BRIEFING #12/2019

A HUNDRED YEARS OF INJUSTICE

On 14th October, Spain's Supreme Court made public its **verdict convicting nine political and civil society pro-independence leaders of sedition and sentencing them to a total of 99 years and 6 months of prison and to a similar ban from holding public office**[1].

It is worth remembering that, as pointed out in a communiqué by Agora Judicial- a professional association of judges- "*Those found guilty worked together in **the calling and the organisation of a referendum on self-determination and that, in itself, is not a crime (...). Such was the decision of the [Spanish] Parliament in 2005 when it excluded from the Criminal Code** the call of a referendum without legal base*."

Similarly, magistrate and jurist Joaquim Bosch claims that "*(…) **the verdict attributes to the pro-independence public officials the authorship of sedition through a stream of behaviours linked to the call of the referendum and their calls to go to vote**. That attribution of guilt also generates legal doubts, because **holding illegal referendums is a conduct that was decriminalized**. And encouraging citizens to vote cannot criminalize the summoners for the crimes that may occur subsequently. **If it is not a crime to hold a referendum, even less so calling to participate in the consultation**. For instance, those who call to take part in a peaceful demonstration cannot be responsible for the offenses that may occur in it. There is no causal link. However, **the sentence considers several public officials responsible for sedition, while admitting that they did not participate in acts of passive resistance, nor did they encourage the sitting downs to hinder the actions of [police] agents***".

The harshness of the sentence, together with its debatable legal foundations have triggered alarmed reactions from law professors, lawyers, magistrates, and civil, political and human rights defenders, both in Spain and abroad.

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1 The specific convictions are as follows:

Oriol Junqueras, former vice-president of Catalonia (13 years)
Dolors Bassa, former Catalan labour minister (12 years)
Jordi Turull, former Catalan government spokesman (12 years)
Raül Romeva, former Catalan external relations minister (12 years)
Carme Forcadell, ex-speaker of the Catalan Parliament (11.5 years)
Joaquim Forn, former Catalan interior minister (10.5 years)
Josep Rull, former Catalan territorial minister (10.5 years)
Jordi Sànchez, activist and ex-president of the Catalan National Assembly (9 years)
Jordi Cuixart, activist and president of Òmnium Cultural (9 years)

See here for more information.

1. The collapse of a narrative: From coup d'état to public disorder

As pointed out by Dr. Joan Queralt, Professor of Criminal Law, *"**All of a sudden, we went from a coup d'état to an offense against the public order**."*

Indeed, the Supreme Court's ruling reaches the same conclusion as that of the German High Court of Schleswig-Holstein when it refused to extradite former President Puigdemont: **the crime of rebellion could not be applied to this case, as the required violence did not exist**.

In fact, **the ruling acknowledges that the defendants always embraced and called to peaceful demonstrations** (e.g. pages 339 or 394), as well as their **"pacifist convictions"** and **"commitment to non-violence"** (p. 390). Furthermore, according to the Supreme Court's ruling, **the political process led by the defendants was no coup d'état** (p. 155)**, it was not a violent plan and was mostly seeking to pressure the Spanish Government into negotiating a referendum** as the one agreed between the United Kingdom and Scotland (e.g. p. 357).

2. And yet, sedition: an ill-defined offense with a dubious reputation

Articles 544-549 of the Criminal Code define **sedition** as the crime committed by those that **rise up publicly and in a tumultuous way -by force or by unlawful means-** to obstruct the implementation of laws, or prevent public authorities from exercising their functions or ensure the enforcement of their agreements or resolutions.

However, the offense of sedition, so defined, has been **criticised**, as Professor of Criminal Law Nicolás García Rivas highlights, because of "*the huge ambiguity of the punished behaviour and **the profoundly authoritarian roots of this crime**.*" Hence, it is not surprising that the offense of sedition does not exist in most European countries. **Germany, for instance, abolished it in 1970** as it was considered rather undemocratic. The same did the **United Kingdom in 2009 and Australia in 2011**.

In a statement released the same day as the verdict, **the International Commission of Jurists** stated, *"the conviction today of Catalan separatist leaders of **broadly defined offences of sedition unduly restricts rights of freedom of expression, assembly and association***". The ICJ also stressed that "*the overly broad definition of the crime of sedition applied in this case creates a **high risk of arbitrariness***".

Indeed, despite having acknowledged the defendants' commitment to peace and non-violence, the Court embarks on a **re-interpretation of the notion of tumultuous uprising to undermine the notion of peaceful resistance:** "*The Court has no doubts regarding the fact that **–regardless of the adjectives evoking peace- resistance is resistance, it entails [the use of] physical and intimidating force, entails pressure, entails opposition to police action***" (p. 393).

3. An overstretched interpretation: sedition without uprising

As mentioned above, **the crime of sedition hinges on the existence of an uprising**. Hence the efforts of the Supreme Court's ruling to depict the demonstration of 20th September 2017 and the episodes of passive resistance of 1st October as an uprising - be it because of the sheer number of participants (p. 284 or 305), because of the feelings it triggered in the officials at the demonstration (p. 284) or the fact that the police felt obliged to charge (p. 54).

In stark opposition to the Supreme Court's reasoning, Dr Joan Queralt, Professor of Criminal Law, points out that "***There was no uprising***. *That is essential. Now that the remains of the dictator are to be exhumed, it is worth remembering what an uprising is.* ***To say that there was an uprising (or several) in Catalonia is a blatant insult to intelligence***."

However, the Supreme Court insists that "***the right to protest cannot mutate into an exotic right to physically prevent public authorities from enforcing a judicial mandate***" (p. 283).

Yet, according to José Luis Martí, Professor of Law Philosophy, when the Court uses notions such as *"conglomerate of people"* or *"clear numerical superiority"* linked to the concept of *"physical impediment"*, "***[the Court] is referring to the thousands and thousands of pro-independence [citizens] that used traditional techniques of passive or non-violent resistance*** *(…), for instance, by sitting on the ground (…).* ***In short, a physical impediment that under no reasonable criteria could be interpreted as a tumultuous uprising."*** Prof. Martí thus concludes that **such an "*(…) extensive interpretation of Article 544 puts our democratic rights in check, and in this sense it is unfair and dangerous.***

Likewise, Prof. Nicolás García Rivas claims "***The Supreme Court has sought a way to convict without enough basis to do so, using an argument that suffers from an undisguised authoritarianism***."

4. The charges of rebellion are dismissed but its effects remain

The defendants have denounced that "*The trial for* ***rebellion has proved to be premeditated for the sole purpose of kidnapping the will of citizens expressed in the ballot box***. *The muzzling of the voice of millions of Catalans through the suspension of their chosen representatives in the polls is of an unnuanced gravity in democratic terms*".

This statement refers to the fact that the choice of rebellion -rather than other more plausible alternatives- **sought to trigger the extraordinary measures foreseen by the Criminal Procedure Law** (e.g. Art. 384) **and keep nine people in pre-trial detention for almost two years while banning them from holding public office**.

As a matter of fact, **the charges of rebellion have been instrumental to alter the democratic results of several elections**: they prevented the defendants from discharging the functions that the citizens of Catalonia had entrusted to them in the **2017 elections to the Catalan Parliament** (9 of the defendants were suspended), **in the Spanish general elections of April 2019** (5 of the defendants were elected and subsequently suspended), and **in the elections to the European Parliament of May 2019** (three of the defendants were elected MEPs but could not take office).

In the already-mentioned communiqué, Agora Judicial agrees that "*(…) this case has **affected the right to political participation of democratically elected people***."

5. Disproportionate jail sentences

The **Supreme Court's dismissive description of the events** (E.g. there was no coup –p. 155-, no rebellion –p. 263-, the State never lost control –p. 270-, a ruling by the Constitutional Court and a publication in the Official Gazette was all was needed –p. 269) **contrasts with the conviction for sedition and the harsh jail sentences**.

Likewise, lawyer Daniel Amelang states "***I cannot come to terms with the fact that the legislator has decided to attribute sentences of up to 15 years in prison for actions that do not involve violence. It is the same penalty as for a homicide.*** *(…) Assaulting a police officer is punishable by imprisonment from 6 months to 3 years. Public disorders (barricades, throwing objects, street cuts with violence, etc.), with the same penalty. Possession of weapons is punishable by penalties of 1 to 2 years. The fabrication of explosives for terrorist purposes carries a maximum penalty of 8 years. Injuries, a maximum of 3 [years]. Therefore,* ***I cannot share that promoting a demonstration, however tumultuous and disobedient it may be, is equated with homicide when it has been peaceful***."

Indeed, the **International Commission of Jurists** has alerted that "*The resort to the law of sedition to restrict the exercise of these rights is unnecessary,* ***disproportionate*** *and ultimately unjustifiable*." Similar concerns have been voiced by the **World Organisation Against Torture (OMCT)**, which "*condemns the* ***disproportionate conviction*** *of Catalan leaders", which, in the OMCT's view, "(…)* ***contravenes international standards*** *establishing that the right to protest includes even conducts that temporarily hinders/impedes/obstructs activities of third parties*."

6. Beyond Catalonia: an attack to civil and political rights

The **International Commission of Jurists** has alerted in a communiqué that "*These convictions represent a* ***serious interference with the exercise of freedom of expression, association and assembly*** *of the leaders."*

Prof. Martí considers that certain elements of the verdict "(…) *not only reflect a legal reasoning but also* ***an ideological positioning improper of a democratic state under the rule of law***". Furthermore, "*What the Supreme Court has done in this sentence is fundamentally* ***an extensive interpretation of the criminal type of sedition that unacceptably curtails democratic freedoms of demonstration and protest***."

Following Prof. Martí's reasoning, "*If we interpret Article 544 [on sedition] (…)* ***reducing the conceptual content of public and tumultuous uprising to practically any disorder, without the need for any violence or serious damage, it would result that many of the demonstrations, protests and actions of non-violent resistance (...) would constitute a crime of sedition. Such an interpretation implies a grave curtailing of the democratic freedoms of demonstration and protest***."

The same conclusion reaches Agora Judicial: "*We believe* ***[the sentence] entails a criminalisation of protest and of the rights of freedom of expression, manifestation, political participation and the democratic foundations of the parliamentary system.***"

BEYOND THE VERDICT: A CONTESTED TRIAL

The trial itself has been much criticised for a number of irregularities. For instance:

The **United Nations Working Group on Arbitrary Detentions**, in statements released in May and June 2019, concluded not only that **the pre-trial detentions were arbitrary** but also "*that the deprivation of liberty of [the defendants] was carried out* ***at the expense of the fundamental rights to a fair trial, to the presumption of innocence, to be judged by a competent and impartial court, and to an adequate defence***." (§140)

Similarly, the final report by the observers' platform **International Trial Watch** pointed to a number of irregularities, which led ITW to conclude that **"*this trial constitutes a general cause of political nature****, which (…) has resulted in* ***a clear manifestation of repression of the exercise of fundamental rights and political ideas***." (§20) Among the irregularities highlighted by ITW, the platform stressed:

- The lack of competence of both the National Court and the Supreme Court **violates the defendants' right to be judged by the ordinary judge predetermined by law**.
- The trial, directly at the Supreme Court, **violates the defendants' right to appeal**.
- The Court's decision not to allow a direct challenge of witnesses' statements by means of videos and other evidence **violates the right to use the appropriate evidence to one's defence**.

More recently, the **International Federation for Human Rights** has released a joint report with **EuroMed Rights** where it attacks, among other elements:

- The **absence of the essence of a trial** -the adversarial debate- given the **limitations imposed by the Court on both the questioning of witnesses as well as on the use of evidence**.
- The **infringement of the right to a fair trial** by the **use of evidence gathered in parallel, ongoing proceedings**, as well as through investigations concerning facts that were prior to and outside of the case.