



Viewpoint

The law in times of exception

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The rule of law means putting limits 'from below' and from outside upon the power of the state. In a strict conception of the democratic principle, the law cannot be a mechanism for covering up abuses of power, but a brake upon them or their primary antidote.

Against the background of legal exceptionality currently being experienced in Catalonia, on the weekend of 5 May Barcelona played host to the first 'Congress in Defence of the Rule of Law'.² The event brought together magistrates, professors of criminal and international law, journalists, members of human rights organisations and lawyers. One of the objectives of the meeting was to advocate for the rule of law as an instrument of denunciation and resistance in the face of the systematic breach of democratic rules that has taken place in recent years in Spain.

The legal exceptionality that we are experiencing is such that, rather than calling for a "alternative" or "contra-hegemonic" understanding of the law, what was demanded was simply that the public authorities are consistent with themselves – that they do not breach the minimum rules that they have adopted with the approval of constitutions and ratification of international treaties.

In effect, the actions undertaken by the government of the Popular Party [*Partido Popular*, PP] (with the support of Citizens [*Ciudadanos*, Cs], the Spanish Socialist Workers' Party [*Partido Socialista Obrero Español*, PSOE] and high judicial instances) against the Catalan independence movement and other forms of dissidence has brought about an institutional crisis in which the foundations of the rule of law are floundering.

In this context, the law and its interpretation have become a crucial battlefield when one side or the other attempts to establish its room for manoeuvre. The greater or lesser degree of legitimacy of their actions depends in good measure upon the acceptance and recognition of

¹ 'El derecho en tiempos de excepcionalidad', *El Diario*, 5 May 2018, https://www.eldiario.es/contrapoder/derecho-tiempos-excepcionalidad_6_768233181.html.

Translation by *Statewatch*. All footnotes and material in square brackets added by the translator.

² 'Congreso en Defensa del Estado de Derecho', *Colectivo Ronda*, <https://www.cronda.coop/es/Agenda/Congreso-en-Defensa-del-Estado-de-Derecho>

their judicial reasoning. At the same time, the dismissal of the political debate by the PP, PSOE and Cs and the constant refuge in a judicial power controlled ‘from above’ backs up the centrality of the law in the social debate.

In this dispute, the head-start enjoyed by those who exercise power is not as overwhelming as in previous eras. The legality of our time is not that of Francoism. It is stringent and brings with it all sorts of limits and controls. A good part of that consists in treaties, constitutions and declarations of rights that would have been unthinkable without the defeat of the fascisms and other dictatorships that blighted the last century – a civilised legacy that could become nothing more than ink on paper if the citizenry does not re-appropriate it in order to denounce the systematic incoherence of the powers-that-be. Despite their apparent inefficiency, these texts make it possible to consider unjust situations not as natural, but as authentic legal violations.

In a time of democratic regression, then, this legality becomes a mirror that is more uncomfortable than usual for the powers-that-be. In fact, it serves to demonstrate state institutions’ growing tendency to disassociate themselves from the bonds of rights-based protections and to situate themselves in illegality. In reality, to invoke the constitutional state nowadays implies defending the supremacy of the citizenry’s political and social rights, the separation of the three powers – each one with its counterweights – the central role of civil society, proportionality and the constant control or supervision of the actions of the state.

This vision corresponds with a German legal tradition of the rule of law (*Rechtstaat*) that came about following the Second World War and which is totally antithetical to the notion of the dictatorship of the law that the Spanish legal system would like to caricature today.³ At its base the idea is very simple: the rule of law means putting limits ‘from below’, and from outside, on the power of the state. The law cannot be, in a strict conception of the democratic principle, a mechanism for covering up abuses of power, but a brake upon them or their primary antidote.

Seen from this perspective, it becomes more crucial than ever for lawyers to show the law not only as an expression of power but also, and above all, as a tool to delegitimise its most arbitrary actions. This task has at least two specific functions: on the one hand, to respond to the unacceptable curtailment of political rights and the criminalisation of all dissidence against established power; on the other, to show that protest and disobedience, far from being reprehensible acts, are legitimate and even necessary instruments for forcing state power to comply with its own legality. A good example of legal resistance against the counter-independence offensive can be seen in the complaints lodged by human rights organisations and various councils (such as those of Barcelona and Girona) against the actions of the *Guardia Civil* and *Policía Nacional* during the referendum of 1 October.⁴

In truth, these types of disputes over the sense of the law are principally fought on Spanish territory. And there the role of human rights organisations and lawyers will be relevant. A

³ Editor’s note: Appropriately, the current issue of the *German Law Journal* (Vol 19, No 2) examines the work of the Ernst-Wolfgang Böckenförde, a former judge on Germany’s Federal Constitutional Court as well as academic and legal theorist who made a series of contributions to legal and political thinking on the *Rechtstaat*. The issue is available at: <http://www.germanlawjournal.com/#>

⁴ Almost 1,000 people were injured during the 1 October vote. For a translation of the official communication of the Catalan health services on injuries caused during the day, see: ‘Report about the incidents between the 1st and 4th of October 2017: patients attended to during the electoral and latter days as a consequence of the actions of state police bodies’, <http://statewatch.org/news/2017/nov/es-catsalut-report-injuries-police-violence-1-october-en-trans-19-10-17.pdf>

relentless initiative was the creation of the platform 'No Callarem'⁵ that recently organised, together with the municipality of Barcelona, the 'Week of Freedom of Expression' in the old Model prison.⁶ A building which for nearly a century was a centre of deprivation of liberty was converted into the epicentre of all kinds of political and cultural activities that condemned the repressive drift. The platform denounced the censoring of exhibitions,⁷ the seizure of the book *Fariña*,⁸ the recent conviction of the magazine *Mongolia* (which was ordered to pay €40,000 euros for making a joke)⁹ and the recent convictions of rappers such as Valtonyc and Pablo Hasél.¹⁰

The outcome of many of these disputes, however, are going to be decided in Europe. As the lawyer Gonzalo Boyé explained at the recent congress, the most significant slight so far to the legal offensive against independence originated precisely in a piece of "strategic litigation" in the European courts. The first warning signal came with the Spanish Supreme Court's withdrawal of the European Arrest Warrant against the members of the *Generalitat* [Catalonia's regional government] exiled in Belgium, due to its certain dismissal by the Belgian courts.¹¹

⁵ In Catalan; 'No Callaremos' in Castilian; or 'We won't shut up' in English. Website:

<http://www.nocallarem.org/>

⁶ The prison, which is currently open as a museum prior to being demolished, was constructed in 'panopticon' style and opened in 1904. Numerous political prisoners were held there during the dictatorships of Primo de Rivera and General Franco. For some further information on the prison, see: Raphael Minder, 'Catalonia's New Conflict Echoes in the Halls of an Old Prison', *The New York Times*, 12 December 2017, <https://www.nytimes.com/2017/12/12/world/europe/catalonia-modelo-political-prisoners.html>

⁷ In February 2018 the *Feria de Madrid* exhibition centre played host to the art fair Arco. The centre removed the work '*Presos políticos*' (Political prisoners), by the artist Santiago Sierra, as it contained the pixelated faces of Oriol Junqueras (former vice-president of the *Generalitat*), Jordi Sànchez (ex-president of the Catalan National Assembly, ANC) and Jordi Cuixart (president of the Catalan cultural association *Omnium*). The centre justified the removal of the work on the grounds of foreseen media controversy, and said it had taken the action with "maximum respect for freedom of expression". See: Jordi Palmer, 'Feria de Madrid censura una obra de Arco que reconoce que en España hay presos políticos', *El Nacional*, 21 February 2018, https://www.elnacional.cat/es/cultura-ideas-artes/obra-arco-presos-politicos_241230_102.html

⁸ "Nacho Carretero's *Fariña*, an expose of drug trafficking in Galicia, was published in 2015, but publication and sales were halted last month after the former mayor of O Grove in Galicia, Jose Alfredo Bea Gondar, brought legal action against Carretero and his publisher, Libros del KO. Bea Gondar is suing over details in the book about his alleged involvement in drug shipping." After the judge made the order there was a significant increase in orders for the book and it reportedly became a best-selling Spanish-language title on Amazon. See: Alison Flood, 'Spanish publisher subverts court gag by using Don Quixote to recreate banned book', *The Guardian*, 21 March 2018, <https://www.theguardian.com/books/2018/mar/21/don-quixote-cervantes-spain-farina>; and 'La jueza ejecuta el secuestro del libro 'Fariña'', *El Periódico*, 6 March 2018, <https://www.elperiodico.com/es/ocio-y-cultura/20180305/secuestro-libro-farina-6668378>

⁹ *Mongolia* is a satirical magazine which was ordered by a court to pay a €40,000 fine for a caricature of the bullfighter José Ortega Cano which, the court ruled, violated his right to honour and damaged his image. The magazine is appealing the ruling.

¹⁰ On these and numerous other cases, see: 'Spain: Counter-terror law used to crush satire and creative expression online', *Amnesty International*, 13 March 2018, <https://www.amnesty.org/en/latest/news/2018/03/spain-counter-terror-law-used-to-crush-satire-and-creative-expression-online/>

¹¹ The European Arrest Warrants were subsequently reactivated, only for a Belgian court to find that they were invalid due to a procedural error on the part of Spanish Supreme Court judge Pablo Llarena: "The court backed the Belgian public prosecutor's case that the re-issued European warrants should have been backed up by new Spanish arrest warrants in order to be valid." See: 'Brussels court rejects Spanish extradition request for three Catalan politicians', *Reuters*, 16 May 2018,

The second problem arose with the [Belgian court's] measures putting the exiles [provisionally] at liberty – a resounding contrast with the harsh measures of preventive imprisonment handed down in Spain. Subsequently, the UN Human Rights Committee urged, upon the request of Jordi Sánchez, that the Spanish state “take all the measures necessary to guarantee that he can exercise his political rights.”¹² A message that included precautionary measures, a mechanism foreseen by the UN to avoid “irreparable damage” to those who denounce violations of their rights before the institution.

The final setback came from the German judicial system. The court of Schleswig-Holstein discarded the existence of violence and the crime of rebellion in the facts under examination [in the case of Carles Puigdemont], contrary to the findings of the Spanish government and judge [Pablo] Llarena.¹³ The international front, in effect, has blown a gigantic hole below the waterline of the criminal case pursued by the Spanish Supreme Court. Actions which in one place are perceived as grave criminal acts become in another simple political acts with no criminal relevance.

Another judicial action that showed up the Spanish state was the recent clip round the ear delivered by the European Court of Human Rights in response to the conviction of two youths for burning photos of the king.¹⁴ Once again, that which for some was a hate crime was for others a simple political act protected within the ambit of freedom of expression.

At its base, the risk of corrosion to the rule of law demonstrated by all these actions is nothing new in Spain. It forms part of a punitive populism that has embedded itself in the state framework like a time bomb. Nevertheless, what is certain is that over the last two years the bloody persecution of the Catalan independence movement has intensified, to unprecedented extremes, a democratic regression that now affects other areas and collectives.

The challenge, then, calls more than ever for building broad, transversal and plural anti-repressive fronts that call into question the legitimacy of the discourse of law deployed by the powers-that-be; and that puts at the centre of politics the role of rights as limits to abuse. Doing so is a question of basic survival, in order to put the brakes on an openly despotic drift.

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<https://www.reuters.com/article/us-spain-politics-catalonia/brussels-court-rejects-spanish-extradition-request-for-three-catalan-politicians-idUSKCN1IH1LF?il=0>

¹² Nicolas Tomás and Carlota Camps, ‘UN urges Spain to guarantee Sánchez's political rights’, *El Nacional*, 23 March 2018, https://www.elnacional.cat/en/news/un-spain-guarantee-sanchez-political-rights_251232_102.html

¹³ ‘Carles Puigdemont freed on bail by German court’, *BBC News*, 5 April 2018, <http://www.bbc.co.uk/news/world-europe-43659699>

¹⁴ ‘Spain's free speech problems laid bare in ECHR ruling and new Amnesty report’, *Statewatch News Online*, 14 March 2018, <http://statewatch.org/news/2018/mar/es-echr-free-speech.htm>



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