The Right of Catalonian Leaders to Protest

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On 22 April, the Spanish Constitutional Court issued its first judgement on the constitutionality of the conviction of the Catalonian leaders for the events of October 2017. It upheld the Supreme Court's interpretation of the crime of sedition which blurs the line between legitimate protest and sedition. The judgement will therefore have repercussions beyond this particular case and may affect the right of protest and dissent in Spain. Should the case go to Strasbourg, it is upon the European Court of Human Rights (ECHR) to decide on the existing room for the freedom of assembly of all European citizens in relation especially with acts of civil disobedience. Otherwise, the crime of sedition can become a threat to the right to protest against the existing political system.

Clearing the path to the ECHR

There are no big surprises in this judgement. For many legal and political observers, the sole purpose of the Court's intervention was to delay the plaintiffs' access to the ECHR, in order to minimize the effects of the European judges' investigation of their allegations. The appeal to the Constitutional Court is prescriptive to open the procedural path to the ECHR. Had the Court promptly refused to consider the case, the plaintiffs could have immediately turned to the ECHR. But since the case was admitted for consideration they had to await the judgment, which took years, before being able to turn to the ECHR.

In recent years, the Spanish Court has admitted less than one percent of the total number of applications filed by way of *recurso de amparo*. The Catalonian independence leaders have filed numerous appeals; in their case the rate of admissions has grown up to 98%. Actually, in the last year, ten percent of the appeals considered by the Court were filed by these Catalonian leaders. Inversely, most of the appeals decided by the Court obtain a positive answer on the alleged violation of the plaintiffs' rights: Only 22 out of 195 judgements in 2020 fully dismissed the allegations of the appellants. Every appeal of Catalonian leaders, however, was fully dismissed.

Although these figures show a striking difference in treatment, they do not necessarily imply a lack of impartiality of the Spanish Constitutional Court towards the claims of Catalonian leaders. The different treatment is procedural: Cases that normally would not have been admitted are admitted but dismissed, delaying the plaintiffs' path to the ECHR. The Constitutional Court's right to select the cases that deserve a decision on the merits allows for for some room to give regard to political considerations.

An exceptional judgement

The judgment concerns the constitutionality of a sentence against Mr. Turull, a former Catalan minister. The Supreme Court had found him guilty of sedition and diversion of public funds, for promoting a peaceful demonstration and an illegal referendum on Catalonian independence in a judicial ban. He was sentenced to 12 years in prison. Mr. Turull appealed to the Constitutional Court alleging several procedural violations of the judicial process, as well as substantial claims, among them a disproportionate penalty.

The Supreme Court acted as the first and last instance court, without the possibility of appeal. With only the sentence of the Supreme Court, the constitutional judge lacks the views of any criminal judge who may have reviewed the case. Therefore, although the Constitutional Court cannot act as a criminal court of second instance and is only competent to rule on violations of fundamental rights, the Court's arguments in this judgement often focus on the guiltiness of the plaintiff, rather than the alleged breach of his rights.

But this is not the only exceptionality of this judgement: never before has a ruling of a *recurso de amparo* filled almost four hundred pages, and the Constitutional Court did not even find any violation of the plaintiff's rights. Never before has the Court reasoned as much about proportionality, as this is not a standard commonly used in its jurisprudence.

Many of the plaintiff's claims, however, do not receive any extended constitutional reasoning and it is sometimes difficult to understand the reason for their dismissal. Regarding the alleged violations of due process, the Court repeatedly refers to the arguments of the contested judgement, validating their coherence and sufficiency, rather than addressing the possible damage to the right of defense. Indeed, most alleged violations were purely formal and taken individually do not demonstrate a lack of impartiality of the Supreme Court. Mr. Turull, however, argued that it was their accumulation which breached his right to a fair trial, in particular, the principle of equality of arms. The Constitutional Court failed to make a general assessment on this question. From a purely formal point of view it is indeed difficult to find any lack of impartiality, as long as every procedural decision was duly motivated. It is therefore doubtful if the Court should have assessed a possible disproportionate reduction of his right to defense.

On the specificity of the offense of sedition

The key arguments of the sentence relate to the specific delimitation of the crime of sedition in the Spanish criminal code and the proportionality of the penalty imposed on Mr. Turull. The principle of legality requires that the description of offenses in the criminal code must be sufficiently clear and specific. The appellant argued that the terms of the code were too broad, allowing the punishment of conduct that is the exercise of civil rights. The prosecutor argued that the description of the crime is not indeterminate because courts can interpret it. The Constitutional Court dismissed the

claim and without further explanations assessed that the description of the crime in the code appears sufficiently specific.

The dissenting opinion of one of the judges, a reputed professor of criminal law, raises some questions about the specificity of the legal precept. Although he agrees that the principle of legality is respected in the case, he recognizes the vagueness of the offense, so that ordinary citizens could not always anticipate if their action was unlawful. Apart from that, the judgement of the Supreme Court against the Catalan leaders was the first to interpret the crime of sedition in this way.

With this assessment, the Spanish Constitutional Court accepts that the typical behavior of sedition is “the promotion of a citizen mobilization to provoke the breach of the law”. Therefore, it subjects any public assembly or mobilization to ideological scrutiny by requiring that its purpose does not go against the existing legal framework in order to be regarded as legitimate. This effectively prohibits peaceful civil disobedience which can be punished with up to nine years of prison.

Moreover, civil disobedience was addressed only against the ban of organizing a social referendum. The Court admits that the main intention of the condemned political and social leaders was “to press the Government of the nation to negotiate the call for a referendum, this time legal”. It also accepts that Mr. Turull and others repeatedly called for peaceful political demonstrations. Therefore, their intention was clearly not to subvert the constitutional order. However, as they called to disrespect a judicial ban in a situation where violence was possible, this qualifies as sedition.

The Court places the respect towards state authorities above any the effects of interpretation over civil rights. It also argues that a peaceful but massive demonstration may be seen as a way to prevent the police to use force which, at the end of the day, may disrupt the normal functioning of the state powers. This perspective allows future severe punishment of any kind of peaceful protest organized against a judicial ban. Worries about the possible chilling effect on the civil right to protest, the freedom assembly and to express dissenting political views were easily dismissed by the court in the case.

About the proportionality of the punishment

The dissenting opinion, signed by two magistrates, points onto the severity of the punishment, which they regard as disproportionate. The Court fails to develop any strong argument on this issue. It considers that the penalty is not disproportionate as it is within the range allowed by the law and the severity of the crime must be taken into consideration, as it “questions the primacy of the law and the functioning of the democratic rule of law”. The Court eventually denies that a chilling effect was even possible, arguing that if the conduct of the appellant was not protected by any constitutional right, his condemnation – even if it was severe – could not affect the legitimate exercise of such rights by other people. The general and permanent prohibition of civil disobedience – even if it is aimed at a ban on assembly – is thus assured with strong criminal penalties.

The dissenting opinion comes to the opposite conclusion. It takes into account the indetermination of the offense in the criminal code; that the illegitimate conduct was developed in the frame of the freedom of assembly and freedom of expression and should be considered as an excess on it; that the only connection between the plaintiff and the events classified as seditious was his position as a member of the Government of Catalonia; that the criminal code also allows for a lighter sentence. Based on all this, the dissenting judges conclude that the conviction was disproportionate. It is reasonable to agree with this dissenting opinion.

The future of the freedom of assembly in Europe

The structure, wording, and justification of the judgement suggest that the Constitutional Court had an appeal to be filed at the ECHR in mind. In fact, Catalonian leaders have repeatedly announced that they will turn to the Strasbourg judges to protect their rights. Knowing this, the Constitutional Court attempts to avoid any future condemnation declaring its lack of motivation or impartiality.

Finally, the last consideration of the ruling is devoted to the general proportionality of the interference in the fundamental rights. One relevant argument is the public position of the plaintiff as minister of the Catalonian government. The court raises the idea of “constitutional loyalty”, implying that public officers are bound by a qualified obligation which was disrespected when the plaintiff called to subvert the constitutional order. This way of arguing is not common at the Spanish court and appears to invoke of the right of the State to severely respond to seditious acts, probably addressed to the ECHR.

By their very nature, political rights such as the freedom of expression or the right to peaceful assembly are used against public authority and may often question the legitimacy of existing laws and rules. Nevertheless, the line between legitimate protest and sedition does not seem to be clear anymore. Moreover, the breach of a judicial ban for protesting can easily bring any citizen into prison for nine years. The possibility of judicially prohibiting any protest becomes a strong weapon for States willing to silent dissidence. All this, will undoubtedly have an effect on citizens when they consider whether they should join a protest.

It will likely be the ECHR which will have the last word in this case. And it will be relevant not only for the supporters of Catalonian independence, nor for those considering the possibility of peaceful civil disobedience as a last resort when the State prohibits public protests, but for all Europeans who want to make use of their right to protest.
