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The Catalonia independence process before the Spanish Supreme Court

Assessment, in light of European Union law, of the constitutional framework from which the Spanish supreme court has approached the prosecution of the Catalan separatist leaders

Pedro TENT ALONSO*

Because the Supreme Court had agreed to consider various preliminary issues concerning the hypothetical violation of fundamental rights, in the first sessions of the trial of the separatist leaders (hereinafter, the trial), several defences questioned the very constitutional framework from which the trial was to be approached.

This point is of paramount importance insofar as — with more or less accuracy — the Catalan independence movement has continually cast doubt on the characterization of the Kingdom of Spain as a state governed by the rule of law, thereby denying it any legitimacy to exercise its jurisdictional power over the conduct under review attributed to the (since convicted) defendants.

The defences (and the Catalan independence movement in general) have pointed to key aspects such as *(i)* the independence of the judiciary, no longer simply in reference to ordinary matters that can be addressed through the recusal mechanism (profusely employed by the defences and discussed *in extenso* in the judgment itself), but also in relation to its very constitutional structure and the mechanisms for appointing Supreme Court justices with the involvement of the General Council of the Judiciary and *(ii)* the effective existence of a true system of protection of fundamental rights (especially those related to political freedoms) in order to underscore that the Kingdom of Spain does not meet the standard for the "rule of law"

* LLM, lawyer and Assistant Professor of Private international law, University of Valencia. This contribution forms part of a Report commissioned by the Committee of Jurists of the *Foro de Profesores* [Academics Forum]. It was submitted on 30 October 2019 and was made within the R+D Projects "Secesión, democracia y derechos humanos: la función del derecho internacional y europeo ante el proceso catalán (SEDEDII)" (principal investigator: Helena Torroja; Ref. PID2019-106956RB-I00) and "La consolidación de la Carta Europea de Derechos Fundamentales en su aplicación en los Estados miembros" (principal investigator: Santiago Ripoll Carulla; Ref. DER2017-89753-P).

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resulting from the founding treaties of the European Union (the main assessment criterion on which this first section will focus).

(A) CONCEPT OF THE RULE OF LAW

It is therefore essential to elucidate the concept used by European Union law to identify political-constitutional structures that qualify as governed by the "rule of law" and thus have the political and legal legitimacy intrinsic to that status.

Article 2 of the Treaty on European Union (TEU) states that the "rule of law" is one of the Union's founding values and is part of the common legal heritage of all Member States.

One of the first references to this complex concept was made in the Communication from the European Commission of 15 October 2003, in which it addressed the essential conditions for applying the current Article 7 TEU. This article, which was introduced by the Amsterdam Treaty and amended by the Nice Treaty, provides for the application of sanctioning mechanisms to Member States that stray from the founding values of the Union laid out in Article 2 of the Treaty, including, as seen, operating in accordance with the concept of the "rule of law".

This first reference is significant not because of the effort to define the term "rule of law" (which is not attempted), nor for the commitment regarding the justiciability of the sanctioning instrument in Article 7 TEU (which is directly denied), but rather because of the categorical confirmation that the scope of Article 7 TEU goes beyond the limits of EU secondary law, such that it is still applicable even in matters that are the exclusive competence of the Member States (paragraph 1.1.),[1] a circumstance that gives the measure of the importance of the "rule of law" value.

A second major milestone was the European Commission Communication regarding "A new EU Framework to strengthen the Rule of Law", dated 11 March 2014. This time, much more thoroughly and with extensive references to case law, the Commission stated that the "(...) case law of the Court of Justice of the European Union ('the Court of Justice') and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU. Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law."

The European Commission's reference to the Venice Commission is not only remarkable

[1] This idea would have an important reflection in the CJEU Judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15.

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for the detailed body of scholarly literature that that institution has generated on the concept of interest here (a highly prestigious institution, it should be recalled, to which former Catalan President Puigdemont unsuccessfully appealed in an attempt to have the pseudo-referendum of 1 October 2017 internationally recognized),[2] but because in one of its main studies on the matter (512/2009, of 4 April 2011), the Commission happened to highlight that, unlike others, the Spanish Constitution [CE] included especially concrete provisions concerning the term "rule of law".[3]

In that study, the Venice Commission listed the following constituent elements of the "rule of law" concept: the principle of legality (including the existence of a transparent, accountable and democratic process for the passage of laws), legal certainty (understood as the prohibition of arbitrariness but not of reasonable discretionary power), access to justice before impartial courts[4] including judicial review of administrative acts, respect for human rights,[5] and non-discrimination and equality before the law.

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[2] See the appeal referenced here.

[3] "The notion of the rule of law (or of Rechtsstaat/Etat de droit) appears as a main feature of the state in a number of constitutions of former socialist countries of Central and Eastern Europe (Albania, Armenia, Belarus, Bosnia and Herzegovina, Croatia, the Czech Republic, Estonia, Georgia, Hungary, Moldova, Montenegro, Romania, Serbia, Slovakia, Slovenia, "the former Yugoslav Republic of Macedonia", Ukraine)[;] it is more rare in old democracies (Andorra, Finland, Germany, Malta, Norway, Portugal, Spain, Sweden, Switzerland, Turkey). It can be mostly found in preambles or other general provisions. There are, however, more concrete provisions in Spain, according to which "the Courts control the power to issue regulations and to ensure that the rule of law prevails in administrative action"; courts as well as prosecutors are subject to the rule of law." Indeed, Article 9.3 CE systematizes (unlike virtually any other constitution) some of the main characteristics of the "rule of law" concept.

[4] With regard to this critical concept, the Venice Commission highlights:

"56. The role of the judiciary is essential in a state based on the rule of law. It is the guarantor of justice, a fundamental value in a law-governed State. It is vital that the judiciary has power to determine which laws are applicable and valid in the case, to resolve issues of fact, and to apply the law to the facts, in accordance with an appropriate, that is to say, sufficiently transparent and predictable, interpretative methodology.

"57. The judiciary must be independent and impartial. Independence means that the judiciary is free from external pressure, and is not controlled by the other branches of government, especially the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. The judges should not be subject to political influence or manipulation. Impartial means that the judiciary is not — even in appearance — prejudiced as to the outcome of the case.

"58. There has to be a fair and open hearing, and a reasonable period within which the case is heard and decided. Additionally, there must be a recognised, organised and independent legal profession, which is legally empowered, willing and *de facto* able to provide legal service. As justice should be affordable, legal aid should be provided where necessary.

"59. Moreover, there must be an agency or organisation, a prosecutor, which is also to some degree autonomous from the executive, and which ensures that violations of the law, when not denounced by victims, can be brought before the courts.

"60. Finally, judicial decisions must be effectively implemented, and there should be no possibility (save in very exceptional cases) to revise a final judicial decision (respect of *res judicata*)."

[5] The Venice Commission specifies the human rights most strongly linked to the rule of law: "The rights most obviously connected to the rule of law include: (1) the right of access to justice, (2) the right to a legally competent judge, (3) the right to be heard, (4) inadmissibility of double jeopardy (*ne bis in idem*) (Article 4 of Protocol 7 to ECHR), (5) the legal principle that measures which impose a burden should not have retroactive effects[,] (6) the right to an effective remedy (Article 13 ECHR) for any arguable claim, (7) anyone accused of a crime is presumed innocent until proved guilty, and (8) the right to a fair trial or, in Anglo-American parlance, the principle of natural justice or due process; there has to be a fair and open hearing, absence of bias, and a reasonable period within which the case is heard and decided. Additionally, there must be a recognised, organised and independent legal profession, which is legally empowered, willing and *de facto* able to provide legal service, and the decisions of which are implemented without undue delay."

(B) ARTICLE 7 TEU: THE "RULE OF LAW" ENFORCEMENT PROVISION

In light of this characterization of the "rule of law" concept, it is publicly and well known that the European Commission (which, under Vice-President Timmermans paid special attention to these matters) activated the pre-sanctioning mechanism described in its Communication of 11 March 2014 against the Republics of Hungary, Poland and Romania. Not only has the possibility of using it against the Kingdom of Spain never been considered, but when former President Puigdemont's circle sought to trigger its application through a popular legislative initiative,[6] the Commission rejected it outright due to the radical impertinence of its form, without at any point activating the dialogue mechanism for which it is exclusively competent described in the Communication of 11 March 2014.

If, in addition to this fact, other no less significant circumstances are taken into account such as *(i)* the detection by the Court of Justice of the European Union of problems related to judicial independence in contexts that have nothing to do with Spain (cases C-64/16 and C-216/18 and joined cases C-508/18, C-82/19 and C-509/18, concerning the Republics of Portugal, Poland and Germany, respectively, to name but a few); *(ii)* the figures for the Kingdom of Spain in relation to the main rule-of-law quality standards;[7] or *(iii)* the number of rulings against the Kingdom of Spain by the European Court of Human Rights;[8] and — for merely illustrative purposes — they are compared to the very serious constitutional shortcomings found in the Law on the Legal and Foundational Transition to the Catalan Republic (*Ley de transitoriedad jurídica y fundacional de la República*), voted on 7 September 2017 (striking shortcomings not only in the procedure used to pass it but also in its substantive content, enshrining a sort of principle of cooperation between the executive and judiciary), there can be only one conclusion: for all the stated reasons, the Kingdom of Spain operates in complete accordance with the principle of the rule of law as it is conceived in European Union law, which makes the internal constitutional framework in which the trial of the Catalan independence leaders was carried out fully legitimate in legal terms.

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[6] See a reference here.
[7] See the data gathered by the World Justice Project here.
[8] See an appraisal here.

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