Politics and Criminal Law: The Trial against the Catalan Independence Leaders

José Luis Martí

23.02.2019 doi: 10.17176/20190324-210230-0

On February 12th, the criminal trial against twelve Catalan independence leaders has started before the Spanish Supreme Court. It is surely the most important trial in the history of Spanish democracy for its political implications.

As we all know, criminal justice in a democratic rule of law system should remain independent from any political influence or pressure. And it should never be used as a political instrument, as a replacement or a substitute of democratic politics. Thus, there should be a thick and clear line separating politics from criminal law. However, several concerns have emerged in the last months and weeks regarding this trial making us fear that the clear and thick line between politics and criminal law might blur or haze in both directions.

First of all, some doubts about the scrupulous impartiality of the court have legitimately been raised. To some pre-existing doubts about the competence of the Supreme Court and some alleged irregularities in the process of establishing its jurisdiction, we need to add the unfortunate event of last November 2018, when a Spanish Senator from *Partido Popular* (the right-wing Spanish party) affirmed in a private message to the other senators of his political group that his party was going to "control the criminal chamber of the Supreme Court from behind". Even if a hearing with this Senator as a witness has not been admitted by the Court, the former Spanish Prime Minister Mariano Rajoy will testify in the trial, probably next week, in addition to a long list of Spanish and Catalan political leaders.

Secondly, the basic truth is that several leaders of the Catalan independence movement are being tried. Their political parties are announcing massive mobilizations and protests against the trial. For Thursday 21st a general strike has been called in Catalonia to protest against the trial. It has not been massively followed, but it has been only the first of many other mobilizations and demonstrations that are bound to be announced. On the other hand, last Sunday the three right-wing parties, PP, Ciudadanos and Vox, called for another demonstration in Madrid against the independentist aspiration and asking for a long sentence for the leaders being tried. In fact, one of these parties, the far-right, proto-fascist, emerging political party Vox, is taking part in the trial as private popular prosecutor. Add to this that all these parties find themselves in an open pre-electoral contest in view of the upcoming national (April 28th) and European, regional, and local elections (May 26th). All this does definitely not create an atmosphere of isolation and neutrality that an important trial like this would require and deserve.

Before returning to the demarcation between politics and criminal law, however, let me summarize the basic facts of this trial.

Who is accused?

Twelve independentist leaders, nine of which former ministers of the Catalan Government (including the former Vice-President and leader of the left-wing independentist party ERC, Oriol Junqueras; and eight other former ministers from both independentist parties, ERC and the right-wing one, PDeCAT); the former President of the Catalan Parliament (Carme Forcadell, also from ERC), and the two leaders of the two biggest independentist social organizations: Òmnium Cultural (Jordi Cuixart) and the ANC (Jordi Sánchez).

Who is in robes?

The Criminal Chamber of the Supreme Court is presided by Justice Manuel Marchena, and is composed

of six other Justices, including only one woman (Justice Ana Ferrer), with a clear majority of conservative ideology (only two of the seven Justices are regarded as progressive). Regarding the defenses, there are nine defense lawyers leading nine different teams representing the twelve defendants. Finally, there are three prosecuting parts: the public Prosecutorial Attorney of the Supreme Court; the State Lawyer, representing the Spanish State's Government; and a private popular prosecutor, representing the far-right party Vox.

What are the charges and possible sentences?

The criminal charges are four, even if not all twelve defendants are charged with the same ones: rebellion, sedition, disobedience to authorities, and misuse or embezzlement of public funds. Vice-President Junqueras, for instance, has so far been charged with rebellion and misuse of public funds, but this might still change during the process, and the public Attorney is initially asking for a sentence of 25 years in prison. For most of the other 11 defendants, the sentence petition ranges from 7 to 17 years.

At this point, it is necessary to introduce some critical analysis. As expressed in a petition signed last year by more than 400 criminal law professors, most of which are not even Catalan, let alone independentists, the charges of rebellion and sedition are highly implausible, from a technical, criminal legal point of view.

First of all, according to Article 472 of the Spanish Criminal Code, the offense of rebellion requires as one of the objective elements in the *actus reus* a "violent and public uprising". We all know enough about the relevant facts of 2017 to be certain that there was no violence on the side of the independence movement, besides the low-level confrontation that can arise in any social protest. If anything has characterized the Catalan secessionist movement and its leaders, besides their irresponsibility, it has been their commitment to a pacifist and non-violent ideology, even if accompanied by massive and impressive social protests and mobilizations. The charge of rebellion, therefore, lacks any plausibility.

Regarding sedition, Article 544 of the Spanish Criminal Code requires a "public and *tumultuous* uprising to prevent, by force or by illegal means, the enforcement of Spanish law or the normal exercise of public authorities", as long as it does not constitute a crime of rebellion. What exactly is a "tumultuous", but not-violent uprising? Do the events of September 20th qualify as such, as alleged by the prosecutor, when a crowd surrounded the building of the Catalan Ministry of Economy to protest and prevent a court official to do a search in the building? The Supreme Court could interpret the notion of "tumultuous uprising" in a more extensive or a more restrictive way. But we need to remember that by virtue of the principle of *in dubio pro reo,* if the interpretation is not obvious, judges should always interpret the law in favor of the defendants' view. Moreover, the facts of September 20th are not different from, and not even as serious as, for instance what took place on June 15th 2011; then, 2,000 "*indignados*" surrounded the Catalan Parliament trying to prevent the MPs to get into the chamber. And yes, it is true that some of the protesters back then were indicted and sentenced to three years for their actions. But it is also true that they were not charged with sedition, but just with the minor crime of coercing the authorities.

Things look different regarding the charge of disobedience to authorities. The Constitutional Court had explicitly pointed out to the independentists' political leaders that they were not allowed to collaborate, by action or omission, with the organization of the referendum of October 1st. Even if they deny they had anything to do with the organization of such referendum, it is clear that they did not do anything to stop it, when they could have done it. Finally, regarding the embezzlement or misuse of public funds, the prosecutors hold that they have found the company that printed out the ballot boxes for the referendum, but whether they will be able to prove that this company was paid with public money is far from clear. In any case, these two last charges are the most plausible ones in this trial.

What are the main pieces of evidence?

Apart from some pieces of documentary evidence, like e-mails and files, or reports about damages produced during some of the protests, most of the pieces of evidence that were initially proposed by the parties in the trial are witnesses. The prosecutors proposed 311 witnesses, while the defenses proposed 289. The Court has accepted a total of 558 witnesses, which is the main reason to expect a long trial. Rejected witnesses include Spain's King, Philip VI and the former Catalan President Carles Puigdemont, who is escaping from Spanish justice and currently living in Waterloo. Among those admitted, there is former Spanish Prime Minister Mariano Rajoy and many other political leaders. In any case, and with the exception of the eventual crime of misuse of public funds, the main issue at stake in this trial is not a factual one. Everyone knows pretty well about the relevant facts, and controversy exists more about how to qualify them from a criminal legal point of view, rather than about what really happened.

Political or technical defense strategies?

After the first two weeks of the trial, different defense strategies and styles have become visible. Contrary to the description given by part of the Spanish, such differences do not lie in the fact that some of these strategies are "political", while others are rather "technical". All these defense strategies are technical, and all of them are also, inevitably, political, as all defendants have declared that this is a "political" trial and they feel like "political" prisoners.

The main difference I see among the defenses is this. While some of them restrict themselves to deny the facts alleged by the accusation, in particular the presence of any form of violence, simply seeking a declaration of not-guilty, the strategy of others goes beyond that and, having in mind potential appeals to the Constitutional Court and to the European Court of Human Rights, denounces a political prosecution based on the use against them of the doctrine of the "Criminal Law of the Enemy" (*Feindstrafrecht*), as described by Günther Jakobs. This defense strategy, followed by the lawyers of Junqueras and Romeva, has raised concerns about whether the Supreme Court has jurisdiction over this case, qualifying the situation as a "procedural vaudeville", and it has argued that several defendants' fundamental rights have been violated.

There are, in fact, reasons to believe that some of the defendants' fundamental rights might have been unduly restricted. Leaving aside the jurisdictional discussion and their right to due process, there are serious concerns about the justifiability of the pre-trial detention the defendants have suffered for more than one year now. As many legal analysts in Spain have pointed out, none of the three conditions that justify such kind of detention seem to apply to this case. Also, the political rights of those defendants who are members of the Catalan Parliament seem to have been violated, since they were not allowed to exercise their Parliamentary duties while in pre-trial detention. This happened even before they were formally charged with rebellion, which, according to the Spanish criminal procedural law, is one of the conditions for the suspension of public office.

Politics and criminal law

Let me now get back to my initial reflections about the thick line between politics and criminal law. I started this post by affirming that this is the most important criminal trial in the history of Spanish democracy, and democracy itself and the rule of law might be at stake.

We are in the middle of a gigantic and deep political conflict in Spain, one that only democratic politics can properly handle. And no criminal trial, whatever its result, is going to fix or make it vanish. Criminalizing social protest, or violating or unduly restricting the civil and political rights of the defendants, is clearly not the way to make things better.

In several posts I previously published on this blog (here, here, here and here), I have described the escalation of the political conflict in Catalonia in the last two years. I qualified several events that occurred in September 2017 as a "constitutional coup d'état", in Kelsenian, technical terms, that clearly violated the Spanish constitution by trying to create a parallel and independent legal order. As I argued, the so-called

referendum of October 1st was clearly unconstitutional and illegal in my view. And even if police brutality trying to prevent Catalan voters from casting their vote in such referendum was disproportional and therefore also illegal – and many of us protested along the independentists on October the 3rd for that unjustified and undemocratic reaction –, President Puigdemont had no democratic legitimacy, and certainly no legal basis, to declare independence on October 27th. But none of this implies that the defendants are guilty of any crime. To be clear: they deserve a fair trial, with all due guarantees, of course, and if they are found to be responsible for some crime, they must surely be sentenced. The rule of law must be scrupulously respected. However, even if that is the result of the trial, the political conflict will surely remain. Criminal law alone is not the way to go. Only democracy, we all know that, can do something to deal effectively and legitimately with such conflict.

The author has given technical advice to some of the defenses in the trial.

ABOUT THE AUTHOR
José Luis Martí
José Luis Martí is an Associate Professor of Philosophy of Law at the Pompeu Fabra University in Barcelona.

SUGGESTED CITATION
Martí, José Luis: Politics and Criminal Law: The Trial against the Catalan Independence Leaders, Verfassungsblog, 23.02.2019, doi: 10.17176/20190324-210230-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20190324-210230-0.