the SPANISH YEARBOOK of INTERNATIONAL LAW

Agora

The Catalonia independence process before the Spanish Supreme Court

Issues related to European human rights law: the European Court of Human Rights

Santiago Ripol Carulla and Rafael Arenas García*

(A) The shadow of the European Court of Human Rights

The references to the European Court of Human Rights (hereinafter, ECtHR) have been a mainstay of the sessions of the trial for Special Proceedings No. 20907/2017.

In the trial's first session, for example, the defendants' lawyers had the opportunity to make their initial arguments, reserved for arguments concerning violations of fundamental rights. All of the defences argued that the state's action constituted an infringement of, amongst other things:

- the defendants' rights to life and liberty (e.g. due to having suffered degrading treatment, abusive use of pre-trial detention, or breach of the right to criminal legality);
- their political rights (e.g. the right of assembly or ideological freedom); and
- their procedural rights (e.g. the right to evidence, in relation to the non-admission or rejection of certain evidence; the right to an impartial court; defencelessness due to the defendants' lack of access to all the documentation — since the case was divided between several courts — as opposed to the Public Prosecutor (*Fiscalía*), who did have this global vision of the proceedings; etc.).

* Santiago Ripol Carulla is Professor of Public international law at Pompeu Fabra University (UPF, Barcelona) and Rafael Arenas García is Professor of Private international law at the Autonomous University of Barcelona (UAB). 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).

 DOI: 10.17103/sybil.24.14

In their arguments, the defences referred to the catalogue of fundamental rights set out in Title I of the Spanish Constitution, but also, and especially, to the violation of the European Convention of Human Rights (ECHR). And they announced their intention to apply to the ECtHR. The Supreme Court saw the defendants' intention to take the case to the Strasbourg Court in the multiple applications made for members of the trial Court to recuse themselves, observing that the defences conceived of the recusal mechanism as a "tedious and needless intermediate step towards the European Court of Human Rights" (Legal Grounds A.5.3).

When challenging the defences' arguments, the Office of the Public Prosecutor (*Ministerio Fiscal*) also referred to the ECHR and the Strasbourg Court, as did the Spanish government's legal counsel (*Abogacía del Estado*) and the private prosecution on public interest grounds (*Acusación Popular*).

Finally, even the presiding judge of the trial court mentioned the ECtHR in his first remarks. Specifically, on the first day of the trial, when telling the parties how much time they would have to make their arguments, Presiding Judge Marchena referred to the solution provided for in the ECtHR Rules, which he adopted as a reference. Two days later, when responding to the defences' arguments regarding the fragmentation of the subject of the proceedings, i.e. the fact that they were being heard by various courts, and its consequences for the principle of equality of arms, he responded with an analysis of the ECtHR judgment in *Chambaz v. Switzerland*, of 5 July 2012, which the defences had cited.

(B) THE EUROPEAN COURT OF HUMAN RIGHTS AND SPAIN

In 1950, the Council of Europe adopted the European Convention of Human Rights or Rome Convention. Section I of this treaty contains a list of rights that the states that ratify the treaty undertake to incorporate into their domestic law. Amongst other things, Section II creates the ECtHR, an international court to which the states parties to the Convention grant jurisdiction to hear claims brought by individuals residing in their territories against the state itself, insofar as its government or courts and judges have violated one of the rights or liberties included in Section I.

Albeit with some differences, the catalogues of rights included in the ECHR and the national constitutions are largely the same; it is no coincidence that all Council of Europe member states are democratic countries that respect human rights and have ratified the ECHR.

The role of the ECtHR should thus be understood as follows: it is an international body for the oversight of Spain's compliance with its obligations under the ECHR. Or, from a different perspective, it is a third level of protection of fundamental rights (after the ordinary courts and the appeal for constitutional protection of fundamental rights) that, in ratifying the ECHR, Spain accepted as an additional guarantee for individuals who, having exhausted the remedies provided for under Spanish law, consider that Spain has violated one of their rights.

 DOI: 10.17103/sybil.24.14

From the time Spain acceded to the ECHR and accepted the ECtHR's jurisdiction to the present (31 December 2018), the ECtHR has handed down 167 judgments in which Spain was a defendant. Three of these cases were concluded by means of the friendly settlement procedure provided for in Article 39 ECHR; another four refer to the question of just satisfaction addressed in Article 41 ECHR (former Article 50). As for the judgments on the merits, in 48 cases (34% of the time), the Strasbourg Court found that the violation alleged by the plaintiff had not occurred; in another 112 cases, however, the ECtHR ruled that Spain had breached one of the rights and freedoms recognized under the Convention (62%).[1]

Spain is one of the countries bound by the Convention to be found by the ECtHR to be in violation of it least often. Based on these 112 judgments, it ranks 22nd in absolute terms with regard to the number of rulings against it; furthermore, no country with a population larger than Spain's has been found to be in violation fewer times. In fact, in terms of the number of convictions per million inhabitants, Spain has the second-lowest conviction rate, trailing only Germany (2.39 per million inhabitants in Spain versus 2.35 per million inhabitants in Germany). By way of comparison, the figures for other European countries would be 4.7 convictions per million inhabitants for the United Kingdom, 11.5 for France, and 15.9 for Belgium. Spain is thus one of the countries to have been reproached the fewest times by the ECtHR.

In terms of the content of the law, 66% of these judgments refer to the rights to a fair trial (50) and to a trial without undue delay (16) enshrined in Article 6 ECHR. The right to respect for private and family life (Article 8 ECHR) accounts for 10% of the judgments concerning Spain (16), whilst the prohibition of torture (Article 3), the right to liberty and security (Article 5), and freedom of expression (Article 10) each account for 5%.[2]

ECtHR case law has had a great influence on Spanish law, whether because Spanish lawmakers have adapted certain laws to it (e.g. the ECtHR judgments in the cases *Iglesias Gil* and *Ruiz Mateos* were the material causes, respectively, for the reforms of the Spanish Criminal Code and the Organic Law on the Constitutional Court) or because Spanish judges have applied the criteria established by the ECtHR to define certain concepts, such as those of a reasonable time of pre-trial detention (*Scott* case), a reasonable time to lodge an appeal (*Stone Court Shipping*), the reasonableness of the length of proceedings (*Unión Alimentaria Sanders*), judicial impartiality (*Perote Pellón*), etc.

The importance of ECtHR case law is clear. Not only has it "made the Convention a dynamic and powerful instrument to confront new challenges and consolidate the rule of law and

1 Including the *Olaechea Cahuas* judgment of 18 August 2006, referring to the violation of Art. 34 ECHR (interim measures), as well as the ECtHR judgment in *Drozd and Janousek v. France and Spain*, of 26 June 1992, formulated before Andorra was party to the ECHR. The stated percentages were obtained from the ECtHR publication *Statistics on Judgements by States 1959-2018* (Strasbourg: Council of Europe, 2018).

2 ECtHR, *Statistics on..., op. cit.*

 DOI: 10.17103/sybil.24.14

democracy in Europe", but it has also emerged as a benchmark for individuals, who view the Court as a main institution for the protection of their fundamental rights.

(C) THE EUROPEAN COURT OF HUMAN RIGHTS AND THE *PROCÉS*

As noted, the defences of the accused in Special Proceedings 20907/2017 have already announced that, once the proceedings have finished and the procedural requirements have been met, they will lodge complaints with the ECtHR against the Supreme Court judgment. They maintain that Spain has violated some of their rights and freedoms and that the Spanish courts have not and will not remedy this violation. They further argue that the investigation and prosecution carried out violated certain procedural rights.

In fact, some of the defendants have already sought protection from the ECtHR in other matters related to the *procés*. This is the case of the application lodged by 76 members of the Catalan Parliament against Spain in the case *Carme Forcadell i Lluís and Others*.

That case refers to Article 4 of Law 19/2019 of the Catalan Parliament, on the right to self-determination, which establishes that a self-determination referendum will be held and that, if the referendum results in a majority in favour of independence, Parliament will proceed to declare it.

The Law, which had been challenged before the Spanish Constitutional Court, could not be implemented because the Constitutional Court had suspended it. This circumstance was known to Parliament and to each and every one of its members. Nevertheless, the referendum was held and, in light of the results, two parliamentary groups —Together for Catalunya (*Junts per Catalunya*, JpC) and the Popular Unity Candidacy (*Candidatura d'Unitat Popular*, CUP)— requested that the Bureau of the Parliament of Catalonia (*Mesa*) convene a plenary sitting so that the president could assess the results of the referendum and declare independence. The Bureau granted the request. Immediately thereafter, the Socialist Parliamentary Group of the Parliament of Catalonia filed an appeal for constitutional protection with the Constitutional Court, which, by means of its Order of 5 October, declared the appeal admissible and ordered the suspension of the parliamentary sitting, initially scheduled for 9 October.

The 76 Catalan MPs who applied to the ECtHR argued that, because the Constitutional Court's order prevented the convening of the plenary sitting, it violated their rights to exercise political representation and prevented them from expressing the will of the voters who participated in the referendum of 1 October.

However, in its decision of 29 May 2019 (application 75147/17), the ECtHR rejects that the alleged violation occurred because, in provisionally suspending the convening of the plenary sitting of the Catalan Parliament, the Constitutional Court adopted a measure that was: 1) provided for by law and whose potential application was known to the applicants; 2) intended to protect the constitutional order (and the rights of the MPs in the minority and, indirectly, of citizens to participate in public affairs); and 3) proportionate to achieve these goals, a point

stressed by the Spanish Supreme Court (Legal Grounds B.17.3 and C.2.1.2).

Therefore, the ECtHR concluded, "the suspension of the Plenary session was necessary in a democratic society". In addition to describing the decision of the Bureau of the Parliament of Catalonia as a "manifest failure to comply with decisions given by the Constitutional Court", the ECtHR's decision affirms time and again that the Constitutional Court's decisions must be complied with. This is the key idea of the decision. For that is the only way to ensure the protection of the constitutional order.

If we have referred to this decision *in extenso*, it is not only because, according to the defences, it is the first in what is expected to be a long list of decisions concerning the *procés*, but also because it is illustrative of how the ECtHR will analyse future claims lodged with it.

The ECtHR has also decided on another case related to the *procés*. By means of its decision of 12 June 2019, the ECtHR declared inadmissible the application that Carme Forcadell had lodged with it concerning the pre-trial detention ordered for her as a precautionary measure. The reason for the non-admission was the failure to exhaust domestic remedies, as the applicant had not filed an appeal for constitutional protection with the Constitutional Court before applying to the ECtHR.

The defendants have since lodged this complaint regarding the inadmissibility of pre-trial detention with the Spanish courts. They consider the imposition of this precautionary measure contrary to the Spanish Constitution and the Rome Convention. Briefly, they argue that the maintenance of pre-trial detention "causes irreparable harm to their rights to liberty and the presumption of innocence". Additionally, as many of the defendants are or have been elected regional, national and even European MPs, they argue that this situation of pre-trial detention violates their fundamental right to participate in public affairs (Article 23 CE) by preventing them from taking part in parliamentary business.

The Supreme Court and, subsequently, the Constitutional Court responded to these complaints (see, amongst others, Constitutional Court Orders 22/2018, of 7 March, 38/2018, of 22 March, 54/2018, of 22 March, 82/2018, of 17 July, and 98/2018, of 18 September). In these decisions, the Constitutional Court examines the ECtHR judgment in *Selahattin Demirtaş v. Turkey*, of 20 November 2018, which the applicants had cited as an obligatory criterion for the Spanish high courts to follow when deciding on "the political rights of a parliamentary official in pre-trial detention and in what situations those rights (and those of their voters) are violated by an extended preventive deprivation of liberty". However, the Constitutional Court reasons that there are singular differences between the defendants' situation and the *Demirtaş* case (Constitutional Court Order 12/2019, of 26 February, Legal Grounds 3).

(D) FUNDAMENTAL RIGHTS AND ECTHR CASE LAW IN THE SPANISH SUPREME COURT JUDGMENT

In general, the defences' arguments concerning the violation of their clients' fundamental rights, which are addressed in detail in the Supreme Court judgment, seem to lack any basis in

the case law of the Strasbourg Court. In this regard, the alleged violation of the right to a trial by the judge predetermined by law — because the Supreme Court rather than a judicial body based in Catalonia is hearing the case — seems unlikely to prosper in an application to the ECtHR. As established in the court's own case-law guide,[3] the right to the judge predetermined by law means that the courts must have been established by law, not at the discretion of the executive (paragraph 73 of the guide). The Supreme Court is clearly a body established and predetermined by law.

Beyond that, and according to the ECtHR itself, potential violations of domestic rules of jurisdiction can be considered by the Strasbourg Court when there exists a flagrant violation of the provisions of domestic law on matters of court jurisdiction (paragraph 74 of the guide). In the matter at hand, the Supreme Court's jurisdiction to hear the case has been debated. The defences have argued that the core acts being tried were committed in Catalonia, which, in their view, would exclude the Supreme Court's jurisdiction. Without the need to question the defences' argument, it seems clear that, as some of the facts being tried took place outside Catalonia, the interpretation that the Supreme Court has jurisdiction is unlikely to be considered a flagrant violation of court jurisdiction rules under Spanish domestic law. The same is true of the joining of all the cases filed with the Supreme Court due to the existence of defendants both with and without parliamentary immunity. The Supreme Court's jurisdiction could be disputed based on Spanish domestic law; but such a debate would not in any case imply a flagrant violation of jurisdiction rules under Spanish law, the interpretation of which, in accordance with ECtHR case law, falls to the Spanish courts.

The same can be said of the lack of impartiality of the members of the Court alleged by the defences. ECtHR case law is based on the idea that the personal impartiality of the judges must be presumed unless there is proof to the contrary (see paragraph 95 of the aforementioned guide to the Court's case law). In this context, ECtHR case law has defined cases in which such partiality should be found to exist, with the ensuing consequences for the right guaranteed under Article 6 ECHR. These cases include those in which the judge has displayed some sort of hostility or arranged to be assigned a case for personal reasons (subjective proof of partiality). Additionally, there are objective elements based on which partiality can be concluded to exist. These elements are related to the existence of hierarchical or other links between the judge and other persons involved in the proceedings (see paragraph 100 of the aforementioned guide). They likewise include situations in which a judge has made pre-trial decisions in relation to the same case. However, these decisions must be of a certain entity. For example, the ECtHR rejected that partiality existed in the case of a decision on the merits by a judge who had participated in the investigation, but only in the questioning of some witnesses (judgment in the case of *Bulut v. Austria*, of 22 February 1996). In the case at hand, the defences argued that the investigating judge had been a member of the court that gave leave to proceed to the

3 Available here.

prosecution and had been at a dinner party with a city councillor for the People's Party (*Partido Popular*, PP). They also argued that the plaintiff, the Public Prosecutor, had been a judge in the Supreme Court Criminal Chamber and, thus, had been professionally acquainted with several of the judges who made up the trial court. In light of its case law, these circumstances seem unlikely to lead the ECtHR to consider that the right to an impartial judge was violated. It was also argued, in relation to the impartiality of the investigating judge, that he had used the phrase "the strategy targeting us" in one of his decisions. According to the defences, the use of the first person would indicate that he considered himself directly concerned by the facts being tried, which would affect his partiality. The Supreme Court rejected this claim on the understanding that the phrase was not significant; but the ECtHR will have to determine its scope, taking into account that, given the nature of the investigated facts, all Catalans were directly affected by what happened. This raises a question of some interest, namely, how to judge impartiality in crimes affecting an entire population.

As can be seen, in its response to the defences' arguments regarding violations of the defendants' fundamental rights (which the Court addresses in the same chapter in pursuit of a "more conventional systematic approach"), in order to define the content and possible restrictions of the fundamental rights under debate, the Supreme Court referred to its own case law, as well as that of the Constitutional Court and the ECtHR.

To this end, the Court notes that its case law on the legitimacy of the limitation of the right to two levels of jurisdiction for MPs and senators with parliamentary immunity is "in line with" that of the ECtHR (p. 99; p. 96 in English). It further states that its case law on the right to an impartial judge "is in accordance" with that of the Strasbourg Court (pp. 117 and 254; pp. 116 and 249 in English), as is its case law on the right to political representation (p. 248; pp. 242-243 in English) and on the principle of equality of arms (p. 186; pp. 182-183 in English).

Elsewhere, the Supreme Court notes that its arguments and decisions are in keeping with ECtHR case law. This is the case of the right to freedom of thought, which it examines as a result of the arguments made by one of the defendant's in relation to his detention, or the principle of the presumption of innocence (p. 247; p. 241 in English).

Nor does the Supreme Court hesitate to incorporate judgments by the Strasbourg Court into its reasonings; hence, its references to it when discussing the limits of parliamentary privilege (*inviolabilidad*) (p. 244; p. 243 in English), freedom of expression (p. 244; p. 238 in English), the right to assembly (p. 245; p. 239 in English), the pre-trial detention of political representatives (pp. 249-252; pp. 243-246 in English), or the principle of adversarial proceedings (*contradicción*) (pp. 163-164; pp. 160-161 in English), which it addresses when it examines the argument made by some of the defendants that the impossibility of checking witnesses' testimony against video documentary evidence led to a violation of their right to a fair trial (pp. 162 *et seq.*; pp. 159 *et seq.* in English).

 DOI: 10.17103/sybil.24.14