

Spain has a Problem with its Judiciary

Joaquín Urías

2020-01-15T12:10:59

According to the [EU Justice Scoreboard of 2019](#) Spain is among the four EU countries with the worst perception about judicial independence among its citizens. The survey shows a trend that isn't stopping: the perception about partiality of the judiciary is growing dangerously in the Spanish society. Causes are to be found in three elements: the political situation in the country; the shortcomings in the regulations on judiciary; the behavior of the judges themselves.

Recently, the Spanish Supreme Court (*Tribunal Supremo*) has issued a decision dismissing the appeal of Mr. Oriol Junqueras against the refusal by the same court to allow him exiting briefly the prison were was kept in provisional imprisonment. Mr. Junqueras was in that moment just elected as member of the European Parliament, and the Spanish electoral authority (Junta Electoral Central) had decided that he could acquire the full status of MEP only by taking in person the oath to the Spanish Constitution on its premises. The Supreme Court prevented him of doing so – even though he wasn't at the moment condemned of any crime – in order to avoid him enjoying any European immunity.

When the politician appealed the decision, the Court itself suspended the procedure in order to refer a question to the European Court of Justice to clarify the start and extension of the privileges and protections of elected members of the European Parliament. [The European Court ruled](#) that it was mandatory to allow Mr. Junqueras to leave the prison in order to start his functions as MEP. Alternatively, the ECJ said that if he was a dangerous criminal it was also possible to keep him in jail but in that case it would be mandatory to present a request to the Chamber before condemning him. The Spanish Supreme Court didn't do either. Nevertheless the appeal of Mr. Junqueras has been by now dismissed, by the Tribunal Supremo considering that it took the right decision.

A lack of independence

This clear disobedience to the ruling of the European Court of Justice is just one more episode in a long **series** of decisions where the *Tribunal Supremo* has directly attacked German or Belgian courts in relation with the Catalanian conflict. The obstinate refusal of the highest Spanish judicial body to follow European standards regarding the criminal treatment of prosecuted Catalanian politicians is seen by many observers as an indicator of its lack of political independence.

Indeed the key problem for judicial independence in Spain is probably the way how judges of the Supreme Court are appointed. According to Spanish law (art. 127 of the law on the judicial power) these magistrates do not access to their position following any objective system of merits, but by appointment of the [General Council of the Judiciary](#) (*Consejo General del Poder Judicial*). Such a lack of objectivity

allows appointments based in political reasons, as well as clientelism or favors' exchange. As the Council's members are themselves appointed by the Parliament, the composition of the Spanish Supreme Court is in fact decided by the political parties. And even if judges are granted full independence during their tenure there is little doubt about the debts acquired in the moment of their appointment and the weight of their ideological positions for such election.

In the Spanish judiciary, many call for the members of the General Council to be chosen by the judges themselves, following the best European standards. However, there is really little said about the possibility of modifying the access to the Supreme Court establishing an impartial and objective system based exclusively in merits. The intense prominence of the – often very politicized – professional associations of judges, which are acting as real trade unions in the representation of members of the judiciary, makes it likely that even a possible change in the composition of the council for the judiciary would not necessary imply a de-politization of the appointment of judges to the Supreme Court.

For many years the Spanish judiciary has suffered from wide-spread suspicion of not being fully committed with the constitutional principles and rights. During the transition from dictatorship to democracy in the 1970s, Spain did not undergo any process of lustration of the judiciary. The same judges appointed during the dictatorship that were used to implement the laws approved by General Franco passed on to implement the new democratic Constitution. A decade later the socialist Government took some efforts to retire some of the judges appointed without transparent system, and sometimes even without any legal background.

Currently, judges who were appointed during the dictatorship are a minority ,and many of Spanish judges weren't even born when Franco died. However the selection system of judges has been often accused of promoting candidates with conservative leaning. Reportedly the current system of competitive examinations requires an average time of five years of studying. This is not always economically affordable to all families and in general favors a conservative attitude among candidates. At the same time, the examination system in Spain is based only in rote learning, without any other consideration related to their social function as judges. In any case the conservative inclination of Spanish judges has become evident in the recent internal election for some boards of direction in the courts: the most conservative association, often close to the far right, the Professional Association of Magistrates (*Asociación Profesional de la Magistratura*) obtained 52% of votes while the only association self-defined as progressist obtained just 12%.

This being said, the political ideology of judiciary should never be a question in a democratic state. In Spain, however, the independentist conflict of Catalonia is increasing the stress put on the system. By facing the Catalanian challenge, the conservative government chose to give a legal rather than political answer. Spanish courts issued a ban to discuss any matter related to independence at the Catalanian parliament. The then leaders of the movement were indicted for disobeying the ban and promoting social protests.

In the path to avoid any possibility of a political answer by the independentists, the judiciary is playing a key role which often goes way beyond the strict implementation of the law. Provisional detention was used as an instrument to publicly silence their voices. Judges used it even to prevent one of them from becoming the President of the Autonomous Region of Catalonia by sending him to prison the very same day when he was going to be elected. They were eventually convicted – without any possibility of appeal – under a criminal provision that has not been used before and that was created specifically by case law of the Supreme Court for this specific occasion. All these decisions may be presented as formally legal, but all of them are possible only in a situation of intense judicial activism.

The Spanish judiciary does not seem to be worried about its public image of independence and impartiality. In social media many judges, presenting themselves as such, make statements about politics in matters unrelated to justice management and reform. Many of them often show support to the extreme right party VOX. Actually in Spanish social media it has become normal to see judges attack feminism as an ideology or insulting MPs from the left. Their political views clearly often determine their legal positions in contradiction with the mandates of the law or the constitution, especially regarding the exercise of civil rights.

When a judge seized the telephone of few journalists in order to identify the whistleblower who was providing them with information – something which is clearly forbidden by article 20 of the Constitution – several well-known magistrates supported him on Twitter arguing that judicial investigations are more important than the protection of the right to information. Fortunately the judge was charged with the crime of disrespecting fundamental rights and the opinions on social media disappeared. Nevertheless, the same happened later when another judge wanted to take their statements as accused of excesses during a demonstration to two MP of the leftist party *Podemos* without any prior authorization by Congress as required by the Constitution. The support of many of his professional mates showed that in Spain often even the decisions of lower courts' judges are also determined by their political ideas. Also by their religion, despite Spain officially being a non-religious state: some time ago a young boy was convicted by a first instance judge for photoshopping his face into a religious image in a picture posted on his Instagram account. Recently a feminist was accused of blasphemy for imitating a religious procession during the 1st of May demonstration, and the judge who dismissed the case insisted in his ruling in the sanctity of the holy Virgin. He received the support of several other magistrates.

The cases of ideological decisions are increasing as, with the new left Governments the judiciary see itself as the only body of resistance to defend traditional values as patriotism, family and religion, even over the constitutional values.

The incapacity of self-restraint by the judiciary may, therefore, be jeopardizing its function as neutral power of the State. This situation can be reversed but it would require a bunch of measures to be taken by different stakeholders. Some of them are long-expected legal reforms: reforming the system of access to judiciary in order to allow any kind of candidates and to improve their social abilities; appointing the judges of the Supreme Court by a system based exclusively in merits; a new system for selecting the majority of the members of the general council of judiciary without

political interferences. At the same time, the current situation requires stronger self-restraint of the judges from political or ideological contents in their decisions and in their public activity. Overall, it is needed to stop presenting the conflict in Catalonia just as a legal problem to be solved by the judges.

There is probably little hope for all this to be achieved, but the consequences on the credibility of Spanish judiciary are so serious that it is definitely worth to give a try.

