Press Release: Special Proceedings 20907/2017

In its judgment on the *procès*, the Supreme Court of Spain has sentenced Oriol Junqueras to 13 years' imprisonment and 13 years' absolute ineligibility for public office, and Raül Romeva, Jordi Turull and Dolors Bassa to 12 years' imprisonment and 12 years' absolute ineligibility for public office. In all four cases, the defendants have been convicted of an offence of sedition, and an offence of misuse of public funds – aggravated by reason of its amount – for the purpose of committing the principal offence of sedition.

Further, the Court has found Carme Forcadell guilty of an offence of sedition, with a sentence of 11 years and 6 months' imprisonment and an equal period of absolute ineligibility for public office. Joaquim Forn and Josep Rull are sentenced to 10 years and 6 months' imprisonment and 10 years and 6 months' absolute ineligibility for public office. Jordi Sánchez and Jordi Cuixart are sentenced to 9 years' imprisonment and 9 years of absolute ineligibility for public office.

Each of Santiago Vila, Meritxell Borràs and Carles Mundó has been convicted of an offence of disobedience, and ordered to pay a fine rated at 10 months, or 200 euros per day, and 1 years and 8 months' ineligibility for specific public offices.

The judgement acquits the defendants Joaquim Forn, Josep Rull, Santiago Vila, Meritxell Borràs and Carles Mundó of the offence of misuse of public funds.

In its judgement, the Court states the reasoning and legal grounds outlined below:

No rebellion

The Court finds that violence was proved to have been present. But, while violence indisputably occurred, this is not enough for the offence of rebellion to be made out. To resolve the issue of which type of offence was committed with a "yes" or "no" to the question of whether or not there was violence would be to adopt a reductionist approach that – however much it may have caught on elsewhere – this Court cannot espouse. Violence must be instrumental, purposeful, and directly intended, without intermediate steps, to achieve the ends that the rebels pursue. And here, while considering the question of which offence applies, we encounter a further obstacle: the acts planned and performed were wholly inadequate to impose *de facto* territorial independence and the repeal of the Spanish Constitution in Catalan territory. Put differently, the violence must be intended to achieve secession, rather than merely to create a climate or bring about a scenario in which subsequent negotiation becomes more likely.

The statutory instruments that the defendants enacted were deprived of legal force by a decision of the Constitutional Court. The attempt to break away was finally frustrated by the mere exhibition of the pages of Spain's national government gazette, the *Boletín Oficial del Estado*, announcing that the measures under Article 155 of the Constitution were to be applied to the Autonomous Community of Catalonia. This event prompted some of the defendants to take flight. Those who chose to stay, whether as a personal decision or because the precautionary custodial measures worked as intended, unconditionally gave up the adventure they had set out upon. Moreover, the powers of provisional direct rule given by the Senate to the Government of Spain under Article 155 of the Constitution were applied, from the first, peacefully and without hindrance.

The Court holds, then, that no offence of rebellion was committed on the objective basis that such violence that did occur was inadequate to that purpose. Further, the Court makes this finding on a subjective ground, to which we now turn.

All the defendants were aware that a referendum for self-determination, which was held out as the means for the construction of the Republic of Catalonia, was clearly not legally viable. They knew that merely enacting statutes, in open defiance of the democratic rules in place for any reform of the Constitution, could not bring about any form of sovereignty. They knew that what was being held out to the Catalan public as a legitimate exercise of the right to decide was no more than a decoy to trigger a mass demonstration that would never result in the creation of a sovereign State. The imaginary right of self-determination was a device concealing the political and associational leaders' desire to pressure the national Government to negotiate a plebiscite. Earnest citizens were led to believe that an affirmative outcome of the so-called "self-determination referendum" would lead them to the yearned-for horizon of a sovereign republic. They did not know that the "right to decide" had shifted in shape, and become an odd sort of "right to exert pressure". Still, the defendants brought into being a parallel scheme of law to countervail the laws in force, and promoted a referendum that lacked proper democratic safeguards. Members of the public were induced to demonstrate *en masse* to prove that judges in Catalonia had lost their ability to enforce the law and, as a result, became exposed to the powers to compel whereby the legal system ensures that court decisions are followed.

Despite the defendants' rhetoric, as a matter of fact the measures ostensibly designed to bring about independence as promised were manifestly not up to the task. The State at all times retained its control of military, police, judicial and even social force. And, by doing so, it made any bid for independence a mere pipe-dream. The defendants were aware of this. The State acted, therefore, as the sole holder of democratic legitimacy to protect the sovereign unity from which such legitimacy emanates.

An offence of rebellion is committed when the interests protected by Article 472 of the Criminal Code become imperilled. But, again, the danger must be real, not a mere figment of the defendant's, and not a misleading device to encourage mass demonstrations by citizens who believed they were witnessing the historic act of the foundation of the Catalan Republic, whereas in reality they had been recruited as a tactically essential element of the defendants' true aims. Mass participation in an event passed off by the defendants to the public as the way to exercise the "right to decide" – the form of words used as an adaptation of the right of self-determination – was none other than the strategic formula of political pressure that the defendants intended to exert on the national Government.

When laying their plan for independence the defendants knew from the very first that there is no legal framework for secession achieved merely as a fait accompli, with no support other than a statute of purported constitutional rupture that loses its effect as soon as it is enacted. The defendants knew that a referendum without the slightest safeguard of legitimacy or transparency for votes to be tallied would never be approved by genuinely impartial international observers. In short, they were aware that breaking away from the State demands something more than obstinately repeating slogans aimed at a part of the general public that naïvely trusts the leadership of its political representatives and their ability to lead them to a new State that exists only in the imagination of its promoters. The defendants, even as they held out the poll of 1 October as a true and inalienable exercise of the right of self-determination, admitted that what they really wanted was a direct negotiation with the national Government. An irretrievable contradiction is committed by someone who tells the public that it has its own

sovereignty, and then immediately strips the declaration of independence of its purported effect so as to return to the starting-point; and demands not independence but a negotiation with a sovereign entity from which he claims to have broken away from, albeit only for a few seconds.

Offence of *sedición*

Political advocacy by an individual or a group for any of the purposes listed in Article 472 of the Criminal Code, such as to repeal, suspend or alter the Constitution or a part of it, or to declare the independence of a portion of the national territory, is not in itself a criminal offence. But it *is* an offence to lead the citizenry in a public and tumultuous rising, which, moreover, prevents the application of law and obstructs compliance with court decisions. This is the unlawful act encompassed by Article 544 of the Criminal Code. The two statutory provisions, Articles 472 (*rebelión*) and 544 (*sedición*), stand expressly in a relationship where each is an alternative to the other. We cannot use a mistaken conception of the principle of immateriality so as to leave entirely unpunished a course of conduct that, while useless for the purposes that define the offence of *rebelión*, does satisfy the requirements of other offences: in this case, the offence of *sedición*.

The Court points out that it would be wrong to assert that where the protected interest is public order, as a systematic feature that is common to all the offences within Title XXII, Book II of the Criminal Code, a characterisation of conduct as being especially serious must be ruled out. But in fact, some of the terrorist offences within the category of offences against public order require an element of intention to "… overthrow the constitutional order" (cf Article 573 (1) (1) Criminal Code). These statutory offences therefore go beyond a narrow understanding of public order as an independent interest protected by law. This has led to a distinction being drawn between public order and other concepts such as public peace, construing public order as a protected interest that is the same thing as society's interest in the acceptance of the constitutional framework, of the law, and of the decisions of legitimate authorities as a precondition of the exercise and enjoyment of fundamental rights.

The protection of territorial integrity is common to European constitutions

In answer to the argument put forward by counsel for the defendants to the effect that the unity of Spain is over-protected, the Court stresses that the protection of Spain's territorial unity is not some extravagance that makes our constitutional system unique. Almost all European constitutions make provision to assure the integrity of the territory in which each State is seated. The constitutions of some of the countries of origin of the international observers retained by the Catalan regional government – who, when testifying at trial, expressed disapproval of the Spanish courts' efforts to prevent the referendum – contain especially stringent rules. The German Constitution characterises as unconstitutional "those parties that, by reason of their purposes or the conduct of their members, seek to undermine or eliminate the free and democratic constitutional order or endanger the existence of the German Federal Republic" (Article 21(2)). The French Constitution of 1958 opens with a provision that proclaims that "France is an indivisible Republic…" (Article 1). The President of the Republic "watches over respect for the Constitution and ensures… the continuity of the State" (Article 5). The Italian Constitution of 1947 declares that "the Republic, which is united and indivisible, recognises and supports regional governments" (Article 5). In Portugal, the Constitution of 1976 states that "the

State is unitary" (Article 6); the President of the Republic has the power to represent the Portuguese Republic, and "… ensures national independence and the unity of the State" (Article 120).

No European Constitution recognises a right to decide

No international treaty exists that has codified a "right to decide". Any movement for unilateral secession in a society that has adhered to the European Convention on Human Rights of 1951 and the Charter of Fundamental Rights of the European Union of 2010 is, by definition, an antidemocratic movement, because it is antidemocratic to wreck the foundations of the constitutional model to build a republic based on a specific identity, where ideological and political diversity are not assured. This remains the case even if the lack of political legitimacy of the secessionist movement is disguised with the totalitarian pre-eminence of some supposed "democratic principle" that prevails over the rule of law. There is no democracy outside the rule of law. If that inflexible prevalence were followed to its ultimate consequences, we would have to allow that the "right to decide" applies at any time and to any matter governed by law. A society whose foundational charter subordinates to the will of its President the very structure of the judiciary can only be built in defiance of constitutional principles that would never be alterable by legal means of reform. And the dogged search for that breaking-away, in disregard of the Constitutional Court, violates interests that are protected by law at its very foundations.

The transmutation of the "right to decide", a power that is indisputably inherent in every human being, into a collective right held by the people as a whole, is always a leap into a void. There exists no "right to decide" that can be exercised outside the legal limits delineated by society itself. There is no such right. Its true nature is merely that of a political aspiration.

The Court certainly cannot accept the "right to decide" as a thermometer that measures the democratic quality of a society. What is more, the democratic quality of a State cannot be made to depend on unconditional acceptance of that right. To be sure, democracy presupposes the right to vote, but it is something more than that. It also entails respect for the political rights that the constitutional system recognises in other citizens, a recognition of the checks and balances between powers, compliance with court decisions and, in short, a shared idea that the construction of a community's future in democracy is possible only if the legal framework that is the expression of the people's sovereignty is respected. No European constitution exists that recognises the "right to decide" in the form repeatedly promoted by the defendants. No Constitutional Court in our peer countries has recognised that right as within the catalogue of rights that form our legal heritage.

Such a right of self-determination would be enjoyed only by some citizens: those who were persuaded by the calls of the Catalan regional government, the *Govern*, and other social and political actors to a poll that was misleadingly passed off as legitimate. A purported right that was presented in a way that marginalised and disregarded another enormous sector of the general public, for whom this would amount to "determination of oneself by others", or determination by force: this other sector of society chose not to take part in the referendum because they thought it to be a fantasy, to be illegal, and also presumably illegitimate. To frame the matter as a conflict between law and legitimacy is to oversimplify. Rather, there is a conflict between the *conception* of legitimacy espoused by some people – perhaps many, perhaps only a few, but certainly not everyone, or even a majority – and a legality that many others, and not necessarily a minority – believe, for their part, to be legitimate. In the end, what one sector of

people – who may or may not be a majority, for we are not facing a quantitative question – thought to be legitimate was intended to be imposed and made to prevail over a legality that contradicted that conception of legitimacy, and also to prevail over what many others believed to be legitimate and consistent with justice, which, furthermore, was endorsed by a democratic legality that was being repudiated. This is not legitimacy versus legality. It is the conflict between the partial conceptions of legitimacy of some people and the beliefs of other people, who, moreover, had the backing of laws and a Constitution that were enacted as a result of legal processes conducted conformably to all democratic standards and, of course, susceptible to change by means of legal procedures.

The concept of sovereignty, however much one might wish to emphasise its multiplicity of meaning, remains the legitimising bedrock of any democratic State. To be sure, we are witnessing a transformation of sovereignty, which is leaving behind its historic form of absolute power and moving towards a functional conception that accommodates the unstoppable process of globalisation. Yet, despite these changes, sovereignty survives, and is not neutralised by a legal armature founded on persistent disregard of the Constitutional Court. The construction of an independent republic demands the forced alteration of the subject of sovereignty: the original subject of the constituent power, which expresses the sociological foundation of any civilised State, must first be mutilated. The "right to decide" can only then be constructed by means of relentless political defiance that, seeking a mere fait accompli, repeatedly attacks the essence of the constitutional covenant and, with it, the essence of democratic life as a community.

The search for a statutory endorsement of that defiance makes matters even worse, in that it conveys to the public a false belief that the law lends its backing to an unattainable purpose. And the politicians who held out that message were and remain aware, despite their strategic disingenuousness, that the subject of sovereignty is not ousted or carved up by a mere statutory enactment. History shows that the demolition of the foundations of the constitutional settlement is never achieved by a formal succession of legislative instruments.

Given this perspective, it cannot be held that there is a collision of principles – a democratic principle and the principle of legality – that are antagonistic to one another: the democratic principle can have no content if not framed in a law that provides it with precise meaning and the necessary structure of safeguards.

Impartial judges

The nine justices of this Court have faced at least seven applications that they recuse themselves from the proceedings. The impartiality of the judges of this bench has been ceaselessly called into question in a manner that is quite remote from the procedural purpose of recusal as an instrument to ensure judicial impartiality. Circumstances of one kind or another that arose throughout the trial prompted counsel for the defendants to use a strategy of "demonising" the Second Chamber of the Supreme Court. This idea has been present up to the last minute of the oral proceedings, where some of the defendants continued to hold themselves out as the victims of a politicised trial. At least one of them claimed that he was indicted only because of his name. Motions to recuse the members of the Court therefore became a routine, used doggedly as a way to disparage the legitimacy of the Supreme Court.

Civil disobedience

Civil disobedience has been described as the inalienable heritage of any mature political culture, enhancing the moral quality of society and expressing an ethics of dissent. Disobedience is thus presented as an enlivening mechanism that is crucial to prevent a slide towards a stagnant democracy that wallows in conformity and mediocrity. Although a majoritarian consensus is the mandatory source of democratic legitimacy, a majority decision is not necessarily fair or just. Hence civil disobedience, viewed as a public expression of dissent and a vindication of the need for change, plays a valuable role in reinterpreting what the majority believe to be the common good. No constitution is perfect. To present a constitution as a hermetically sealed legal block that is immune to any proposed reform is to contradict the very meaning of the constitutional settlement. There can be no perpetual consensus, nor can society be in a permanent state of assent.

But if in the face of any court decision we were to say that whoever disagrees with it and thinks it unfair is entitled to prevent its being enforced, what protection would be extended to those who might benefit from the decision, or who agree with it and think it fair? An absolutist conception of one's own ideas or beliefs that entitles you to pay no heed to legitimate public authority consigns law-abiding citizens to second-class status. The ideas of those who engage in civil disobedience end up prevailing over those of people who, instead, obey the law and comply with the decisions of the courts and other public authorities.

Nobody can claim to have a monopoly over saying what is or is not legitimate, casting into the realm of illegitimacy anyone who disagrees with their ideas about self-determination, however much they may argue for a right to civil disobedience. Arguments in support of dissent cannot be used to defeat whoever thinks differently, or to impose oneself over legality in reliance on the claim that you and only you enjoy some higher legitimacy. Other citizens who have other ideas about the territorial question have equal rights; and it is by the same methods – within the societal fabric and through institutional policy – that their ability and right to oppose those ideas with their own, which *they* believe to embody legitimacy, must be assured. To allow each person's diverse and conflicting notions of what is legitimate and fair to become part of the legal order, procedures have been put in place by agreement among all citizens, which are consistent with the Constitution and the law; they are not inalterable, but can in fact be modified following democratic pathways designed to make sure that the ideas of a few are not imposed on the many. And, at the same time, majorities are not to undermine the rights of a minority.

When a domain delineated by the rules of criminal law is invaded by actions driven by a desire not merely to express dissent, which may be founded on deeply held beliefs, but also to achieve a change in legality itself – whether ordinary or constitutional – and to shape it in accordance with one's own ideas and hopes, it must be understood that the legal order itself will react using the mechanisms designed for its self-defence against acts that are not merely unlawful but openly attack and rebel against legality.

Ideological freedom and the right of assembly

The Court certainly agrees that ideological freedom allows and, what is more, protects advocacy for the right of self-determination. The political parties with which some of the defendants have stood for office in various elections, through their representatives, argue for the democratic legitimacy of the right of self-determination, in Parliament and in the media and whenever they

please, without hindrance of any kind. To assert that the indictments and convictions arise from the mere fact of having advocated for the self-determination of Catalonia can be viewed only as a rhetorical strategy, which, while legitimate from the standpoint of the right of defence, is to be rejected as a legal claim.

The events of 1 October did not amount merely to a demonstration or mass public protest. If they had, there would be no reaction under the criminal law. It was, instead, a riotous uprising, encouraged by the defendants, among many others, so as to use physical force and *de facto* coercion to turn court decisions of the Constitutional Court and of the High Court of Justice of Catalonia into a "dead letter". No objection could be made if the action had taken the form of mass meetings, mass protest, and demonstrations using harsh and combative slogans. All of that is protected and even encouraged by the Constitution and its spirit. But what neither our Constitution nor the fundamental norm of any democratic State can tolerate is to make one of the most vital requirements of the rule of law – compliance with a court decision, which need not attract adherence or applause or immunity from criticism – subordinate to the will of one person, ten people, a thousand, or thousands or millions. All the more so when there is another great number of citizens who place their trust in that decision and abide by it and even agree with it, and wish to be confident that they, too, will be protected by the rule of law.

The substance of the right of assembly encompasses adversarial utterances and vigorous protest against the decisions of any of the powers of the State. To disparage an arrest as being unjust and illegal, and to do so publicly at an assembly of citizens, is entirely allowed as an exercise of the right of assembly proclaimed and recognised in Article 21 of the Spanish Constitution. Passionate advocacy for the independence of Catalonia forms part of normal democratic life. To declare at an assembly that justice should be administered by Catalan judges only is a statement protected by the freedom of speech.

However, on Friday, 20 September 2017, what took place was not an assembly of citizens to protest against the arrests and searches taking place in the early hours of the morning in compliance with decisions issued by Barcelona Court of Instruction No 13. The associational leaders knew – and they said so in their speeches and slogans – that the Civil Guard was under a legal duty to take the arrestees to the place where the search was to be conducted. They were fully aware that a court-appointed task force headed by the Justice Department's attorney and comprising more than ten Civil Guard officers was in the process of obtaining evidence requested by the court in the form of records and account entries. The defendants' motive in their action was to prove to society at large, in full concert with government officials – as has been proved – that the judges carrying out their constitutional duties in Catalonia had lost their ability to enforce their decisions.

Misuse of public funds

The judgement acquits Rull, Forn, Vila, Mundó and Borràs of the offence of misuse of public funds of which they were accused by the Public Prosecutor, Counsel for the Government and the people's prosecution. To be sure, all of these defendants set their signatures to the government decision announcing that all expenditure earmarked by the *Govern* for the holding of the referendum would be assumed as a joint and several responsibility. However, an offence committed as a partnership requires, in accordance with the case-law of this Court, something more than a prior agreement to commit that offence.

It is indispensable that the co-defendant should have taken genuine steps towards committing the offence, whether or not central to the scheme. However, it has not been proved – despite the prosecutors' efforts – that Councillor Ms Borràs or Councillors Forn, Rull, Vila and Mundó placed the departments under their charge at the service of specific expenditure shown to have been used for the holding of the illegal referendum. In fact, as stated by some witnesses, some of them even gave specific orders not to apply budgetary appropriations to the plebiscite scheduled for 1 October. This is especially the case of Mr Vila, Mr Mundó and Ms Borràs. This is the difference with respect to the other members of the regional government who have been convicted of this offence, as they went beyond a shared statement of their intention to evade the financial scrutiny that is inherent in democratic societies, and performed specific acts of economic expenditure, in a genuine display of disloyalty.

Public Prosecutor's application for an order that one half of the prison term must elapse before a convict is to classified as eligible for the benefits of pre-release prison rules

The Court believes that this power cannot be construed as a legal mechanism to forestall decisions of the prison authorities that are thought inconsistent with the severity of the offence. Such decisions can be challenged by the ordinary procedures, and may be reviewed. Article 36(2) of the Criminal Code gives the sentencing court power to make a prediction of future danger so as to preserve the interests protected by law that were violated by the offence. It is from this perspective only that the Public Prosecutor's application is to be considered. The defendants have been penalised with custodial sanctions based on the offences of which they have been convicted, and by penalties of absolute ineligibility for public office that prevent them from standing for office at elections and from assuming responsibilities such as those they had at the time of committing the offences.

The power of the courts to review administrative decisions in the penitentiary domain that are thought unlawful is the best assurance that the prison terms will be served in accordance with an individual appraisal of compliance and progression. The central role that our legal system gives the Public Prosecutor to challenge any unlawful decision as to the enforcement of custodial sanctions is an added safeguard that further justifies our reply.