

Junqueras' Immunity: An Example of Judicial Dialogue

Germán M. Teruel Lozano

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There is no doubt that the criminal prosecution of the "Catalan question" is a stress test for Spanish Justice. One of the last episodes, now with a European dimension, has been the "euro-immunity" of Junqueras. And, in this respect, the political and journalistic readings of the judicial decisions issued by the Spanish Supreme Court and by the Court of Justice of the European Union emphasize the confrontation. However, in my modest opinion, I believe that these decisions are an example of dialogue between courts, necessary to manage the current pluralism where legal orders are intertwined without clear hierarchies. Neither the [Court of Justice in its ruling of December 19](#), nor the Spanish Supreme Court in [its order last January 9](#), have undermined the other and their decisions have left enough space to avoid a direct collision using solid legal arguments. This is how courts should act, far from political noise.

As is well known, the Luxembourg Court concluded in its judgment that "the status of member of the European Parliament derives from the fact of being elected by suffrage" and is acquired with the official proclamation of the results of the election. From that moment MEPs would enjoy the immunity provided in art. 9.2 of the Protocol on privileges and immunities of the Union, which refers to their freedom of movement "while they are travelling to and from the place of meeting of the European Parliament". As a result of which the Court of Justice declared that the Spanish Supreme Court should have lifted the pretrial detention of Junqueras so as to allow him to take possession as a MEP. At the same time, in order not to corner the Supreme Court, the Court of Justice admitted that exceptionally this restrictive measure could be maintained on condition that the national court request the European Parliament "as soon as possible" to lift immunity.

Now, in the resolution mentioned above, the Supreme Court has ruled that Junqueras must comply with the prison sentence that had been imposed in a final sentence. Besides, the Supreme Court has declared that request the European Parliament to lift immunity no longer makes sense. A cursory reading of this decision could lead to the conclusion – wrong, in my opinion –, that the Supreme Court faces the Court of Justice or even the European Parliament, and that, given the result, the Supreme Court could have saved the question for a preliminary ruling.

However, in my opinion, the Supreme Court loyally has assumed the "new" Luxembourg's doctrine. First, the Supreme Court has recognized the status of MEP since the proclamation as elected. Although, since they are not relevant to the cause, the Supreme Court has not entered into other subsequent consequences of this statement: whether the recognition as a MEP should be understood for the sole purpose of immunities (as could be understood from § 81 of the Luxembourg's ruling), or if, on the contrary, the national provisions that impose certain requirements

for the full acquisition of the status as MEPs – in the Spanish case, to swear or promise the Constitution – must be understood as contrary to the law of the Union. The Advocate General had held this last position in his conclusions – § 52 – and can also rely on § 69 of the Luxembourg's ruling. A matter of great interest for the cases of Puigdemont and Comín but that remains for the moment open until the General Court resolves it.

The Supreme Court has also come to terms with the "extensive interpretation" that Luxembourg makes of the immunity recognized in art. 9.2 of the Protocol, warning that it is an immunity of "autonomous configuration", typical of European law and which do not have to correspond to the national concept of immunity. However, does the Luxembourg's ruling imply that the Supreme Court could have not concluded the main proceedings without first asking European Parliament to lift immunity? The Supreme Court has understood that no. In its opinion, among the different ways of conceiving immunity, the one established in paragraph 2 of art. 9 of the Protocol is limited to the "formal prohibition of proceeding with [the] detention [of a MEP] when they address the Parliament, are in it or return"; but it does not imply a prohibition that judicial proceedings can take place without the authorization of Parliament. It is just "freedom from arrest".

Moreover, MEPs can enjoy broader immunity following paragraph 1 of art. 9 of the Protocol. In particular, in this case, Junqueras had enjoyed "in the territory of their own State, the immunities accorded to members of their parliament". And, according to Spanish law, the Court does not have to ask Parliament to lift immunity when the oral trial had been opened before the person was elected. The trial started in February 2019 and finished June 12, one day before the proclamation of the electoral results. So, Junqueras enjoyed immunity according to with Luxembourg rule since his proclamation as an elected member, but, taking into in consideration the Spanish law, the Spanish Supreme Court was able to give judgment without asking the European Parliament because the trial was previous.

Restricting the scope of immunity in this cases makes full constitutional sense: It is teleologically impossible that the constitutional end of this prerogative can be given when the condition of Member of the Parliament was acquired after the trial. We cannot forget that "The purpose of parliamentary immunity is to protect Parliament and its Members from legal proceedings in relation to activities carried out in the performance of parliamentary duties and which cannot be separated from those duties" (Committee on Legal Affairs. European Parliament, Notice to Members on Principles for immunity cases, 0011/2019).

This helps to understand that the Supreme Court did not wait for the Luxembourg's decision to the preliminary ruling to resolve the main proceedings. The preliminary ruling was focus on an incidental issue about the custody of Junqueras but did not affect the competence of the Supreme Court to prosecute the facts. Additionally, the Supreme Court has provided other reasons that endorse why it had resolved without waiting for the Luxembourg decision (the trial was already finished, people were in custody waiting for the ruling...).

Thus, currently, as the Supreme Court has resolved, Junqueras has lost his status as a MEP in the application of European and national rules on incompatibilities, having been sentenced to imprisonment and a disqualification from holding any public office or exercising any public function. So the European Parliament has responded correctly by not currently recognizing him as a Member.

Two questions remain open: According to the Luxembourg's ruling, was the Supreme Court obliged to ask the European Parliament to lift immunity if it did not leave Junqueras free to take possession as a MEP? Yes, although the Spanish Supreme Court also explains why it would have been "sterile", since the European Parliament itself did not recognize him as a MEP at that time. Both the European Commission and the European Parliament defended before the Court of Justice that Junqueras could not be considered MEP because he had not met the requirements of national legislation to access the position. When the Court of Justice had changed this interpretation (something that was not foreseeable at that time), the Spanish Supreme Court has requested to the European Parliament to lift the immunity to Puigdemont and Comín. In addition, the Supreme Court also explains the compelling reasons that led to not releasing Junqueras – among others, the flight risk due to the lack of collaboration of the judicial authorities of other countries with the European Arrest Warrant-. And finally, does the fact that the Supreme Court had not asked the European Parliament to lift immunity imply the nullity of the main proceedings? No, because, as it has been said, the request for waiver of the immunity was only necessary in relation to the pretrial detention, but it did not affect the main proceedings, which had been carried out with all the guarantees before Junqueras had been elected MEP. At most, Junqueras may now argue that the decision of the Supreme Court adopted in the incidental question of not allowing him to travel to the European Parliament without requesting that his immunity be lifted has violated his right to the exercise of representative office (art. 23 Spanish Constitution). A matter that is outside, as I said, of the main process. And it is precisely this last question that, in my opinion, justifies that the Supreme Court maintained the question referred for a preliminary ruling even though it did not have direct effects on the current situation of Junqueras.

To conclude, I believe that It must be recognized the Supreme Court's consideration towards the European legal order, presenting the question for a preliminary ruling and giving a response respectful of the European Union law. I wish other national courts that have resolved issues related to this case would have been so sensitive to European law. In particular, I wish the German or Belgian courts would have presented a preliminary ruling in relation to the European Arrest Warrant in the Puigdemont's case. The Luxembourg's ruling leaves, on the other hand, an important task for the European institutions that will have to advance in the standardization of European electoral provisions, as [López Garrido has pointed out](#). However, I disagree with Professor van Elsuwege when he has argued that it is "[A matter of representative democracy in the European Union](#)". In my opinion, what is at stake is respect for judicial independence, equality before the law, and separation of powers. Parliamentary immunities cannot be a source of impunity. That is why, no matter how much now in Europe the judicial drift of countries like Hungary or Poland may concern, the interpretation of these prerogatives must be

restrictive where there is a full democracy, as in Spain. Following the principles given by the [Venice Commission itself](#). The "Catalan question" is not a case of "lawfare", but the response of a Democratic State based in the Rule of Law, through an independent Judicial Power, to those who abandoned their political legitimacy by breaking the constitutional order, repeatedly disobeying the Constitutional Court, with misappropriation of public funds for illegal acts, and mobilizing citizens to prevent compliance of judicial decisions. A response that is also subject to the review of the corresponding national and supranational guarantee courts, especially the European Court of Human Rights. In addition, any commentator on the Catalan question must know that there were legal channels to express those political demands within the framework of the Spanish constitutional order. Even, if the Government wants to intervene politically in what had been judicially resolved, there is also a constitutional way: the pardon – without entering to value its political opportunity or not-; but never impunity.

