The immunity case of Carles Puigdemont, Toni Comín and Clara Ponsatí

Why Parliament should reject the request for waiver of immunity

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1. The waiver of immunity must be rejected because the request has procedural defects

2. The waiver of immunity must be rejected because the charges are unsubstantiated

3. The waiver of immunity must be rejected because it is a case of *fumus persecutionis*

Summary

This document outlines the arguments against the request to waive the immunity of MEPs Carles Puigdemont, Antoni Comín and Clara Ponsatí.

Spain is seeking the waiver of immunity for the three Catalan MEPs in order to prosecute them for their participation in the independence referendum of October 1, 2017, which was organized by the Catalan government despite the fact that the Spanish Constitutional Court had prohibited the vote. Indeed, the Spanish courts have been seeking the MEPs' extradition since the three left Spain to seek the protection of European courts from the unlawful criminal prosecution unleashed by the Spanish state against the leaders and activists of the pro-independence movement. Since then, the Supreme Court has judged the members of the Catalan government that remained in Catalonia, the President of the Catalan Parliament and the presidents of two civil society organisations, most of whom were convicted in October 2019 of the crimes of "sedition" and, in some cases, "malfeasance of funds" and sentenced to prison terms of 10 to 13 years and disqualified from office.

The request to waive the immunity of Mr. Puigdemont, Mr. Comín and Ms. Ponsatí is another of the many actions that the Spanish judiciary has undertaken to incarcerate and disqualify them from office, with the goal of ending their political activity and hindering their political project.

The European Parliament must reject this request because: (i) it suffers from procedural irregularities, (ii) the charges are unsubstantiated, and (iii) there is strong evidence of *fumus persecutionis*[1]. Each of these three reasons on its own constitutes sufficient grounds for rejecting the request.

First, this request must be rejected purely on procedural grounds. The main defect is the non-competence of the Supreme Court. Given this incompetence, if the EP decides to lift their immunity, the whole procedure could be brought to the ECJ and fail.

Second, the charges are not substantiated. The main charge against Mr. Puigdemont, Mr. Comín and Ms. Ponsatí is of sedition.

[1] According to the principles that the Committee of Legal Affairs has developed in dealing with immunity cases, *fumus persecutionis* is the suspicion founded on established facts (such as uncertainties surrounding the proceedings and the underlying cause) that the legal proceedings have been instituted with the intention of causing damage to the Member's political activity.

Mr. Puigdemont and Mr. Comín are also charged with malfeasance of public funds. Neither of these charges are substantiated. Criminally prosecuting the organization of a referendum criminalizes actions protected under international law.

Third, since, as explained, this waiver of immunity seeks to harm their political activity, there is ample evidence of *fumus persecutionis* which has been the main grounds for the Committee of Legal Affairs to argue against the waiver of immunity in the past[i]. For instance, the current disregard for their immunity as MEPs proves the lack of guarantees of the whole process and the ideological bias of the Spanish judiciary system. It is clear that if they were to be extradited, they would not get a fair trial.

Next, we spell out the facts supporting each of our three arguments.

1. The waiver of immunity must be rejected because the request has procedural defects

1.1 The Spanish Supreme Court is not competent

The waiver of immunity of Mr. Puigdemont, Mr. Comín and Ms. Ponsatí has been requested by Spain's Supreme Court, which is not the competent authority to make the request. The competence of the Spanish Supreme Court has been contested from the beginning of the case because, **in accordance with Spanish law, the alleged crimes ought to be judged by a court of the territory where they were committed, in this case, by courts in Catalonia**.

In this regard, on August 7 the Belgian court examining the extradition case of Lluís Puig (another former member of the Catalan government living in Belgium) ruled that "the Council Chamber has rejected the execution of the European arrest warrant considering that the Spanish authority that issued that mandate was not competent to do so"[ii] thus confirming that the Spanish Supreme Court is not competent. To support this decision the Belgian court took into account the resolution from the **UN Working Group on Arbitrary Detentions, which had already declared the incompetence of the Spanish Supreme Court to judge the case of Catalan leaders currently in prison**. This Belgian ruling is a major new development that Parliament should take into consideration: since the Supreme Court, the authority issuing the mandate of the European Arrest Warrant and the waiver of immunity request against Mr. Puigdemont, Mr. Comín and Ms. Ponsatí is non-competent, the immunity procedure is invalid and must therefore be interrupted. Otherwise, if the waiver of immunity of Mr. Puigdemont, Mr. Comín and Ms. Ponsatí were to be approved, this decision could be easily be contested in the ECJ.

At any rate, the Supreme Court had taken the case because some of the defendants, given their positions, could not be judged by an ordinary court. However, since Mr. Puigdemont, Mr. Comín and Ms. Ponsatí stopped being government officials on October 27, 2017, their case should be judged by a lower local court in Barcelona.

Additionally, according to the ruling of Spain's own *Consejo de Estado* regarding the request to lift Berlusconi's immunity as MEP on 2001, the sole competent body to make the request is the Ministry of Justice and not the courts[iii].

1.2 Non-recognition of European immunity

While Supreme Court judge Pablo Llarena requested the waiver of immunity for Mr. Puigdemont, Mr. Comín and Ms. Ponsatí - which *de facto* suspended the European Arrest Warrants he had issued against them - he maintained the Spanish arrest warrant, on the grounds that MEP immunity does not apply inside Spain where, he claims, they must be arrested and kept in pre-trial prison, regardless of their MEP immunity[iv]. This peculiar interpretation of MEP immunity was supported by the Spanish Constitutional Court on September 9, 2020. **What legitimacy does the Spanish judiciary and the Spanish State have to demand the waiver of immunity while at the same time refusing to respect such immunity inside Spanish borders? By recognizing immunity in third countries but not in Spain the Spanish Supreme Court and the Constitutional Court breach the immunity of MEPs provided for in EU law, breaking the principle of non-discrimination in relation to other MEPs**.

It is not the first time in this affair that the Spanish judiciary has disregarded EU law and decisions by EU courts. In 2018 Llarena refused to recognize the decision of the court in the Schleswig-Holstein ruling that there had been no rebellion or sedition in the case of Mr. Puigdemont.

1.3 Pre-trial prison in case of extradition

In fact, since judge Llarena has ruled that Mr. Puigdemont, Mr. Comín and Ms. Ponsatí must be arrested and kept in pre-trial detention if they set foot in Spain, even before the request to lift their immunity has been granted, **it is clear that if their immunity is lifted and the EAWs executed the consequence would be pre-trial detention**. In this case, Mr. Puigdemont, Mr. Comín and Ms. Ponsatí, would immediately be prevented from carrying out their duties as MEPs, which goes against the principle that MEPs' activity should be guaranteed until they are convicted in a final and unappealable sentence, and would therefore impair the rights of their voters and the proper activity of the European Parliament.

1.4 Erroneous translations submitted to the European Parliament

The translations of accompanying documents sent with the request contain mistakes that can be misleading. As explained in more detail below, the main charge against Mr. Puigdemont, Mr. Comín and Ms. Ponsatí is of sedición (sedition) but Mr. Puigdemont and Mr. Comín are also charged with a crime of *malversación de caudales públicos*, that is, for allegedly using public funds to organize the referendum. In the English version of the submitted documents *malversación* appears incorrectly translated as "misappropriation" of public funds (a crime of corruption whereby a public officer takes public money for private benefit). The correct translation of which would be "malfeasance" of public funds (meaning misuse of public funds, without any private purpose, which is not considered corruption). **This erroneous translation may lead MEPs to falsely believe that Mr Puigdemont and Mr Comín are accused of corruption, which is not the case**. There are other instances in the voluminous documentation sent to the JURI committee where the English translation is problematic. For example, there are references to an alleged charge of "rebellion" despite the fact that the EAWs against Puigdemont, Comín, and Ponsatí have no mention of rebellion.

1.5 Conflation of different cases at the JURI committee

Last but not least, **the arrangements made in the JURI committee conflating the three cases and allocating them all to the same rapporteur constitutes another procedural error**. It must be reminded that the precedents and rules of the JURI committee indicate that a different rapporteur shall deal with each immunity case. This particularly damages Ms. Ponsatí as the charges against her are different from those of Mr. Puigdemont and Mr. Comín, because she is not accused of malfeasance of funds.

2. The waiver of immunity must be rejected because the charges are unsubstantiated

The main charge against Mr. Puigdemont, Mr. Comín and Ms. Ponsatí is of sedition, which implies the use of violence and carries very heavy sentences of up to 15 years. This is the charge applied by the Supreme Court in October 2019, with sentences ranging from 9 to 13 years in jail to their former government colleagues and to two social leaders. Additionally, Mr. Puigdemont and Mr. Comín are charged with a crime of malfeasance for allegedly using public funds to organize the referendum. As we explain here, neither of these charges are substantiated.

2.1 Sedition is an anomaly in the EU

The existence of the crime of "sedition" in the Spanish Criminal Code, a loosely defined crime which punishes public disorders with very severe penalties, is a remnant of the past (the Spanish minister of justice himself recently called it a "19th-century crime")[v] and an anomaly in the EU. **The crime "sedition" does not exist in many member states including Germany, France, Italy and Belgium, and while it still exists in Ireland, it was last applied in 1901**. The criminal offences which exist in members states other than Spain that might be analogous to "sedition" are associated with substantially shorter prison terms.

It is worth noting that the JURI Committee has previously argued that immunity should not be lifted when the alleged act is regarded as a criminal offence only in the State requesting the immunity waiver, or when it carries less severe penalties in the laws of other Member States.

2.2 The crime of sedition as seen in the framework of international law, the court of Schleswig-Holstein, the UN WGAD and Amnesty International

The charge or conviction of sedition for the organization of peaceful gatherings and protests without violence on the part of the protesters, is an illegitimate interference with the rights to freedom of expression and peaceful assembly, and thus the interpretation of the crime of sedition made by the Spanish Supreme Court (which according to their verdict does not require violence) contravenes the Spanish Constitution, EU and international treaties, and charters on human rights which Spain has ratified, and is also contrary to the interpretation of the crime the Spanish courts had upheld until now.

The court of Schleswig-Holstein which examined a EAW against Mr. Puigdemont invoked precisely this lack of violence to determine that the actions attributed to him in relation to the celebration of the referendum do not constitute a crime in Germany, and thus rejected extradition on the crimes of rebellion or sedition. The court found that: *"the referendum of October 1, 2017 itself did not realize the required level of force* [for the crime of high treason to be applicable] *because it could not have led to an immediate secession from Spain and was intended by Puigdemont to only initiate further negotiations..."*[vi]. It also denied the charge of "public disorders": *"the prerequisite is that this 'supportive man' should acknowledge and approve acts of violence and influence events. This was not the case with defendant Puigdemont. It only dealt with the referendum. He was not a 'spiritual boss' of violence"*.

In reports[vii] regarding the pre-trial detention and the criminal proceedings against the pro-independence leaders issued before the end of their trial at the Spanish Supreme Court, **the United Nations Working Group on Arbitrary Detention (WGAD) considered that the actions attributed to the leaders were not violent, did not incite violence and did not seek or result in violence**. On the contrary, it found their actions *"constituted the pacific exercise of the rights to freedom of opinion, expression, association, assembly and participation"* and consequently concluded that their detention was arbitrary

because it was the result of the exercise of these rights. Furthermore, **in its annual report on its activities to the Human Rights Council[viii], published in September 2020, the WGAD warns that Spain, the only EU country included in the report, has not implemented its recommendation to release the pro-independence leaders**. The report also notes that it maintained its opinion even after reviewing the case, as requested by Spain.

In its analysis of the Supreme Court's verdict[ix], Amnesty International explains that a conviction for sedition is contrary to the principle of legality and criminalizes actions protected under international law.

2.3 Referendums and declarations of independence are not a crime under Spanish law

It is worth noting that the Supreme Court has charged Mr. Puigdemont, Mr. Comín and Ms. Ponsatí with a crime of sedition because their actions do not constitute a crime under any of the provisions of the Spanish Criminal Code: **the organization of "unauthorized referendums" was decriminalized in Spain in 2005[x], and peaceful declarations of independence had already been decriminalized in 1995[xi]**.

2.4 A clear lack of proportionality

Taking into account the events that occurred (the peaceful -except for police violence- celebration of a referendum), **punishment with heavy prison sentences lacks proportionality**.

2.5 There was no malfeasance of funds

Mr. Puigdemont and Mr. Comín are charged with a crime of malfeasance for allegedly using public funds to organize the referendum. However, no public funds were spent in the organization of the referendum: in fact, **the Spanish Minister of Public Finances at the**

time of the referendum repeatedly stated that no public money had been used to organize the referendum[xii] **and his department issued several reports certifying that**. It is worth noting that from November 2015 on the public finances of the Catalan government had been under the supervision of the Spanish government.

Furthermore, even the Spanish Supreme Court itself has acknowledged that no public funds were spent for the referendum. In their verdict of 14 October 2019 they stated: *"None of those payments were ultimately made to Unipost. Its insolvency administrator decided not to claim payment from the Regional Ministries that had placed the respective orders"*. Despite this acknowledgement of the facts, the Supreme Court argued that whether the funds had actually been paid to the suppliers or not was irrelevant: according to them the crime was committed merely by ordering the service, even if the funds were never actually paid. This novel interpretation is contrary to the doctrine previously upheld by the Supreme Court, i.e., that since a requirement of the crime is the actual damage to the public finances, there is no crime without actual payments.

3. The waiver of immunity must be rejected because it is a case of *fumus persecutionis*

The persecution of Mr. Puigdemont, Mr. Comín and Ms. Ponsatí is a case of fumus persecutionis. In a context where (as repeatedly denounced by the Council of Europe[xiii]) the hierarchy of the Spanish judiciary is highly politicized, the procedural defects that we have discussed in section 1 arise from the political nature of the prosecution which has progressed by a coordinated effort of the courts, the public prosecution, administrative authorities and the Constitutional Court. This has resulted in a faulty process, first, because of the lack of guarantees and, second, due to numerous episodes where the different institutions have displayed an open ideological bias.

Next, in points 3.1 to 3.3, we argue that the process lacks guarantees.

3.1 The right to the natural judge has been violated

The first major irregularity, which would necessarily also affect Mr. Puigdemont, Mr. Comín and Ms. Ponsatí, is the contravention of the right to the natural judge and the right to appeal. As explained above regarding the case of Lluís Puig and the ruling of the Belgian court of August 7, 2020, **the Supreme Court was never the competent court: the trial against the other pro-independence leaders should have been held before the Superior Court of Catalonia, as denounced by the WGAD and the International Federation of Human Rights and EuroMed Rights (FIDH)**[xiv]. Moreover, the Spanish Supreme Court is not competent to issue EAWs against Mr. Puidemont, Mr. Comín and Ms. Ponsatí either. To make matters worse, since the Supreme Court is the highest instance in Spain, by assuming competence it has denied the defendants the right to an appeal.

3.2 There would be no fair trial in case of extradition

Since the pro-independence leaders which remained in Spain have already been judged, **the case against Mr. Puigdemont, Mr. Comín and Ms. Ponsatí is considered essentially settled and therefore, they cannot be expected to receive a fair trial** (they would be judged by the same court) and it is clear that their presumption of innocence has not been, and will not be respected. In fact, the three MEPs are routinely referred to as criminals by the press, by members of the Spanish government and other prominent politicians and even by members of the judiciary.

It is worth noting that the prosecution, pre-trial detention, trial and sentencing of the pro-independence leaders which remained in Spain was a politically-charged procedure full of irregularities, as denounced, among others, by the WGAD and the FIDH. They flagged irregularities such as the violation of the presumption of innocence, the contravention of the right to have enough time and means to prepare the defence, and the proceedings being a general incrimination not based on concrete facts.

3.3 An opportunistic use of the European Arrest Warrants

Judge Llarena has used the European Arrest Warrants (EAWs) against Mr. Puigdemont, Mr. Comín and Ms. Ponsatí arbitrarily and opportunistically:

- First, on December 3, 2017 he withdrew the first round of EAWs issued by the prior investigating judge (before the Supreme Court assumed the case)[2] because he suspected the Belgian court might "partially deny the execution of the EAWs" which would "restrict" actions against the three[xv].

- Then, after concluding the investigating phase and issuing the indictment against the pro-independence leaders that remained in Spain, Llarena issued new EAWs and Mr. Puigdemont was arrested in Germany en route to Belgium. The court of Schleswig-Hol-

[2] In fact, the FIDH considers that "the existence of multiple judicial proceedings in various courts and their late centralization in the Supreme Court constitutes a violation of the right to a fair trial".

stein refused to execute the EAW for "rebellion" or "sedition" but was ready to execute the EAW for "malfeasance of funds". As this would have meant judging him for a much lesser crime and would have forced the release from pre-trial prison of the other pro-independence leaders, Llarena withdrew the EAWs again[xvi]. Meanwhile, in Belgium the EAW affecting Mr. Comín had already been rejected in May 2018 because of a procedural error.

- Lastly, following the conviction of the other pro-independence leaders, Llarena issued the third "round" of EAWs which are currently in force (though suspended due to immunity). The case of Lluís Puig has already been rejected by Belgium's court on the grounds that the Supreme Court is not competent. Given the precedents, there is no guarantee that, if immunity is waived, the EAWs will not be withdrawn once more if the outcome does not satisfy the Spanish judiciary.

Finally, in points 3.4 to 3.8 we discuss the ideological bias of the institutions involved in the process.

3.4 Ideological bias in the Supreme Court

The decisions regarding who to prosecute and on what charges have been arbitrary, treating those that remained politically active differently from those that did not. In March 2018 only some of the former members of the Catalan government were put in pre-trial detention. **Former ministers that had quit politics were set free, while those that had carried on with their political activity by running in elections were imprisoned**. This arbitrary distinction was also shown in the sentencing: the politically inactive were "only" convicted for a crime of disobedience without a prison sentence, the others were convicted for sedition (and in some cases malfeasance of funds) with harsh prison sentences of over 10 years.

In February 2018, judge Llarena, denied the request to end the pre-trial detention of former Catalan minister of interior, Joaquim Forn, on the grounds that he had not renounced his pro-independ-

ence views[xvii]. He denied another request in May 2018 because Forn had written a letter of support to the pro-independence grassroots organization Comitès per la Defensa de la República[xviii].

In March 2020, during the COVID-19 lockdown, Catalan penitentiary authorities reviewed the permissions of convicts in open prison regimes to remain at home during the emergency, including some of the Catalan leaders. While these cases were examined by the competent committee, the Supreme Court press service issued a statement threatening to bring criminal charges against committee members if any of the Catalan leaders were released[xix]. The message said nothing about other convicts with the same penitentiary status.

On July 23, 2020, the Supreme Court revoked the penitentiary regime of the former president of the Catalan parliament, Carme Forcadell, which allowed her to do volunteer work outside of prison. **The court considered that any relaxation of her incarceration regime had to relate to a "treatment program" implying that she was to be subjected to a re-education program**[xx].

Public speeches by Supreme Court judges at official events often exhibit an open ideological bias. For example, the president of the Supreme Court, Carlos Lesmes, described citizens protesting against the imprisonment of Catalan leaders as a *"small but resounding part of society, made up of citizens blinded by irrationality who were frontally attacking the fabric of our democracy"*[xxi].

3.5 Ideological bias and re-education plans by the public prosecution

The public prosecution has been very keen on expressing the need for **political re-education** and has systematically opposed any penitentiary permits to the Catalan political leaders on such grounds. For example:

- **In February 2020, they appealed a 72-hour permit to leave prison for civil society leader Jordi Cuixart on the grounds that he**

had not repented and was not yet "re-educated" and argued that such a permit would never be granted to a rapist or a murderer who declared his intention of "doing it again"[xxii].

- In May 2020, they appealed the permit for civil society leader Jordi Sánchez to leave prison to carry out volunteer work and asked that he must first take a class to teach him that "a regional government cannot transform the structure of the State"[xxiii]. A permit for former labour minister Dolors Bassa to take care of her sick mother was opposed on similar grounds[xxiv].

- **On July 28, 2020, they appealed the decision to grant a partially open regime to some of the Catalan leaders saying they need to spend more time in prison to follow a re-education program on sedition**[xxv].

3.6 The role of political party VOX as initiator of the procedures

The criminal proceedings started in March 2017 with a criminal lawsuit brought up by the far-right political party VOX. **This extremist political party has remained part of the proceedings as the "people's prosecution". They systematically requested the longest prison terms** (thrice what the public prosecution service was requesting) and enjoyed ample media attention due to their role (the lawyer acting for the party in the trial was simultaneously running in the Spanish elections and is now an MP)[xxvi]. VOX also holds 4 seats in the European Parliament in the same political group with the rapporteur of the immunity case.

3.7 The non-neutrality of the Central Electoral Commission

The Central Electoral Commission (JEC, as abbreviated in Spanish) is the Spanish electoral authority whose mission is to ensure fairness in elections. **In the European Parliament election of May 2019 the JEC acted with a lack of impartiality**. They first attempted to exclude Mr. Puigdemont, Mr. Comín and Ms. Ponsatí from the electoral lists (this

decision was overturned by the administrative chamber at the Supreme Court). After the election, the JEC prevented Mr Puigdemont and Mr. Comín from taking up their MEP duties for six months, claiming that they had to go to Madrid to swear allegiance to the Spanish constitution as a pre-requisite for becoming a MEP. Eventually, after the ECJ ruled against the JEC claim, Mr Puigdemont and Mr. Comín were able to take their seats in January 2020 (Ms. Ponsatí became an MEP after Brexit.) As a consequence of the same JEC interference, Oriol Junqueras, elected MEP while in pre-trial prison, was kept from taking his seat in the European Parliament. The final outcome of Mr. Junqueras' case is still open at the ECJ.

The politicisation of the JEC is illustrated by the revelation by the Spanish newspaper *El Diario* that **one of the JEC's members from 2017 to 2019, Andrés Betancor, who was on the payroll of the Spanish party Ciudadanos**[xxvii], prepared legal filings on behalf of his party to exclude Mr. Puigdemont, Mr. Comín and Ms. Ponsatí from the European elections while at the same time he participated in the decision as a member of the JEC.

3.8 Bias and strategic timing in the Constitutional Court

The Constitutional Court was devised as an arbitral body to resolve constitutional disputes. However, **over the last years it has turned increasingly partisan and has played a key role in the judicialization of what is essentially a political conflict. In fact, its resolutions have been the stepping stone for the "general criminal cause" against pro-independence leaders**. This has been facilitated by the direct executive powers the court was granted in a reform of its charter in 2015, a reform which was criticized by the Venice Commission of the Council of Europe because it could affect the "perception that the Constitutional Court only acts as a neutral arbiter, as judge of the laws"[xxviii].

The Constitutional Court works as a chamber of last appeal above the Supreme Court in cases related to fundamental rights. Because appeals need to be examined at the Constitutional Court before

they can be brought to the European Court of Human Rights, the Constitutional Court can act as a gate keeper before cases get to Strasbourg. In practice, about 99% of the appeals are quickly dismissed by the Constitutional Court (because they are considered of no constitutional relevance)[xxix] and then can quickly move on to the ECHR. However, in the several appeals filed by the Catalan leaders during their pre-trial detention, the Constitutional Court accepted examining all of them (the Spanish law says a decision on admissibility should be made within 30 days), and then is spending a very long time examining the case. These inordinate delays reveal[xxx] a deliberate strategy to stall appeals and ensure they could not reach ECHR before the trial was over.

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According to the principles that the European Parliament Committee of Legal Affairs has developed in dealing with immunity cases,

fumus persecutionis

is the suspicion founded on established facts (such as uncertainties surrounding the proceedings and the underlying cause) that the legal proceedings have been instituted with the intention of causing damage to the Member's political activity.

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