A Matter of Representative Democracy in the European Union

The Catalan Question before the Court of Justice

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As reported in an earlier contribution to this blog, the European Parliament started its new term with three empty seats. The Catalan politicians Carles Puigdemont, Antoni Comín and Oriol Junqueras got elected in the European Parliamentary elections of 26 May 2019 but the Spanish Central Electoral Commission did not include their names in the list which was notified to the European Parliament. The reason was that they did not comply with a requirement under the Spanish election legislation to appear in person in order to swear or affirm allegiance to the Spanish constitution within five days after the official proclamation of the elections results. One of the elected candidates, Mr. Oriol Junqueras, was held in provisional detention in the context of criminal proceedings brought against him for his role in the organisation of the Catalan referendum on self-determination. In the meantime, he has been sentenced, on 14 October 2019, to a 13-year term of imprisonment and a disqualification from holding any public office or exercising any public function for the same period. The two other Catalan politicians reside in Belgium where they are subject to a pending European Arrest Warrant procedure issued by Spain.

This is the context against which the fate of the Catalan politicians reached the Court of Justice of the European Union. On the one hand, the Spanish Supreme Court brought a preliminary reference concerning the personal, temporal and material scope of the immunities enjoyed by Members of the European Parliament (MEPs) in a dispute concerning the refusal to grant Mr. Junqueras permission to travel to Brussels for the inaugural session of the European Parliament. On the other hand, Carles Puigdemont and Antoni Comín brought an application for interim measures before the General Court of the EU, requesting the suspension of the European Parliament's decisions concerning the results of the European Parliamentary elections as declared by Spain. In an order delivered on 1 July 2019, the President of the General Court dismissed the application, essentially on the ground that the election procedures for the European Parliament are governed by national electoral provisions.

Just before the Christmas break, it became obvious that the EU law dimension of this discussion cannot be simply ignored. On 19 December 2019, the Grand Chamber of the European Court of Justice (ECJ) ruled that elected MEPs enjoy the concomitant immunities offered under EU law from the moment the election results are officially declared. This implies that Spain unlawfully prevented Mr. Oriol Junqueras from taking his seat in the European Parliament while he was held in provisional detention. The next day, the vice-president of the ECJ annulled the order of the President of the General Court of 1 July 2019. The General Court now has to reconsider the request for interim measures in light of the EU law provisions regarding elections to the European Parliament.

A ruling of constitutional significance

As observed by Advocate General Szpunar in his opinion to the Junqueras case, the election process of European Parliamentarians and their immunities "is of constitutional importance which goes far beyond the personal situation of the applicant in the main proceedings and the national political debate with which he is associated." Indeed, the legal questions at

stake essentially concern the interaction between national and European rules on the election of MEPs and the understanding of the principle of representative democracy in the EU legal order as defined in Article 10 TEU. The latter provides that "the functioning of the Union shall be founded on representative democracy" and that "citizens are directly represented at Union level in the European Parliament". Accordingly, Article 10 TEU gives concrete expression to the value of democracy stated in Article 2 TEU, just as Article 19 TEU does with respect to the rule of law.

Whereas Article 14 (3) TEU further specifies that "Members of the European Parliament shall be elected for a period of five years by direct suffrage in a free and secret ballot", it follows from the 1976 Election Act that the Member States remain in principle competent to regulate the election procedure and to proceed, at the end of it, to the official declaration of the election results without any competence of the European Parliament to intervene in this process. However, once the results have been declared, the elected persons acquire the status of MEP and enjoy the immunities guaranteed under EU law. The latter *inter alia* involves the immunity as regards travel to the place of meeting of European Parliament, including to the first session. It follows that the Spanish Supreme Court erred in law when it kept Mr. Junqueras in provisional detention after his election to the European Parliament. Since the European Parliamentary immunity of Mr. Junqueras is directly connected to his status of MEP, it can only be lifted upon a decision of the European Parliament. *Mutatis Mutandis*, the same logic applies to the situation of Carles Puidgemont and Antoni Comín, even though they were not involved in this procedure.

With its judgment in the Junqueras case, the Court adopted a functional approach to the election procedure of the European Parliament, proceeding from the principle of representative democracy as one of the core values in the EU legal order. In particular, the Court stressed the need to ensure that the composition of the European Parliament fully reflects the free choice of the Union's citizens, by direct universal suffrage. Moreover, the immunities of MEPs are crucial to ensure that the European Parliament can operate in an independent manner, without any obstacles or pressures from the Member States. Last but not least, the EU rules on parliamentary immunities also contribute to ensure the effectiveness of the right to stand as a candidate for European Parliamentary elections as guaranteed under Article 39 (3) of the Charter of Fundamental Rights. This right would become entirely meaningless when national requirements could prevent that elected candidates can take up their seats.

Implications for the composition of the European Parliament

The Court's judgment in the Junqueras case is not only of constitutional significance, it also has important practical implications for the current composition of the European Parliament. The key question is whether Mr. Junqueras will now be released from prison in order to take his seat. In this respect, it is noteworthy that, *stricto senso*,the Court of Justice only answered the preliminary questions from the Spanish Supreme Court which all concerned the situation when Mr. Junqueras was in temporary custody. In the meantime, the situation changed in the sense that he was found guilty and sentenced to a 13-year period of imprisonment and a ban from taking public functions. On the implications of this development, the Court of Justice somewhat ambiguously concludes that "it is for the referring court to assess the effects to be attached to the immunities enjoyed by Mr Junqueras Vies in possible other proceedings [...] in respect for Union law and, in particular, the principle of loyal cooperation referred to in the first subparagraph of Article 4 (3) TEU". In this context, the Court also explicitly refers to the relevance of specific paragraphs in its judgment which concern the direct nature of European Parliamentary elections and the objectives of European Parliamentary immunity.

It follows that the Spanish Supreme Court cannot simply ignore the European Parliamentary immunity of Mr. Oriol Junqueras on the ground that he has already been convicted in Spain to a loss of all his representative functions. Such an interpretation would

undermine the *effet utile* of Article 10 TEU, which, read in conjunction with Articles 2 TEU, 14 (3) TEU and 39 (2) of the Charter, guarantees the EU's citizens' right to directly elect their representatives to the European Parliament as a core constitutional value in the EU legal order. This implies that, once it has been confirmed that a person enjoys the immunities attached to the status of an elected MEP, national courts can only proceed with criminal proceedings against this person after the European Parliament decided to waive his immunity in accordance with the procedural requirements as defined under EU law. Any other interpretation seems to contradict the logic of the EU's constitutional principle of representative democracy as clarified by the Court in its judgment of 19 December 2019.

Whereas the Spanish Supreme Court still has to decide on the implications of the Court's ruling for the personal situation of Mr. Junqueras, the implications for the two other Catalan politicians are already visible. On 20 December 2019, Carles Puigdemont and Antoni Comín received a provisional accreditation which allows them to enter the buildings of the European Parliament. Moreover, the issue of European Parliamentary immunity also affects the pending European Arrest Warrant (EAW) procedure against the two Catalan politicians in Belgium. In this respect, it is noteworthy that the Brussels court delayed its decision on the execution of the EAW until February 2020 in order to take into account the outcome of the ECJ's ruling. It appears that the EAW cannot be executed as long as the Catalan politicians enjoy European Parliamentary immunity. It is, therefore, not surprising that Spain's state prosecutor already urged the Spanish Supreme Court to immediately request the European Parliament to waive their immunity.

The procedure for such a waiver implies the involvement of the Committee of Legal Affairs, which adopts a recommendation to the plenary session of the European Parliament. The latter decides by a simple majority vote. Existing practice reveals that immunity is defended only if there is a clear *fumus persecutionis*, i.e. "a well-founded suspicion that the legal proceedings have been instituted with the intention of causing political damage to the Member." This is of course a highly contentious issue, and the General Court already ruled in the past that "the Parliament has a broad discretion when deciding whether to grant or to refuse a request for waiver of immunity or defence of immunity, owing to the political nature of such a decision". This implies that the EU Courts can only verify to what extent the relevant procedural requirements have been followed, whether the facts were adequately stated and whether there has been no manifest error of assessment or misuse of power. Hence, it appears that the fate of the Catalan politicians will not only be decided in the courtroom but also within the European Parliament.

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