the SPANISH YEARBOOK of INTERNATIONAL LAW

Agora

The Catalonia independence process before the Spanish Supreme Court

A Decent Supreme Court Judgment

Araceli MANGAS MARTÍN*

Spanish Supreme Court Judgment 459/2019, of 14 October 2019, on the Catalan independence process, was a remarkable effort of intellectual honesty due to its legal reasoning and moral rectitude in upholding Spanish democracy.

The Spanish Supreme Court judges should be thanked for that effort at a time when so many from the pro-independence trenches are committed to ripping the Spanish high court to shreds. The Supreme Court judgment has also been attacked from democratic positions, which view it as lacking punitive harshness and legal categorizations to suit their tastes. This extreme criticism is unmerited, especially from those who advocate the rule of law. After all, in light of the successive failures to act of the Rajoy government [right-wing People's Party (PP)] at the peak of the pro-independence escalation and, later, of the social-populist Sánchez government, the Supreme Court has proved to be the last bastion of the rule of law in Spain.

The Supreme Court Criminal Chamber judges are decent jurists who made a great intellectual and technical effort in a difficult and complex situation to deliver their judgment unanimously. And they fulfilled the expectations of the decent jurists that — without arrogance or sectarianism — exist in Spain.

Whilst the judgment of 14 October 2019 may not coincide with the position I have defended in several articles on the severe *institutional* violence of the Catalan independence parties,[1] the second chamber of the Supreme Court has rendered a technically meticulous judgment, i.e. with knowledge of the laws that it is required to apply to the facts being judged. It is reasoned and reasonable. Any excesses or shortcomings that it may have in terms of categorization can all be chalked up to the mediocre 1995 Spanish Criminal Code, drafted by the Socialist government in power at the time.

* Full Member of the Spanish Royal Academy of Moral and Political Sciences and Professor of Public International Law at the Universidad Complutense of Madrid.

[1] "Violencia desde las instituciones de Cataluña", *El Mundo*, 25 October 2018; or "España indefensa", in the monograph: "¿Cataluña independiente?", 71-72 *El Cronista del Estado Social y Democrático de Derecho* (2017, October-November) 12-15.

 DOI: 10.17103/sybil.24.11

The Supreme Court is not to blame for the outdated 1995 Criminal Code made by old-fashioned constitutionalists and criminal lawyers thinking more about the military uprisings and attempted coups of the 19th century than the threats to democracy in 21st-century Spain. The antiquated 1995 Criminal Code has a nineteenth-century understanding of violence based only on armed force.

It is the current Criminal Code that fails to protect against political violence, to account for institutional rebellion or the moral violence suffered by non-nationalist citizens in Catalonia, and to address the path of consummated institutional illegal acts. The 1995 Criminal Code does not make it a crime for the institutions of a Spanish self-governing region, or "autonomous community", to proclaim the independence of a territory of Spain as long as it does so with smiles and hugs. For the Criminal Code, a unilateral declaration of independence is symbolic; so the TS concludes in its judgment. A state with this code should tremble for the future of its territorial integrity.

Democracy and freedoms are defenceless in Spain with this code that seeks only to avenge the military uprisings of the 19th century and not to administer justice, now, in the 21st century, against the coups of the pro-independence politicians and their anarchist hatchet men. Clearly the Supreme Court cannot invent rules or stretch the Criminal Code —nor did it do so— with the reasonings in which we lawyers might engage without procedural constraints and guarantees.

The Supreme Court cannot undertake extensive or restrictive interpretations as it sees fit, as the Constitutional Court used to do in regional matters, inventing an accommodative Constitution in each judgment that could be moulded, at least until 2017, to the needs of the clientelist pacts with the nationalists. Those concessions of statehood by the Constitutional Court and by the governments of both parties that governed Spain between 1979 and 2017 —the Socialists (PSOE) and the PP— led to the pro-independence radicalization of the Catalan nationalist parties.

Today, the international order accepts an evolved notion of armed aggression and other forms equivalent to it in the case of virtual or cyber violence against sovereignty, independence or territorial integrity. The space under attack that is the object of an aggression is not only the land, air and sea, but the diffuse cyber space that has come to be integrated as part of sovereignty. And cyberattacks between states are aggressions, although in place of tanks and bombings, they are executed with a smile and a magic touch upon inserting a device in an enemy USB port.

There has been a legal mutation of the concept of violence and of all its legal determinants, as evidenced by the "Tallinn Manual" on international cyber warfare.[2] Violence has grown

[2] The 2013 *Tallinn Manual on the International Law Applicable to Cyber Warfare* — an updated version of which, known as the *Tallinn Manual 2.0*, was published in 2017 — was prepared by a select group of experts from NATO together with observers from the International Committee of the Red Cross. It is an unofficial, non-binding document intended to serve as a guide for purposefully adapting the law of the Hague and the law of Geneva to cyber warfare.

more sophisticated. In Catalonia, too. Yet the Criminal Code that the Supreme Court had to apply could not correct for its 19th-century rigidities or punish the rebellion — which existed *de facto*.

The Supreme Court judgment convicting the institutional leaders who proclaimed independence twice in a single month also includes reasonings of exquisite legal logic. Nothing is simply because. The judgment is meticulous — at times exasperatingly so — in refuting the defences' objections and allegations. The arguments are protracted to demonstrate their consistency with the case law of the European Court of Human Rights, as required under Article 10.2 of the Spanish Constitution.

The sections devoted to debunking the simplistic "right to decide" are both pedagogical and technically accomplished. Like the Supreme Court of Canada in its opinion of 20 August 1998, the Spanish Supreme Court finds no basis for this right in international law or constitutional law, nor does it find any violation of human rights. There is no human right to create states by neighbourhood, to each person's liking; nor are Catalans a superior people in relation to the rest of Spain's regions, whose peoples are also entitled to a state, as the Supreme Court clearly justifies. The Court strives to convey a reasoning that would be no different anywhere else in the EU, such as Bavaria or Lombardy.

The sections devoted to the Canadian Court's opinion are excellent. It is a pity that the separatists, so resistant to rational argument, will not read them. The Spanish Supreme Court likewise makes excellent use of UN General Assembly Resolution 2625 (1970), a general international legal rule (binding and universal according to the International Court of Justice), establishing a rational limit to self-determination. It is well-known that this Resolution neither authorizes nor encourages "any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States [...] possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour." True, the Supreme Court does not cite Resolution 2625 directly, but rather refers to resolutions subsequent to the 1970 text that reproduce that paragraph of it. Nobody's perfect.

I was pleased that the Spanish high court cited the examples of two judgments by the constitutional courts of Italy (2015) and Germany (2016) denying the right to decide to regions of those countries. I had cited them in a much-discussed newspaper article in a futile effort to engage the famous football coach Pep Guardiola,[3] a populist rebel against rational thought. For the independence movement's footballing leader, the global model of democracy with a right to decide is the Qatari dictatorship.

Likewise satisfying was the Spanish Supreme Court's reference to the statement endorsed by nearly 400 international law professors from Spain (including around 40 from Catalan universities). The statement — which we promoted and drafted with utmost care to occupy

[3] "Guardiola por el mundo", *El Mundo*, 22 June 2017.

the space of truth and commitment of decent people — denies any foundation for independence based on current international law.[4]

The Supreme Court's handling of the scholarly literature of the Committee for the Elimination of Racial Discrimination, deep and respected in matters of self-determination, was commendable and appreciated: it approached it without fear. Likewise, its handling of the literature of the Venice Commission. What a shame that the Catalan government failed to read this respected constitutional and international literature back in the day, or these sections of the Spanish judgment now. I recommend readers focus on pages 197 to 254 of the Supreme Court judgment (pages 194 to 248 of the English-language version) to examine the high-calibre reasoning of the Spanish Supreme Court. At least so that neither the Catalan people nor anyone else can be lied to about some unlimited right to decide; they cannot keep saying, so simply, that they were convicted for "putting out ballot boxes".[5]

However, the judgment is hardly the solution to all problems. I always thought the Supreme Court would lead us into a loop with few ways out. Nor does the second-rate Criminal Code help with its seemingly severe punishments, such as the 13-year prison sentences for several of those found guilty of sedition: that is what will echo and linger in the streets and the international press. In reality, when the systematic reductions provided for under penitentiary law are combined with the sectarian and arbitrary pro-independence government — which is responsible for prisons in Catalonia, due to the transfer of that competence by a PP government — none of the people convicted has spent or will spend more than four years total in jail.

As stated, the Supreme Court does not deserve the harsh criticism it has received; it has been the last bastion for the defence of the rule of law. Former Prime Minister Rajoy and his centre-right party failed to use (all) the means they had at their disposal to prevent the crime and head off the pro-independence escalation. Instead, with treachery and premeditation, he chose to allow the separatists to reach the end, allowing them to stage their declaration of independence twice (on 10 and 27 October 2017). The crime could have been prevented if the constitutional intervention, under Article 155 of the Spanish Constitution (CE), had been carried out when the two bills were being prepared or, at least, as soon as Catalan Law 19/2017, of 6 September, on the self-determination referendum,[6] and Catalan Law 20/2017, of 8 September, on the Legal and Foundational Transition to the Catalan Republic,[7] were passed.

---

[4] "Declaración sobre la falta de fundamentación en el derecho internacional del referéndum de independencia en Cataluña", 70 *REDI* (2018-1), at 297. The original and an English translation of the statement are available here.

[5] A summary and a link to the full judgment can be found here. An English-language summary and link to an English translation of the full judgment can be found here.

[6] Sitting as a full court, the Constitutional Court unanimously declared this Catalan law null in Judgment 114/2017, of October 17 (Official State Gazette (*BOE*) No. 256, of 24 October 2017). The Constitutional Court has made a translation of the grounds and ruling of the judgment available in English, in French and in German. The Court's Press Office also published an English summary of the Judgment.

[7] Sitting as a full court, the Constitutional Court unanimously declared the so-called "foundational law of the Republic" null in Judgment 124/2017, of 8 November (BOE No. 278, 16 November 2017). A translation of the grounds and ruling of the Constitutional Court judgment is available in English, in French and in German. The Court's Press Office has also published

 DOI: 10.17103/sybil.24.11

If the intervention under Article 155 CE had taken place then, rather than on 27 October, several crimes could have been forestalled and, with them, the costly and pointless criminal trial. Former Prime Minister Rajoy hid behind the judges and prosecutors (I said as much in the newspaper *El Mundo* on 26 November 2016); rather than stepping up to tackle the separatist challenge politically, the right-wing government preferred to expose and sacrifice the King of Spain. In a grave speech to the nation, the King had to draw on the "reserve" of his abstract powers in defence of the Constitution. And then, as a last-ditch effort, the judiciary assumed its responsibility in defence of the rule of law in Spain.

a summary of the judgment in English and in French.

 DOI: 10.17103/sybil.24.11