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The Catalonia independence process before the Spanish Supreme Court

The Catalonia independence process and EU Law (2017-2020)

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(A) INTRODUCTION

The Supreme Court trial against the main political leaders behind the secessionist challenge may be the most politically and legally important trial related to the "Catalan case", but it is certainly not the only one from a domestic or international perspective.

In a large share of the domestic judicial proceedings, the European factor has emerged. Interestingly, despite the separatists' desire to internationalize and Europeanize their cause, the response of EU law to this insurrectional movement and to the Kingdom of Spain's response to it is fundamentally understanding and protective of Spanish interests and actions.

The following sections will focus on the arguments based on EU law invoked or invocable in relation to the Catalan independence movement (i.e. not only in relation to the general proceedings conducted before the Supreme Court against the movement's political leaders).[1] The analysis will be divided in two parts: the first up 1st December 2019 and the second from that date until December 2020.

(B) THE STATE OF THE QUESTION AROUND THE SPANISH SUPREME COURT'S JUDGMENT UNTIL 1ST DECEMBER 2019

Arguments based on EU law have been made in several domestic court proceedings linked to

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[1] Other arguments of international law, such as those arising from the UN or Council of Europe legal systems, fall fundamentally beyond the scope of these remarks. In any case, the considerations arising from the European Convention on Human Rights and its Court are inseparable from European Union law, for the Rome Convention is part of EU law as a general principle, and the standard provided by the convention serves as a reference for the EU Charter of Fundamental Rights.

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the *procés*. For instance, the National High Court's (*Audiencia Nacional*) (Judicial Review Chamber) judgment of 20 December 2018 is quite relevant. Using extensive citations of EU law, it confirms the fine imposed on the Catalan National Assembly (*Assemblea Nacional Catalana*, ANC) for violating data protection rules with the survey conducted in relation to the pro-sovereignty straw poll held on 9 November 2014.

The EU has shown confidence in the Spanish judges and courts to substantiate and settle the charges arising from the secessionist challenge.[2] Most notably, in July 2019, the European Commission deemed inadmissible the European Citizens' Initiative promoted by former President Puigdemont's circle ultimately aimed at triggering Article 7 TEU to sanction Spain for violating democratic principles. This provision, activated against Hungary and Poland, although it faces a challenging path forwards, ultimately provides for the imposition of sanctions on a Member State, in particular, the suspension of its voting rights in the Council of the European Union. Commission President Ursula von der Leyen has been more cautious — or, perhaps, ignorant — in her first statements on the Catalan trial, saying she needs to learn more about the matter before she can speak out. In my view, the secessionist pounding is not purely a Spanish domestic matter, as it also undermines the legal principles of European integration.

The political and legal charges against Poland and Hungary stem, mainly, from the pointed or already implemented attacks on the system of separation of powers, especially against the independence of the judiciary. The case law of the EU Court of Justice confirms that the state of a country's justice in this regard falls within the competences and concerns of European integration (see the CJEU judgment of 24 June 2019, *Commission v. Poland*, C-619/18).

It should be stressed that the refusals of the Belgian and German courts to grant the European arrest warrant in the terms requested by the Spanish Supreme Court have not been based on suspicions or criticisms regarding the state of human rights in the country. In other cases, albeit exceptionally, the CJEU has allowed that, in the case of violations of fundamental rights in the issuing country, the executing country may refuse to surrender the accused person. This has never happened in relation to Spain. In its October judgment in the trial of the leaders of the independence movement, the Supreme Court criticized the attitude of the court of Schleswig-Holstein in Germany.

Secessionism within a state seems to fly in the face of the general and seminal spirit of European construction, conceived of as a battering ram against nationalism, against exclusive and excluding identities, and as a vector of cohesion, connectivity and solidarity between nations, of pluralism and tolerance.

The basic legal argument refuting the Catalan separatist cause from an EU perspective is

[2] Information from the Europa Press news agency available here.

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contained in Article 4.2 TEU, which supports and protects institutional autonomy, the constitutional framework of each Member State. Specifically, Article 4.2. is worded as follows: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

Of course, the so-called right of self-determination invoked by Catalan separatism has no support in European Union law, whose sources include international law (as the Supreme Court judgment explicitly lays out). I do not believe that the EU will ever prohibit internal secessionism, but it certainly does not authorize it; on the contrary, it refers to and endorses the constitutional orders of its Member States. And these constitutional traditions of the Member States, which are general principles of European Union law, do not in any way enshrine the right to secession, as witnessed by the opinions of the German and Italian constitutional courts. The EU itself is essentially based on representative democracy.

As for so-called internal self-determination, i.e. the right of a people to democracy within the framework of a state, as we have seen, the basic pillars and values of European construction are democratic principles for itself and its Member States. Both orders — the state-level and the European — complement and fertilize each other. The European system requires fundamental rights and the rule of law from its Member States as a cornerstone of mutual recognition and trust. From the Spanish constitutional perspective, Constitutional Court Statement 1/2004 defined a hard, unrevisable core, made up of essential constitutional principles. Thus, the constitutional blocs of the EU and Spain mutually protect and respect each other.

Whatever the shortcomings of Spanish democracy — and it certainly has some — there is no reason to project from them, as Catalan secessionism has done to legitimate its cause and exonerate its leaders, a shadow of denigration or defamation.

As I recently wrote elsewhere, "If, due to the weakness or complicity of the government of the nation, a direct violation of our rule of law were to materialize, the European Union, as it has done with Poland, although in different circumstances — due to a state nationalism, let's say — would have to act against the Kingdom of Spain (...). Integration through law cannot allow the disintegration of one of its States without and against the law. The sudden, factual reform of the Spanish Constitution, if consented, would be a direct violation of European Union law, as neither constitutional order — the Spanish or the European — tolerates the reckless reform of laws, let alone primary and fundamental ones."[3]

[3] J. Roldán Barbero. "El desafío soberanista en Cataluña y el Derecho de la Unión Europea", 63 *Revista de Derecho Comunitario Europeo* (May-August, 2019) 387-404, at 401-402.

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The question of the status of elected MEPs, and the potential scope of their immunity, has prompted the first action of the EU Court of Justice directly linked to the *procés*, namely, Order of the President of the General Court of 1 July 2019 in the case *Puigdemont and Comín v. the European Parliament* (T-388/19 R). The order dismisses the application for interim measures by the two members elect of the European Parliament who have fled from Spanish justice, for the Parliament to override the Spanish authorities, which require the candidates to pledge allegiance to the Spanish Constitution in person, and welcome the applicants as MEPs regardless. Additionally, the Supreme Court requested a preliminary ruling from the CJEU on the question of the scope of the European Parliament immunity of the likewise elected Oriol Junqueras, currently in prison and already convicted by the Spanish Supreme Court. The hearing for this case took place on 14 October. Notably, no EU Member State appeared in court in the proceedings to make submissions. In contrast, the Supreme Court has rejected the preliminary question in reference to Puigdemont as he did not appear in court in the proceedings.

The Supreme Court judgment on the *procés* led the Court to reactivate the European arrest warrant for Puigdemont (only for him) with the Belgian justice system, this time on charges of sedition and embezzlement. The possible reform of this European arrest warrant will surely be considered in the new term inaugurated by the new European Parliament and the new Commission. For now, the most recent CJEU case law reaffirms that the executing judicial authority "must rely, in principle, on the assurances given by the issuing judicial authority" (Case C-128/18) in a case of possible inhuman or degrading treatment due to the conditions of detention in the country issuing the warrant (Romania). The CJEU's ruling on the question referred to it by the Belgian justice system in the case against the Balearic rapper Valtonyc will also provide some assessment criteria for the "Catalan case". It is thus beyond doubt that EU law, together with the European Convention and Court of Human Rights, will be crucial factors for both the legal and political resolution of the Catalan dispute. At both levels, my legal opinion is that European law, in general, will continue to align itself with the arguments of the Kingdom of Spain in defence of its constitutional order and territorial integrity. European construction cannot be based on the degradation of the rule of law by separatist forces, a movement that moreover fans the flames of Spanish nationalism on the opposite side, which is likewise disrespectful of democratic foundations.

(C) THE NEW DEVELOPMENTS OF THE CATALONIAN SECESSIONIST PROCESS IN CONNECTION TO EU'S LAW (SINCE DECEMBER THE 1ST 2019 UNTIL END OF DECEMBER 2020)

(1) General remarks

The Covid-19 pandemic has been a black swan and a game changer that has modified –even transformed– our political and social reality and the Catalan separatist movement is not an exception: the Catalan independence process has been postponed in the political agenda and it is no longer a top concern for citizens due to the pandemic.

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The *coronatimes* have certainly had a significant impact on the development of the secessionist *procés*. The spread of Covid-19 has led to appeals to release the Catalan leaders in jail[4], but it has also raised the contrafactual question about the capacity of a hypothetical independent Catalan state to manage the crisis. In more general terms, the devastating pandemic has sparked a sanitarian, humanitarian and economic crisis in Spain and has reopened the debate about the essence of the country and its quasi-federal structure, its ability to implement effective measures and the balance between security issues and civil liberties. Spain's reputation is consequently at stake and notoriously at risk anew, and this situation is irrefutably linked to the Catalan perception of its integration within the Spanish state. By the way, according to a recent opinion poll, support for independence is at its lowest level since 2011 and only 44.4% of the Catalan population would vote for independence if a referendum were held in November 2020[5].

Covid-19 has also shaken the foundations of the European integration to which an independent Catalan republic would aspire, although, according to a resolution adopted by the autonomous Catalan parliament, the decision to join the EU and other international organisations would be subject to a decision of the eventual sovereign parliament. This resolution certainly elaborates on the rather out-dated (mis)conception of sovereignty as an individual and full right instead of an interdependent and limited one.

Europe is facing the terrible and invisible menace of coronavirus, adding a new crisis to recent European history: the 2008 Great Recession, the 2015 migratory crisis, Brexit, illiberal tendencies, etc. It can be argued that the current global emergency could entail a more introspect and nationalistic view of Europe, which would be more fragmented due to diffuse and uncoordinated decisions of Schengen states, the new economic recession —a depression, really—, the external barriers of different kind erected in order to protect European citizens, etc. State nationalism, as well as many other divisive factors, will probably survive and may even be amplified by irrationality, which also penetrates the non-state peripheral nationalism, like Catalan or Scottish nationalism or, in cultural terms, the so-called Islamist separatism in France. It is still uncertain whether the post-coronavirus international scene will be more prone to unilateralism or multilateralism, but for now the European reaction to the current economic crisis has been quite different to that of the 2008 Great Recession: instead of the orthodox and *austeritarian* approach, a €750 billion Recovery and Resilience Facility (Next Generation EU) has been, among other measures, designed. For the first time in EU history the new fund addresses an embryonic common European debt and it constitutes a certain mutualisation of risk and solidarity. In spite of the problems that may arise from its

[4] A report submitted to the Parliamentary Assembly of the Council of Europe in 2020 by the Latvian socialist Boris Cilevisc (Motion of the Resolution 14802) called for the release of prisoners with political backgrounds, such as the Catalan politicians, in order to prevent the spread of the coronavirus. This report is foreseen to be debated by the Assembly by the end of the year. The Spanish Constitutional Court has dismissed this possibility: STC 38/2020, of 25 February 2020 (*BOE*, No. 83, 26 March 2020).

[5] Report published on 17 November 2020 by the *Instituto de Ciencias Políticas y Sociales* of Catalonia.

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implementation, this reaction is certainly more cohesive than the response to the 2008 Great Recession. As far as the Catalan separatist movement is concerned, EU institutions continue to avert the problem and avoid assuming a potential mediator role: the movement is considered a domestic issue, exclusively subject to the Spanish Constitution. However, the Catalan legal convulsion is not in substance only a Spanish problem, but by extension a European political and legal problem: the Constitutional rupture of a state is a European disturbing factor and a blatant violation of EU law (Article 4 (2) TEU).[6] Additionally, as it will be discussed in the next two sections, the ramifications of the *process* have had a significant impact on several judicial cases in the EU as well as the European system of human rights as a whole.

It is still early to conclude that dialogue is replacing unilateralism and legality is replacing illegality. Secessionist forces seem doubtful and divided regarding the roadmap to achieving political hegemony in Catalonia. The upcoming regional election scheduled for February 2021 may shed some light on this question. For now, given the parliamentary minority of the Spanish government, the influence of Catalan separatists in Spanish political life remains important: the support of secessionist parties is essential and the Spanish government has therefore adopted a more lenient attitude towards them. The possibility of pardoning the Catalan leaders in jail will be looked into and, alternatively, the Spanish criminal code may be reformed, with natural retroactive effect, in order to reduce the punishment associated to sedition, adapting it according to other EU states national law and thus favouring the recognition of European arrest warrants issued for this crime. It is worth noting that academic debate over the scope of the illegality of this conduct continues at the Spanish level[7], beyond the economic nature of the embezzlement charges.

However, we cannot forget the strategy of confrontation, denigration and weakening of the state pursued with no constitutional loyalty and characterised by legal disobedience –

[6] More data and ideas in J. Roldán Barbero, "El desafío soberanista en Cataluña y el Derecho de la Unión Europea", 63 *Revista de Derecho Comunitario Europeo* (2019) 387-404 [doi: http://doi.org/10.18042/cepc/rdce.63.01].

[7] H. Roldán Barbero has summarised the positions of his fellow criminal lawyers in relation to the events occurred in Catalonia during the disconnection process and the judgment rendered by Supreme Court concerning the main political leaders of the region. The different positions range from denying the crimes to claiming that there is a crime of rebellion, not only of sedition, as the Supreme Court established. "El delito de rebelión en la Segunda República" (to be published in tribute book to Javier Boix in 2021 by Tirant lo Blanch, Valencia).

In the international arena it is important to take into consideration the report published by the Venice Commission (European Commission for Democracy Through Law) on 8 October 2020 (Opinion No. 970 / 2019) entitled "Criminal Liability for Peaceful Changes for Radical Constitutional Change from the Standpoint of the European Convention on Human Rights". The report highlights the freedom of speech and tries, although ambiguously, to strike the right balance between individual rights and the state duty of preserving constitutional order and public security. In the Catalan case, individuals are not prosecuted on their right to freedom of expression, but on the violation of rulings and judgments of national authorities in a state governed by the rule of law. Accordingly, the Venice Commission has ratified its criteria –already included in its Code of Good Practice on Referendums in 2006-2007– concerning the referendums in a Report adopted on the same date (CDL-AD(2020)031) and entitled "Revised Guidelines on the Holding of Referendums". The Commission reiterates and emphasizes the need for referendums to respect the rule of law and, in particular, to comply with the legal system as a whole, especially with the procedural rules on constitutional revision.

leading, inter alia, to the judicial disqualification of the regional President[8]–, fake news, some of them disseminated by foreign powers like Russia, a project of a Digital Catalan Republic (thwarted by a Royal Decree-Law[9]), etc. The independent movement has not stopped trying to impose its own narrative at an international level. However, the Catalonia's external action plan for the period 2019-2022 has been deemed incompatible with regional competences and national unity in foreign policy by the Spanish Constitutional Court, which has therefore denied the international subjectivity of autonomous regions.[10] Spanish nationalism, languid until recently, has correlatively disquietingly woken up[11]. Nationalisms feed each other…

Although from a political point of view, Catalan independence has lost momentum, the legal front remains quite active and controversial. The Spanish Constitutional Court's rulings on some dozens of cases of different nature related to the *procés* have been unanimous in almost all of them, with the exception of some cases concerning preventive prison[12]. The separatist movement awaits, once exhausted the domestic remedies, for the final intervention of the European Court of Human Rights (ECHR), whose ruling on the *Forcadell* case was favourable to the interests of the Spanish state (dialogue between Spanish highest courts and the Strasbourg Court through the request of an advisory opinion is not possible in this case since Spain has not ratified Protocol no. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms). The Strasbourg Court ultimately underpins the criteria brandished by Member States "in a democratic society" and in defence of their own democratic order. It is important to bear in mind that the Catalan case is a very peculiar one insofar as it entails the impeachment and imprisonment of political representatives.

In these circumstances, the reputation of the rule of law and the separation of powers in Spain is of utmost importance in order to determine the legitimacy of both the constitutionalist and the secessionist stance. It must be emphasized that different international rankings have positively assessed the state of the Spanish democracy. Spain was again classified as "full democracy" by The Economist Intelligence Unit in 2019,[13] although the Catalan issue was recognised to have provoked a disturbing setback. Even Greco, the Group of the Council of Europe against Corruption, recognised some improvements in this field in Spain in 2019[14]. However, both Greco and the first report published in 2020 by the

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8 Judgment given by the Spanish Supreme Court (Criminal Chamber) on 28 September 2020.

9 Decree-Law 14/2019, 31 October 2020, on adopting urgent measures for public security reasons concerning digital administration, government procurement and telecommunications (*BOE* no. 266, 5 November 2019).

10 STC 135/2020, 23 September 2020 (*BOE* no. 289, 2 November 2020).

11 See Núñez Seixas, X. M.: *Suspiros de España. El nacionalismo español 1818-2018* (Editorial Crítica, Barcelona, 2018).

12 STC 155/2019, 28 November 2019 (*BOE*, no. 5, 6 January 2020). This decision, which concerns the preventive custody of Oriol Junqueras and deals with the judgment rendered by the ECHR on 20 November 2018 in the *Demirtas v. Turkey* case, had 3 dissident opinions.

13 See the information here. Other international indices ratify the health of the Spanish democracy.

14 See the information here.

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European Commission over the quality of the rule of law in the European Union[15] deplore the long-lasting impasse in the renewal of the members of the General Council of the Judiciary, which is the organ of governance of the judiciary in Spain. The proposal announced by the Spanish government to reform the appointment method of the General Council of the Judiciary has given rise to mistrust in Europe[16]. Moreover, the European Commission has warned against the appointment of the former Minister of Justice as General Prosecutor, pointing out its negative effect on the independence of the judiciary. Nevertheless, no reference whatsoever to the handling of the *procés* has been included in any of these international documents. It is important to underline the relevance of the independence of the judiciary within the European integration, as the different decisions taken by the European institutions, notably those regarding Poland, confirm.[17] In general terms, Spanish democracy is far from being ideal: some of its elements are deteriorating and some additional difficulties to the solution of political conflicts and the promotion of shared policies may arise, partly due to territorial disputes and the polarisation of the ideological spectrum. But democracy cannot be discredited as a whole and Catalan nationalists cannot be considered as a persecuted and oppressed minority entitled to international protection or the right to self-determination (a *secession remedy*). It is preposterous to invoke the flaws of the rule of law in Spain in order to legitimise an uprising against the whole legal system. As it has been said by the European Commission, the flaws of the Rule of Law in Spain are occasional and not systemic (and people are not persecuted for ideological reasons).[18] Law does matter!

(2) Recent European jurisprudence linked to the Catalonian *procés* and its interaction with Spanish jurisprudence

(a) *European elections and parliamentary immunity*

The relationship between national high courts and the Court of Justice of the European Union (CJEU) is sometimes sensitive and always crucial for the rule of law in Europe and the unity and primacy of EU law.

There has been some tension between the Spanish Supreme Court and the CJEU regarding their respective jurisprudence about overlapping matters in the past[19] and some of it still persists, especially in many cases concerning mortgage loan agreements and consumer

15 COM (2020) 580 final. 30 September 2020.

16 See the letter signed on 14 October 2020 by the President of Greco.

17 P. Martín Rodríguez, "Poland before the Court of Justice: Limited or Limitless Case Law on Article 119 TEU?", *European Papers*, 17 July 2020.

18 Interview with Didier Reyners, the European Commissioner of Justice, *El País*, 8 October 2020.

19 In a Judgment given by the European Court of the European Communities on 12 November 2009, in a case concerning tax functions of Land Registrars (Registradores de la Propiedad), the ECJ condemned a Member State for wrong jurisprudence emanated from its Supreme Court for the first time. *Commission v. Spain*. C-154/2008. In general terms, see D. Sarmiento, "La aplicación del Derecho de la Unión por el Tribunal Supremo en tiempos de crisis", 13 *Papeles de Derecho europeo e integración regional* (2012).

protection[20].

One of the most recent and relevant examples of the tension between both courts is in fact related to the Catalan *procés* as a consequence of the unprecedented request by the Criminal Chamber of the Spanish Supreme Court for a preliminary ruling of the CJEU in order to clarify the start of the mandate of Members of the European Parliament and the immunities accorded to them. The questions concerned the former Vice-President of the autonomous government of Catalonia, Oriol Junqueras, one of the main leaders of the illegal referendum and of the adoption by the regional parliament of the so-called *disconnection* laws in 2017.

The request and the implementation of this preliminary procedure spark many remarks:

First of all, it is surprising that the Supreme Court referred the matter to the European justice when a previous judgment of the European General Court regarding the former regional President Carles Puigdemont pointed to the relevance of national legislation and the need of national intervention in the verification of the credentials for elected Members to take their seats in the European Parliament[21]. This interpretation had already been included in the 2009 *Donnici* decision by the European Court of Justice (ECJ) and it was consistent with current practice and the Spanish stipulations[22].

Apparently, there was no "reasonable doubt" but an "acte clair" in this question. Yet, the ECJ ruling in the *Junqueras* case given on 19 December 2019 provided a different answer[23], which confirms the importance of preliminary rulings since in this case the *a quo* court seemed convinced of the opposite result. In its preliminary ruling the ECJ concluded that the status of Member of the European Parliament –and the immunities accorded to it– is acquired on the very day of the official declaration of the election results (on 13 June 2019) and declared in general terms that preventive imprisonment should be lifted. Consequently, Oriol Junqueras could only be prosecuted by national authorities through a request to the European Parliament and provided that it accepted it.

It is true that the ECJ changed the former criterion and did so without a solid grounded justification and motivation, which explains the critics to the ruling in scientific publications and the Spanish media. It has been deplored the confusion created and its collateral effects[24], describing the ruling as legislative[25] and *ultra vires*[26]. According to Paz Andrés, the ruling is very weakly grounded and unjustified as well as ambiguous and enigmatic, and it fails to take

[20] See, for instance, Judgment of 21 December 2016, *Floor Clauses*, Joined cases 154/15 and others, ECLI:EU:C:2016:980.

[21] Order of 1 July 2019, *Puigdemont and others*, T-388/19 R, ECLI:EU:T:2019:467.

[22] Judgment of 30 April 2009, *Donnici*, C-393/07, ECLI:EU:C:2009:275.

[23] Judgment of 19 December 2019, *Junqueras*, C-502/19, ECLI:EU:C:2019:1115.

[24] A. Mangas Martín, "Infinitos daños colaterales", *El Mundo*, 19 December 2019. X. Vidal-Folch qualifies the decision as "balanced", but "problematic". "Sentencia equilibrada y problemática". *El País*, 19 December 2019.

[25] E. Gimbernat: "La Sentencia del tribunal de Luxemburgo", *El Mundo*, January 2 2020.

[26] T. de la Quadra-Salcedo, "Junqueras: inmunidad y presunción de inocencia", *El País*, 3 January 2020.

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account of the conflict of interest, considering the constitutional relevance and the seriousness of the crimes involved[27].

But ECJ rulings are not subject to ordinary appeals, they are mandatory and must be executed on their own terms. Europeanist ideology should not be selective nor opportunist, and this ruling can certainly be considered Europeanist, since it pushes EU competences at the expense of national requirements. Naturally, the ECJ cannot demand the release of a prisoner or the annulment of the Spanish judgment[28] and it is also true that the ruling grants a margin of appreciation to the Supreme Court for its right implementation.

In this respect, it is hard to understand the position of the Supreme Court. It has already been pointed out that the preliminary ruling was surprising, but the performance of the *a quo* court was even more so. The Supreme Court went on with the procedure against the incidental nature of the preliminary process and pronounced its judgment on 14 October 2019 –two months before the ECJ ruling was published– condemning, inter alia, former Vice-President Oriol Junqueras.

Why was the preliminary ruling requested, then? —the Advocate General wonders[29]. The *effet utile* of the ECJ ruling was applicable not to Junqueras, but indirectly to the former President Puigdemont and the former regional minister Comín, who had fled to Brussels in order to avoid prosecution in Spain and acquired the status of Members of the European Parliament without going to Madrid (the Supreme Court itself had denied the pertinence of the preliminary ruling regarding Puigdemont on the basis he was a fugitive).[30] In the meantime, the criminal procedures and charges against them continue, as do the European warrant arrest and the supplicatory procedure (already under scrutiny in the European Parliament)

Immunity is usually lifted by the European Parliament, but it is appropriate to reflect on

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[27] P. Andrés Sáenz de Santa María: "Nadie es perfecto: el TJUE y el TS en el asunto de la elección de Oriol Junqueras al Parlamento Europeo", 50 *Revista General de Derecho Europeo* (2020). See also J. A. Vallés Cavia: "La adquisición de la condición de parlamentario europeo y el alcance temporal y material de la inmunidad. A propósito de la sentencia del TJUE en el asunto *Junqueras Vies*", 65 *Revista de Derecho Comunitario Europeo* (2020) 189-215; and M. Jordana Santiago, E. Zapater Duque: "La cuestión prejudicial ante el Tribunal de Justicia de la Unión Europea a propósito del caso *Junqueras*: ¿un asunto de largo recorrido?", in J. J. Queralt (dir.): *La sentencia del procés: una aproximación académica* (Atelier, Barcelona, 2020) 187-210.

[28] Spanish domestic law contemplates the annulment of an internal judicial judgment, under certain conditions, in case of a decision taken against the Kingdom of Spain by the European Court of Human Rights, but not in case of a decision rendered by the CJEU.

[29] According to Advocate General Szpunar's opinion, the status of MEP is acquired solely from the electorate and it cannot be conditional on the completion of any subsequent formalities. Szpunar considers that the European Parliament should be able to decide whether it is appropriate to waive or defend the immunity of one of its Members, but he underlines that the reply would be hypothetical. ECLI:EU:C:2019:958.

[30] A. Ruiz Robledo has rightly asked for the formal derogation of Article 224.2 of the Organic Law on the General Electoral Regime (regarding the internal procedure in order to be inaugurated as a Member of the European Parliament), so as to to confer legal certainty to this kind of situations. A. Ruiz Robledo, "Inmunidad no significa impunidad", *El Español*, 19 December 2019. In the meantime, since the ECJ's judgment we must deem this provision inapplicable according to the classic *Simmenthal* doctrine established by the Court of Luxembourg in 1978.

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whether Spanish institutions are now willing to start a new judicial process with great media impact due to political reasons. Junqueras, who remains in jail, was not allowed to leave the prison because the Supreme Court, in disagreement with the State Attorney's position, who was in favour of Junqueras's release and the immediate petition to the European Parliament, argued that Junqueras had already been convicted when the ECJ ruling was published. On 23 October 2020, the Criminal Chamber of the Spanish Supreme Court declared that the prosecution of a person cannot be considered arbitrary if it has been initiated long before the announcement of the election results and has no relation with his or her parliamentary functions[31]. Moreover, the Spanish Constitutional Courts has affirmed that a popular vote cannot overrule a judicial decision[32].

As a matter of fact, there has been no formal defiance or disobedience to the ECJ, since its ruling delegated the final decision to the Spanish judicial authority and it later on rejected the appeals lodged by Junqueras concerning the measures implemented and the endorsement of the European Parliament of the position of the Spanish national authorities. The most recent and determining case of this jurisprudence saga is the Order of the Vice-President of the ECJ of 8 October 2020 that upholds the ECJ's dismissal of interim measures regarding the European Parliament's decision of 13 January 2020 that declared Junqueras's seat vacant with effect from 3 January 2020 and consequently rejected the urgent request to protect his immunity. As a consequence, the Vice-President of the ECJ ruled that in this context the European Parliament can only be informed of the expiry of the mandate since it is not its competence to comment on the national procedure that led to Junqueras's loss of the status of Member of the European Parliament[33].

Consequently, this case is completely different to the highly criticised ruling by the German Constitutional Court of 2020 regarding the quantitative easing policy of the European Central Bank, since in the latter a national court openly challenged the legality of a European secondary norm in spite of the ECJ's prerogative.[34] Nonetheless, the positions of the Spanish Supreme Court and the ECJ in the *Junqueras* case have certainly had a negative impact on the credibility and consistency of both courts.

(b) *The European arrest warrants*

Besides the question of the alleged immunities linked to the European election, there have

[31] Order of 23 October 2020. JUR/2020/303482.

[32] Waiting for further expected decisions on this matter by the Constitutional Court, see its order denying the suspension of the European arrest warrant issued by the Supreme Court against former Catalan President Carles Puigdemont. *Iustel - Diario del Derecho* (14 September 2020).

[33] Case 121/2020 P (R). We must also note the Order given by the General Court of the EU on 15 December 2020 (Case T-24/20) in which it declares an action brought by Oriol Junqueras against the statement by the European Parliament that his seat is vacant to be inadmissible. The General Court observes that the European Parliament has no competence to review the decision of the authorities of a Member State declaring an individual to be ineligible to hold office as a member of the European Parliament under national law.

[34] Decision 2020/440, 24 March 2020.

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recently been new cases of European arrest warrants (EAW) issued by the Spanish Supreme Court that have been rejected or delayed by judicial authorities of third countries.

As it has already been pointed out, the ECJ's ruling on the *Junqueras* case has eventually favoured Puigdemont's and Comín's admission as Members of the European Parliament. The Supreme Court has in fact ratified the EAWs regarding Puigdemont and Comín, which have, however, been unilaterally suspended in Belgium. Alongside the warrants, the petitions to the European Parliament have also been issued and are currently under discussion.

Additionally, two other former counsellors of the regional Catalan government that pushed the *disconnection* from Spain and are far from the scope of the Spanish judicial power have managed to evade EAWs. On the one hand, as far as Clara Ponsatí is concerned, the supplicatory procedure is also under examination because she is a Member of the European Parliament. In 2019 a Scottish police authority rejected the EAW issued against her because it deemed it "disproportionate", although it is well known that EAW is a mechanism that operates entirely and exclusively between the judicial authorities involved[35].

On the other hand, Lluís Puig, also a former member of the regional Catalan government, is currently in Belgium, where Catalan secessionists have been welcome so far too. On 7 August 2020, a Dutch-speaking judicial chamber in Brussels responded to the EAW in a shocking way: the EAW was rejected on the basis that the *a quo* judge had no jurisdiction over the case. This judicial chamber considered that the Supreme Court had therefore violated the right to effective judicial protection and the right to the lawful judge and supported its position with a report by a UN Working Group. There is no reference to the violation of human rights within the Spanish legal order but, as a matter of fact, this was the first time that an EAW was rejected on the basis that the judicial authority of the requesting state was not competent according to its national legal system, which is not a reason contemplated by EU law. This astonishing decision has raised new and increased indignation among constitutionalist lawyers and politicians in Spain and there have even been calls for the rupture of diplomatic relations with Belgium[36] as well as logically for a reciprocal response to the EAWs issued by Belgian judicial authorities[37].

Unionist forces in Spain have demanded the amendment of the EAW legal framework and functioning and, by extension, the revision of the framework for judicial cooperation in criminal matters in the European Union[38], which has become one of the few specifically European matters that are currently at stake in the Spanish political debate. The judicial response from other European countries –not particularly from the prosecutors, who have

[35] This decision has been condemned by C. Bautista in "Euroorden, la última frontera", *El Mundo*. 13 November 2019.

[36] J. A. Yturriaga, "Enésima afrenta judicial de Bélgica a España", *Sevillainfo*, 17 August 2020.

[37] See D. Berzosa, T. Freixes, "La justicia belga contra la Unión Europea", *El Mundo*, 17 August 2020.

[38] See the series of working papers published by P. Rivera Rodríguez, *La influencia del caso Puigdemont en la cooperación judicial penal europea* (Fundación Universitaria San Pablo CEU, Madrid, 2019).

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been in general more cooperative– has been qualified as denigrating and humiliating for Spanish democracy and sovereignty, and has certainly had a negative impact on the attitude of a part of the Spanish population towards the European identity.

However, as it has been pointed out, it would be wrong and unfair to speak of the disqualification of the Spanish judicial system by European organs in the framework of the Catalan secessionist challenge[39]. The Spanish government has stayed silent and launched a reform of the Spanish criminal code in order to harmonise the legal treatment of the crimes of sedition and rebellion with other European states. Meanwhile, the European Commission has overhauled the EAW mechanism and concluded that, in spite of some anomalous cases, its performance is on the whole satisfactory[40].

Finally, it is relevant to point out that the European Court of Human Rights has dealt with the execution of EAWs in the light of the European Convention on Human Rights. In the *Romeo Castaño* case, regarding Natividad Jáuregui, a member of the Basque terrorist organisation ETA[41] who has been eventually surrendered to the Spanish authorities, the Kingdom of Belgium was condemned not for rejecting the handing-over of the requested individual to Spain, but for not having thoroughly analysed the request.

[39] In this regard, see R. Alonso García, "Procés y hartazgo judicial", *El País*, 5 February 2020.

[40] Report on the implementation of the European Arrest Warrant and the surrender procedures between Member States. COM (2020) 270 final. 2 July 2020. It is also worth mentioning the letter sent from the Criminal Procedures Unit of the European Commission on 8 October 2020 to the "Foro de Profesores", an association of Spanish scholars defending the constitutional order. In this letter, the Commission promises to examine the national transposition of the EAW in Belgium and Germany, but it warns as well that the Commission is incompetent to revise the decisions taken by the domestic judicial organs in respect of these warrants. As far as the European Parliament is concerned, its Committee on Civil Liberties, Justice and Home Affairs (LIBE) has passed on the 1st of December 2020 a resolution asking for an amendment of the EAW, aiming, *inter alia*, at the inclusion of the crimes against the constitutional order and the integrity of the State among the crimes subject to an automatic surrender. The proposal seems reasonable, as the violations of the national constitutional structure are at the same time a blow against European values and foundations. Therefore, these violations have an indirect European scope.

[41] A comment on this judgment by A. Sánchez Frías in "Convergencia de caminos entre el TEDH y el TJUE en cuanto al riesgo de vulneración de los derechos fundamentales como motivo de no ejecución de la euroorden. Un análisis de la Sentencia del TEDH de 9 de julio de 2019, Romeo Castaño", 65 *Revista de Derecho Comunitario Europeo* (2020) 167-187 [doi: https//doi.org/10.18042/cepc/rdce.65.05].