, collective uprising, *de facto* channels, deployment of resistance. The explicit seriousness of the offense of sedition lies in its specific criminal definition in respect of the other criminal definitions falling under the same title. Sedition is incapable of completely disturbing the public peace or tranquility". Furthermore, "sedition (…) is characterized by not being committed via a single act, rather a succession or accumulation of various. They are multiple-subject offenses with convergence, in the sense that their perpetration demands a union or agreement of willing for the achievement of a shared aim"[16].

The defendants' defense counsels, as well as critics of the judgment (see, among others, the mentioned petition), indicate that in the science of Spanish criminal law it is disputed whether this violence must contain an element of force and cause significant damage and that since none of these elements have occurred, in the light of the existing doubts as to an unambiguous understanding of the criteria for the offense of sedition, the Supreme Court should adopt a narrow interpretation of this provision, which would result in the defendants' behavior not fulfilling these criteria and which would lead to the acquittal of the defendants from this charge. This qualification of the defendants' behavior has also been criticized based on facts, with the argument that there is no indication that the defendants have elicited, provoked, or played a leading role in any violent behavior aimed at preventing the observance of law. It has been argued that inciting to exercise the right of peaceful assembly, which is one of the fundamental rights, cannot be considered as such[17].

However, it is hard to agree with this argument, since the cited provision that defines sedition clearly states that the offense of sedition is committed by force or illegal means ("por la fuerza o fuera de las vías legales"). The use

[16] See pp. 273–274 of the judgment.

[17] J.L. Marti, op.cit.

of the word "or" clearly indicates that violence is not required and "illegal means" are sufficient. Therefore, there was no reason to expect that the Supreme Court would take a different position. The Court thus concluded that elements of violence, as well as the need for damage, are not a necessary element of such an offense[18]. Referring to the criterion of the violence, it is worth noting that, according to the prosecutors, this kind of behavior took place on 20 September 2017, when a crowd surrounded the building of the Catalonian Ministry of Economy to prevent a court official from searching the building. The Court's assessment of the events of 1 October 2017, when the police were prevented from carrying out the orders to stop the voting in the referendum was similar. Moreover, the Supreme Court concluded that the evidence showed that violence was used by the secessionists, even if it was not of the serious kind required by the crime of rebellion. This raises the question of whether it is possible that public and violent behavior is not a behavior that involves the use of force. In the opinion of the Supreme Court and the author of this document, this is possible. Moreover, in the light of those and other facts indicated in the judgment, the Court could not have had the slightest doubt that the results achieved by those actions, which were the consequence of the adoption of the Law of the Catalan Parliament No. 19/2017, of 6 of September, on the self-determination referendum, as well as the Law of the Catalan Parliament No. 20/2017, of 7 of September, on the legal and foundational transition of the Republic, "were obtained completely outside the legal channels".

However, regarding the alleged criterion of damage, although the Criminal Code does not include it in this provision, in my opinion, one can consider the criterion of damage also from the standpoint of civil-law because of the costs of organization of the illegal referendum that has been incurred[19].

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[18] See pp. 275–276 of the judgment.

[19] It is worth noting that one of the allegations was misappropriation of public funds, which, according to Art. 432, in conjunction with Art. 250 of the Criminal Code (after the thorough amendment in 2015), consists in the fact that a public authority or official, entitled under the law to administer public property entrusted to it or him/her, exceeds its or his/her powers, thus causing damage to the property being managed. At the same time, the Supreme Court classified the actions of the defendants as a qualified type of this offense provided for in Art. 432(3a), which consists in the fact that serious damage or deterioration of the quality of public services was caused as a result of misappropriation, and for some of them the Court applied the qualified type provided for in Art. 432(3) *in fine*, which concerns a case in which,

Victor Ferreres Comella refers to this case also from the constitutional standpoint, as it is difficult to imagine a coup d'état that would be harmless to the system of government of a state and, in this case, to its integrity[20]. Thus, even if it is concluded that the criteria indicated by the defense counsels are necessary, the Supreme Court would still have to convict the defendants in the light of the proven facts.

IV.

The third charge under consideration, i.e. disobedience to the authorities, concerns an offense established by Art. 410 of the Criminal Code. According to this provision, this offense occurs when public authorities or officials openly refuse to comply with court rulings or orders of superior authorities, issued according to applicable procedures and within their jurisdiction. The Supreme Court pointed out that the jurisprudence to date has already clarified the key criterion of this offense, which is the word "openly". "This idea has been identified with the frank, clear, patent, unequivocal, undisguised, evident or unequivocal" (Supreme Court Judgment No. 263/2001, 24 February). At the same time, the Supreme Court emphasized that "this offense is characterized, not just because the disobedience adopts an open, determinate and clear form in appearance, but also punishable is 'that which results from reiterated passivity or the presentation of difficulties and obstacles that ultimately demonstrate a rebellious will'" (Supreme Court Judgment No. 1203/1997, 11 October)[21]. In this case, it must be taken into account that the Spanish Constitutional Court indicated that the independence referendum planned for 1 October 2017 was illegal. Law No. 19/2017 on the self-determination referendum and Law No. 20/2017 on the legal and foundational transition of the Republic were suspended by two Constitutional Court de-

as a result of misappropriation, the value of the damage caused exceeded EUR 250,000. The allegation was based on the claim that the organization of the referendum was financed by funds from the Spanish budget allocated to the region for other purposes, so that, paradoxically, the referendum on separation from Spain was paid for by Madrid itself.

[20] V. Ferreres Comella, op.cit.

[21] See pp. 286–287 of the judgment.

cisions of 7 September 2011[22]. These decisions contained appropriate warnings about the illegality of future decisions and the possibility of criminal liability. Importantly, the Constitutional Court, in addition to their publication, sent these decisions to a number of key politicians, including the 12 defendants, making it clear that the organization of the referendum must be stopped and that the authorities cannot cooperate in any way or form, either by action or by omission, in its organization. Moreover, according to these provisions, these persons were required to use all legal means to stop the preparation and conduct of the referendum[23]. It is hard to imagine that the members of the government, if they did not even take any action to organize the referendum, could not have prevented it. This seems unbelievable in the light of the fact that they publicly encouraged Catalans to participate in the referendum.

V.

In the narrative of the defense and the critics of the judgment, the key argument used is a violation of fundamental rights. In line with this position, the classification of the behavior of the separatist leaders as a crime of sedition shows that the features of this offense specified in the code are contrary to the democratic right to protest, which includes the freedom of speech, the freedom of association, and the right of assembly. The broader the interpretation of the crime of sedition, the smaller the area of the democratic right to protest[24]. Another important proposition of the defense raised during the trial was that a conviction for the alleged acts would mean criminalization of political discourse, thus violating freedom of speech.

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[22] Eventually, these laws were declared unconstitutional by judgments of the Constitutional Tribunal No. STC 114/2017 of 17 October and No. STC 124/2017 of 8 November.

[23] A number of other decisions of the Constitutional Court were also been disregarded, such as the decision of 7 September 2017 suspending decree No. 140/2017 of the Catalan Government of 6 September 2017 on additional rules for the organization of the Catalan referendum on self-determination and the decision of the Constitutional Court of 5 October 2017 suspending the act of announcement of the results of the referendum in the Parliament of Catalonia, which happened on the following day.

[24] J.L. Marti, op.cit.

During the process, the example was given of the Platform of people harmed by mortgages, a Spanish civic organization, which in the worst years of the most recent economic crisis was very successful in preventing thousands of evictions enforced by the police. This example was given to show that sedition charges were not considered in that case. Another example is the actions of the Indignados movement, which besieged the Catalan Parliament in 2011, preventing members of parliament from entering the meeting hall. Even if several of them were accused then, they were acquitted of preventing members of parliament from performing their functions exactly because they were deemed to exercise their right to protest and demonstrate. However, it must be borne in mind that the Supreme Court annulled this decision and eventually sentenced them to 3 years in prison. But in any case, no one considered – not even the Supreme Court – the possibility of accusing them of sedition. In the commented judgment, as J.L. Marti writes, the Supreme Court introduced three additional elements of the definition of sedition provided in the code. According to the verdict, the term "public and violent behavior" used in the Criminal Code requires that to be considered sedition, such conduct must take place on a large scale or in a crowd, and occur generally (commonly) in a specific area and be deliberately planned. These three elements seem, in the author's opinion, to be specially constructed to match this matter in an *ad hoc* manner and to exclude the two commonly known and mentioned examples[25].

According to critics of the judgment, this judgment assumes that, by definition, any form of a physical impediment to the exercise of law enforcement by the police is unlawful and, therefore, cannot be understood as an exercise of any freedoms or rights. They argue that "this physical obstruction", concerning the case under consideration and the role of the convicted persons, was nothing more than sitting quietly at the polling stations. In their opinion, if there is any paradigm of non-violent protest, it is a peaceful sitting, even if it is an occupation of a public area. This can cause physical hindrance for the police if they are ordered to pass through that area or take people out of the area, but the defense poses the rhetorical question: How can such behavior constitute sedition? Critics of the judgment also present other examples of

[25] Ibidem.

events in which there were mass protests and disobedience to the police (e.g. the events of 27 May 2011 in the Plaza de Cataluña), which is due to the essence of civil disobedience, but in these cases, no one considered the charges of sedition, even if the participants in these events committed physical obstruction of law enforcement and the behavior occurred on a large scale, covered a specific territory, and were planned. To sum up the arguments of the critics of the judgment in this regard, it should be noted that they emphasize that the right to protest is the essence of democracy and that citizens, even in a minimally advanced democracy, must have the right to challenge and protest any decision made by the authorities. Just as democracy requires a number of elements, such as elections, power-sharing, etc., in their opinion all this starts with the most basic right to protest and question the decisions made by the authorities. Since in Spain the right of peaceful assembly is a fundamental right established in the Constitution and, therefore, takes precedence over all other laws, including the Criminal Code, this means that a broad interpretation of the offense of sedition necessarily constitutes a restrictive, and therefore unconstitutional, interpretation of the right to protest and assembly. The basic objection is therefore that behavior consisting in enticing others to exercise their right of assembly, which is one of the fundamental rights, cannot be considered as rebellion or sedition[26].

Of course, one should agree that an overly expansive interpretation of the Criminal Code can lead to a violation of fundamental rights. To avoid this accusation, the Supreme Court tried to distinguish this case from the aforementioned cases of protests that took place in Spain. The Court thus sought to narrow down the scope of the offense and not extend it at the expense of fundamental rights. After all, establishing additional criteria that must be met to conclude that a given offense has taken place means that some behavior cannot be classified as sedition. One can analyze whether the introduction of just such criteria was correct and acceptable, but there is no doubt that this is a restrictive interpretation, and thus favorable to constitutional freedoms and fundamental rights. Concerning these criteria, it seems that they make it possible to assess and distinguish, in compliance with the spirit of a criminal code provision, whether a given behavior actually threatens the consti-

[26] Ibidem.

tutional order and thus is differs from preventing the police from executing a sentence of eviction, preventing entry into the building of the parliament, or occupying a square illegally. In the author's opinion, it is incorrect to compare these behaviors with obstruction of the performance of public authorities' tasks through a series of actions that are a part of a systematic plan to achieve Catalonia's independence through a *de facto* coup d'état.

The sense of the Supreme Court's argumentation, which conveys its essence, is an excerpt from the explanatory memorandum (p. 283), which states that the Supreme Court recognizes the constitutional protection of the right to protest, but emphasizes that it cannot be transformed into an "an exotic right to physically prevent officers of the law from carrying out a court order, and to do so in a generalized manner throughout the autonomous region". While accepting this position of the court, it should also be noted that establishing the right to protest as the highest value in a democracy would suggest that no form of protest should ever be criminalized, as if forgetting that all freedoms and rights have their content but also their limits. Therefore, the instrumental use of freedoms and rights for activities contrary to the constitutional order is unacceptable[27].

According to the Supreme Court, there was no violation of the freedom of speech, as no one accused the defendants of making their views known, even if they were contrary to the current constitutional order, or even concerned about its change. The Spanish constitutional system even allows these ideas to be a part of electoral programmes and it considers a regional government which programme includes a change in the constitutional order to be a legal one[28]. The Supreme Court emphasized that none of the proven behaviors on which the accusation was based fell within the scope of the material

[27] In Catalonia, paradoxically, the problem of exercising the right to protest does not concern separatists at all, which I think has been sufficiently proven over the last dozen years. In fact, the problem concerns those people in Catalonia who are trying to express their opposition to the idea of separation from Spain. Even though they can, of course, formally enjoy these rights, separatism is in fact a hegemonic ideology maintained by regional power structures in Catalonia and permeates many institutional and social spheres, including public schools. The scale and intensity of this ideology is so overwhelming that, while the *de jure* fundamental rights do exist, in reality a significant proportion of Catalan citizens are afraid to exercise them. V. Ferreres Comella, op.cit.

[28] See pp. 237–239 of the judgment.

content of freedom of expression, so there could be no violation of this freedom. As indicated by the Supreme Court, there were no violations of fundamental freedoms and rights, as the charges concerned behaviors that violated a number of provisions of the Criminal Code, which were beyond the scope of those fundamental freedoms and rights. As the Supreme Court emphasized, the charges, therefore, do not concern the expression of an opinion or advocacy of secession, but are based on an attempt at annihilating the constitutional order through open and persistent legislative attempts at creating a parallel constitutional order, to mobilize citizens on a large scale to oppose the execution of final decisions of the judiciary, and to hold a referendum declared illegal by the Constitutional Court and the High Court of Justice of Catalonia, the aim of which was to leave the structures of the Spanish State.

The Supreme Court took a similar position about the argument of the defense that was based on the right of peaceful assembly. According to the defense, there was a "conversion into criminal acts of mere acts of protest that are fully included within the exercise of the fundamental right of assembly"[29]. While the Supreme Court found the right of assembly to be undisputed, it pointed out that there are limits to the exercise of this right and the Criminal Code sets such limits. However, this case is not about assessing whether the defendants' behavior falls within the constitutionally permitted scope of this right, because, as the court emphasized, none of the defendants, nor any other protester, was charged for participating in the demonstrations themselves. The Supreme Court indicated that the right of assembly even includes behaviors such as the proclamation of independence (!); harsh criticism of the central government; and speeches that try to convince the listeners that the territory has the right to break its ties with Spain. In the court's view, this is obvious and nobody disputes or qualifies it as a crime. According to the Supreme Court, criminalization of such conduct would be tantamount to putting in question the Spanish Constitution itself. However, the active and concerted behavior aimed against the actions of representatives of the authorities with a constitutional mandate to take these actions were not an exercise of the right of peaceful assembly. In the case in question, in the opinion of the court, the defendants implemented a strategy aimed to mobilize and stimu-

[29] See p. 239 of the judgment.

late the masses of citizens called to participate in demonstrations to obstruct law enforcement and enable a referendum declared illegal by the Constitutional Court and the High Court of Justice of Catalonia[30].

While agreeing with the opinion of the Supreme Court, it should be emphasized that using freedom of speech or the right of assembly as a form of expression of certain political views, even if they would call for a change of the constitutional order, is not the same thing as taking actions that violate law, especially criminal law, to change or even to conspicuously and flagrantly reject this order, which was the factual basis of the trial.

VI.

Admittedly, the judgment seems to be very harsh and is most often described as such by commentators; however, several factors can lead anyone to change this opinion. Firstly, the individual offenses for which the defendants were charged are of great importance in their own right and their repercussions affect the integrity of the state and the lives of millions of people. Secondly, it is necessary to consider that the actions of the defendants were deliberate. Thirdly, account should also be taken of the fact that the Spanish Criminal Code itself is quite strict compared to many other European Criminal Codes. As a result, in the author's opinion, these penalties do not seem severe.

However, the judgment of the Supreme Court does not close the issue of liability of the convicted politicians. This is because it was appealed against the Spanish Constitutional Court, which accepted the case for consideration. According to the Spanish Constitution (Art. 161(1)(b)), the appeal procedure is only possible, if the convicted person claims a violation of her fundamental rights, which explains the defensive nature of the judgment constituting the subject matter of this commentary[31]. It should also be borne in mind that, in

[30] See pp. 240–241 of the judgment.

[31] An analysis of the substantiation of the judgment indicates that the Supreme Court considered the issues of potential violations of fundamental rights with great care; hence the term "defensive judgment", which was used earlier. Suffice it to say that this issue was discussed on more than 180 pages of the substantiation, based not only strictly on the Criminal Code, but also with extensive reference to the Constitution and documents of international law, in order to demonstrate that no fundamental right was infringed in the judicial proceedings. The Court

the end, the case will probably be lodged with the ECHR. In both cases, however, only violations of individual rights will be investigated.

Literature

Ferreres Comella V., *Constitutional Conflicts: A reply to José Luis Martí on the Spanish Supreme Court's judgment convicting Catalan secessionist leaders, VerfBlog*, 25 October 2019, https://verfassungsblog.de/constitutional-conflicts.

Marti J.L., *An Exotic Right: Protest and sedition in the Spanish Supreme Court's ruling on Catalan secessionism, VerfBlog*, 18 October 2019, https://verfassungsblog.de/an-exotic-right.

referred in turn to all the arguments put forward by the defense, even to the argument, which is so absurd from the point of view of the Spanish law, that the defendants' behavior should not be assessed from the point of view of the Spanish Criminal Code, because international law entitles Catalonia to unilaterally separate from Spain. The Supreme Court was very attentive to this argument, as well as to other arguments (including the claim concerning legality of these actions based on the idea of the "right to civil disobedience").