

Dealing with the Catalan conflict from a criminal point of view: from the last resort to the only solution

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It is evident that the criminal proceedings against pro-independence politicians in Catalonia have raised many concerns about the politicians' refusal to solve political conflicts of their own field. This subsequently affects the courts, compelled to solve these problems with the risk of discredit and loss of acknowledgement as the independent institutions they should be. For these exact reasons, however, many of us who are seriously worried refuse to accept the opposite situation: the politicization of justice, where judges are compelled to exclusively consider the undeniable political dimension of the problem and leave aside the rule of law, the only thing which they are "subject to" (Article 117.1 of the Constitution).

This conflict raises the classic problem of the limits of the indispensable interpretation of the law. In my opinion, the balance must lead to rationalization based on interpretations that avoid resorting to the courts for the resolution of political conflicts. These interpretations, while based on accepted methods, should not deform the possible meaning of the legal terms, deprive norms of their content or even abolish them. About the methods, I believe some of them are misused such as the consideration of the bases of the legal institutions that are to be applied, or the lack of material unlawfulness when the conduct does not actually affect the legal right protected by the criminal rule. Or the possibilities of the well-known teleological interpretation of the laws, or the use of criminal law as the last resort (which, while not entitled to declare criminal laws null and void, can be used to construe them based on the constitutional principle of proportionality; Judgment of the Constitutional Court 136/1996).

This rationalizing attempt sometimes seems like squaring the circle. Differentiating between the situations is necessary in order to avoid maximalisms (in an all-or-nothing approach) when resorting to criminal law. I do not intend to offer a magical formula, but I reckon that the starting point of this debate is the specificity of the actions carried out in the exercise of these individuals' parliamentary duties. I do not think that resorting to the Parliament's sovereignty or to a generous interpretation of the parliamentarians' freedom of speech pursuant to Article 71 of the Spanish Constitution is inappropriate as long as it aims to protect an autonomous exercise of their functions. It is true that the former President of the Basque Parliament Juan Mari Atutxa was convicted of insubordination. But that was in 2008, eight years ago, in a different political context and through a reprehensible Judgment, for which reason it should not be a barrier.

In addition, there are some worrying interpretations which, instead of placing the criminal system as a last resort, are aiming precisely for the opposite. As an example, those interpretations that distort the meaning of "provocation" so as to include serious offences such as sedition – thus spreading it over all scenarios where freedom of expression comes into play. Our Criminal Code protects in an excessive manner the reputation of our public institutions by criminalizing all acts against them: against the Crown (Article 491 of the

Criminal Code), the national and regional Parliaments (Article 496), the Government, the General Council of the Judicial Power, the Constitutional Court, the regional Governments and Supreme Courts (Article 504), and so on. I shall not dwell upon this matter here, but these offenses collide with the freedom of expression and should disappear. While this does not happen, it is also possible to avoid resorting to them when what is said does not entail a real danger for the mentioned institutions, which is the most frequent case. Only those political systems that feel insecure due to the lack of social consensus need to resort to criminal law in order to protect their own reputation.

If, after all, resorting to criminal law is absolutely necessary, it cannot be avoided by barely saying that “this is a political problem”, worrying as the case may be. A criminal punishment for insubordination might be arguable in specific cases where it turns out as the unavoidable consequence of a broader political action. Nevertheless, when insubordination seems to be aimed precisely at provoking a criminal response and is the only and essential goal of a specific action, it is obvious that criminal law will have to come into play.

In any case, none of the above makes sense if it is understood as a simple legal and technical debate that will solve the problem. In contexts such as the current Spanish reality, criminal law is particularly inappropriate if used as the only solution because there are no political decisions aiming at solving deeper conflicts.