

The implications of the *Otegi* case for the legitimacy of the Spanish judiciary

ECtHR 6 February 2019, Case Nos. 4184/15 and 4 other applications, *Otegi Mondragon and Others v Spain*

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INTRODUCTION

The European Court of Human Rights' decision in the *Otegi* case dropped like a bomb in the midst of the Catalan secession crisis.¹ That crisis, which began in 2006, represents the most serious threat to the Spanish constitutional order since the end of Franco's dictatorship.² The challenge involves a combination of political action from the streets—crowds of demonstrators, labour strikes, and two unconstitutional 'participatory processes' or 'referendums' asserting Catalonia's independence from Spain³—and institutional action by the Catalan regional government, which has encouraged the movement and enacted legislation aimed at breaching constitutional legality.⁴ The economic crisis that unfolded parallel to the political impasse has compounded the drama of these difficult years for the Spanish constitutional order.⁵

The constitutional response to this turmoil has predominantly been judicial. Although central government intervention aimed at limiting the autonomy of Catalan institutions has

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¹ ECtHR 6 February 2019, Case Nos. 4184/15 and 4 other applications, *Otegi Mondragon and Others v Spain*.

² For an initial overview of the Catalan secession crisis, see V. Ferreres Comella, 'The Independence Vote in Catalonia—The Constitutional Crisis of October 1', *International Journal of Constitutional Law Blog*, 4 October 2017, www.icconnectblog.com/2017/10/i-connect-symposium-the-independence-vote-in-catalonia-constitutional-crisis/, visited 30 April 2019.

³ Aversion to the reform of the Autonomous Statute of Catalonia in 2006 is commonly considered the starting point of the secession crisis. The crisis intensified after the Spanish Constitutional Court invalidated the 2006 reform in 2010 (see Spanish Constitutional Court judgement No. 31/2010, of 28 June). Since 2006, several pro-independence demonstrations have been held, especially on 11 September (the national day of Catalonia). There have been also several pro-independence participatory processes, e.g. the municipal popular consultations held in 2009-2010, but the two most important ones, because they were directly carried out by the Catalan government, were: (i) the so-called 'participatory process' held on 9 November 2014 under Artur Mas Gavarró's government and (ii) the so-called 'referendum' of 1 October 2017 under Carles Puigdemont Casamajó's government.

⁴ *Inter alia*, because of their importance, the enactment of (i) Law No. 19/2017, of 6 September, on the referendum of self-determination; (ii) Law No. 20/2017, of 8 September, on the legal transition and the foundation of the Republic; and (iii) the Declaration of Independence of 27 October 2017, a text whose legal standing is uncertain but is definitely below the rank of legislation, are all relevant.

⁵ M. González Pascual, 'Austerity Measures and Welfare Rights: the Spanish Constitutional System under Stress', 1-2 *European Journal of Social Law* (2014) p. 116 at 116 - 117.

been decisive in managing the crisis,⁶ the central government has mainly relied on the Constitutional Court and regular courts to check the secessionist challenge.⁷ The Constitutional Court will even have the final word concerning the application of Art. 155 of the Spanish Constitution; there are two pending constitutional challenges before it that explore the provision's reach.⁸ In one way or another, the judiciary has played or will play the main role in protecting the constitutional order. The prominence of the courts is recognised not only by the central government, which initially activated the judicial mechanisms but also by secessionist leaders who have implicitly accepted it by strategically playing the judicial game, using all available tools to defend their position, especially in criminal proceedings.

The *Otegi* case gains in importance in this context, even though it is related to a different secession narrative. If the integrity of the constitutional order relies on the Spanish judiciary, the integrity of the judiciary itself is a crucial principle that must be preserved. A lack of trust in the Spanish judiciary would inevitably lead to an undermining of the legitimacy of the constitutional order and the anti-secession measures imposed by the courts. Impartiality as an element of the constitutional right to fair trial becomes the precise premise upon which the entire edifice of judicial protection of the constitutional order against secessionist challenges is built. Moreover, the ultimate acceptance of and compliance with judicial decisions taken in the context of the Catalan secession crisis will depend, even in case of disagreement, on the credibility—to which impartiality is key—of the Spanish judiciary. In other words, the acceptance of the constitutional order will ultimately be gauged through the perception of impartiality underlying the actions of the judiciary.

⁶ The application, for the first time in history, of Art. 155 of the Spanish Constitution represented a breaking point in the crisis. Art. 155 reads as follows (translation of the Spanish Constitution provided by the Official Spanish Gazette):

‘1. If an Autonomous Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way seriously prejudicing the general interests of Spain, the Government, after lodging a complaint with the President of the Autonomous Community and failing to receive satisfaction therefore, may, following approval granted by an absolute majority of the Senate, take measures necessary in order to compel the latter forcibly to meet said obligations, or in order to protect the above-mentioned general interests.

2. With a view to implementing the measures provided in the foregoing clause, the Government may issue instructions to all the authorities of the Autonomous Communities.’

To activate the measures allowed by recourse to this provision, then-President of Spain Mariano Rajoy Brey sent a “requirement of compliance” to the President of Catalonia, Carles Puigdemont Casamajó, on 11 October 2017. The requirement of compliance is a written statement which points out the regional government’s non-compliance with its constitutional obligations and thus the prejudice caused to the general interest of Spain. In this case, the Spanish Government asked for clarification regarding the nature and effects of the Declaration of Independence of 27 October 2017 and, specifically, whether the Declaration was legally binding, which, the requirement pointed out would be a breach of constitutional legality requiring termination of all its effects. Following the ambiguous response of the Catalan regional government, the central government declared that the requirement had not been met because of lack of clarity in the response. Several measures intended to bring Catalan institutions back under control had been authorised on 21 October 2017, and these were subsequently approved by the Senate on 27 October 2017.

⁷ The central government has systematically filed constitutional challenges before the Constitutional Court against the pro-independence legislative and executive measures approved by the Catalan institutions. Simultaneously, the ordinary judiciary under the lead of the public prosecution office has launched investigations and filed criminal charges against those it believes responsible for the Catalan secession crisis.

⁸ The constitutional challenges were filed on 3 December 2017 by 50 members of parliament from the *Unidos Podemos* party, and on 8 January 2018 by the Catalan regional Parliament. Those proceedings are still pending. In the meantime, the Spanish Supreme Court has ruled that the measures taken by the Spanish government and approved by the Senate were constitutional (see Supreme Court Judgment No. 312/2019, of 12 March).

The analysis in this case note begins with an overview summarising the ruling in the *Otegi* case. It then explores two recent disturbing trends that cast a shadow over the integrity of the judicial process, one in which *Otegi* plays a role and another involving certain questionable freedom of expression decisions which jeopardise the perception of impartiality underlying the judicial response to the Catalan secession crisis. The article closes with an argument reiterating the need to preserve the credibility of the judiciary at all cost in times of crisis.

THE OTEGI CASE

On 16 September 2011, the *Audiencia Nacional* sentenced Arnaldo Otegi Mondragón and Rafael Diez Usabiaga to ten years' imprisonment for being members and the leaders of a terrorist organisation (*Euskadi Ta Askatasuna*, 'ETA'). Another three applicants to the European Court of Human Rights were sentenced to eight years' imprisonment for being members of ETA. In addition, all the applicants were banned from taking part in elections for the duration of their respective prison sentences. On 7 May 2012, the Supreme Court, on appeal, reduced the sentences to six years and six months for Arnaldo Otegi Mondragón and Rafael Diez Usabiaga and to six years for the other three applicants. The disqualification from taking part in elections was confirmed and, therefore, not reduced. Finally, several individual constitutional appeals (*recursos de amparo*) were lodged by the applicants, all of which were rejected.

Prior to this set of convictions, on 2 March 2010, Arnaldo Otegi Mondragón had been sentenced to two years' imprisonment for the encouragement of terrorism (*enaltecimiento del terrorismo*) by the Fourth Section of the *Audiencia Nacional*. During the oral hearings, the President of the Fourth Section of the *Audiencia Nacional* asked the applicant whether he was prepared to condemn ETA. The applicant chose to remain silent and the judge replied that she 'already knew that he was not going to give an answer to that question'. The applicant felt that this statement was a breach of the sentencing judge's impartiality; it was on this basis that he lodged his cassation appeal. On 2 February 2011, the Supreme Court ruled in favour of the applicant, finding that the sentencing judge had been biased. Subsequently, on 22 July 2011, the Fourth Section of the *Audiencia Nacional*, after a recent reconfiguration, acquitted Otegi Mondragón.

The 16 September 2011 decision of the *Audiencia Nacional* was delivered by the same panel of judges that had convicted Arnaldo Otegi Mondragón on 2 March 2010, leading Otegi Mondragón to question the partiality of the judicial panel based on its past judicial conduct and the 2 February 2011 finding of partiality by the Supreme Court. On 7 May 2012, the Supreme Court— in a 3 to 2 decision— however, refused the applicants' appeal claiming a violation of the right to a fair trial, ruling that the panel's past conduct was not egregious enough to support a charge of lack of impartiality. The Constitutional Court also rejected, by split decision, the various individual constitutional appeals filed by the applicants. Neither court observed a breach of impartiality because the factual differences between the two cases were too great: the first case dealt with the encouragement of terrorism while the more recent one was related to membership in or leadership of a terrorist organisation.

The European Court of Human Rights addressed the case with its traditional approach to impartiality as laid out in Art. 6.1 of the Convention.⁹ Accordingly, impartiality was understood to mean the absence of prejudice or bias and could be tested either subjectively or objectively. From a subjective perspective, a judge should never allow personal prejudice or bias to influence the outcome in a given case.¹⁰ From an objective perspective, the Court should focus on ensuring that no legitimate doubt exists—from the perspective of an external observer—about the judge’s impartiality.¹¹ The latter (objective) test is concerned with appearances conveyed in the context of a trial whereas the former (subjective) test scrutinises, for evidence of partiality, the behaviour of the judge in question. In other words, the objective test is focussed on the overall context and facts of the trial whereas the subjective test scrutinises the conduct of the judge. However, as the Court has frequently stressed, there is no watertight barrier between the two tests: both perspectives might be compromised in the same case.¹² In any event, as the Court also notes, in most cases, the Strasbourg’s scrutiny focusses on the objective test.¹³

The Court examined the case by means of the objective impartiality test, thus disregarding the claims of personal bias on the part of the sentencing judges.¹⁴ Through the lens of the objective test, the Court found that the right to a fair trial had been violated since it considered the applicants’ concerns about the impartiality of the sentencing court to be objectively justified. The same panel of judges had previously tried Arnaldo Otegi Mondragón, and the Supreme Court declared the decision in that trial to be in breach of the principle of impartiality. Although the subsequent trial examined the applicants’ convictions on different criminal charges, the key for the European court was the fact that both trials shared an identical context, that is, ETA and terrorism.¹⁵ In the previous case, the sentencing judge had demonstrated prejudice, later confirmed by the Spanish Supreme Court, in attributing to the applicant affinity with the terrorist organization ETA. The subsequent trial, heard by the same sentencing judge, also principally involved ETA and terrorism and, therefore, the common thread running through both cases raised legitimate doubts, at least to an external observer, about the impartiality of the sentencing court.

The Court also addressed three additional factors.¹⁶ First, while it is true that the lack of impartiality in the previous trial applied only to Arnaldo Otegi Mondragón, the four other applicants were also subsequently tried for the same charges as Otegi and, thus, the ETA terrorism context also applied in their cases, thus objectively justifying those applicants’ fear of partiality. Second, doubts about the impartiality of a sole judge—based on her declarations during the previous trial—also cast doubt on the impartiality of the two remaining judges on the *Audiencia Nacional* panel. Here, the Court agreed with the Supreme Court’s criteria in the previous trial: retrial by a recomposed judicial panel had been required. Third and lastly, the fact that the judge whose behaviour had led to the partiality declaration that overturned the first trial did not act as judge rapporteur at the subsequent trial did little to assuage doubts about partiality. For the Court, it was impossible to

⁹ *Otegi Mondragon and Others v Spain*, *supra* n. 1, paras. 52-57.

¹⁰ ECtHR 15 December 2005, Case No. 73797/01, *Kyprianou v Cyprus* [GC], para. 119 and 129-133.

¹¹ ECtHR 15 October 2009, Case No. 17056/06, *Micallef v Malta* [GC], para. 96.

¹² *Kyprianou v Cyprus* [GC], *supra* n. 10, para 119.

¹³ *Micallef v Malta* [GC], *supra* n. 11, para. 95.

¹⁴ *Otegi Mondragon and Others v Spain*, *supra* n. 1, para. 60.

¹⁵ *Otegi Mondragon and Others v Spain*, *supra* n. 1, para. 63.

¹⁶ *Otegi Mondragon and Others v Spain*, *supra* n. 1, paras. 66-67.

ascertain the actual level of influence this judge had had on the decision taken by the *Audiencia Nacional* panel and, therefore, doubts about impartiality remained intact at the subsequent trial.

Against this backdrop, the European Court of Human Rights declared, unanimously, that the applicants' right to a fair trial under Art. 6.1 of the Convention had been violated because of a lack of impartiality on the part of the sentencing court. The Court decided, by six votes to one, that the mere declaration of the violation constituted sufficient just satisfaction and dismissed, also by six votes to one, the applicants' demand for just satisfaction.¹⁷ The Court recalled that, in cases of violation of Art. 6.1 of the Convention, the most appropriate form of redress is, in principle, a retrial or a reopening of the case at the request of the interested party, directly referring to that possibility in accordance with Spanish legislation.¹⁸ The applicants could thus have requested that such a line of action be opened at the domestic level.¹⁹

JUDICIAL CRISIS: A TWO-FRONT BATTLE WITH THE CATALAN SECESSIONIST THREAT

The first front: The integrity of the judicial process

As regards respect for judicial impartiality, the *Otegi* case should be contextualised as part of the Spanish judiciary's quite decent track record as a subject of scrutiny by the European Court of Human Rights. Indeed, since Spain's ratification of the Convention in 1979, the country has been condemned nine times—including *Otegi*—for breaches of judicial impartiality. Two of those cases concerned the impartiality of military courts,²⁰ two others involved *Audiencias Provinciales* (Provincial Courts),²¹ two the *Audiencia Nacional*,²² one the *Tribunal Superior de Justicia de Comunidad Autónoma* (Regional High Court)²³ and, finally, only a

¹⁷ For the disagreement over the award of just compensation for non-pecuniary damages, see the partially dissenting opinion of Judge Keller.

¹⁸ *Otegi Mondragon and Oibers v Spain*, *supra* n. 1, para. 74. Under Art. 5 bis of Organic Law No. 6/1985, of 1 July, of the Judicial Power and Art. 954.3 of the Spanish Criminal Procedural Code, a final judicial decision can be reviewed on grounds of a Strasbourg judgment finding the violation of a fundamental right protected by the Convention.

¹⁹ All the applicants had served their prison sentences by the time Strasbourg decided the case and, consequently, they did not file a request for revision in that regard. However, in the case of Arnaldo Otegi Mondragon, the ten-year electoral disqualification expires in 2021. Thus, the applicant could request the Spanish Supreme Court to revise that sentence under Art. 954.3 of the Spanish Criminal Procedural Code. So far, I have no knowledge of a request of this kind made by Arnaldo Otegi Mondragon. However, in December 2018, the Constitutional Court did accept an individual constitutional complaint filed by Arnaldo Otegi Mondragon requesting review of the criminal penalty of disqualification. This complaint was filed after the Strasbourg decision in the *Otegi* case and, therefore, the Constitutional Court will decide it with the Strasbourg decision in mind. See Editorial Department, 'El Constitucional admite a trámite el recurso contra la inhabilitación de Otegi' [The Constitutional Court accepts the individual constitutional complaint against the disqualification sentence of Otegi], *El Confidencial*, 9 December 2018, www.elconfidencial.com/espana/2018-12-08/otegui-eta-constitucional-admite-tramite-recurso_1693446/, visited 8 May 2019.

²⁰ ECtHR 28 October 1998, Case No. 79/1997/863/1074, *Castillo Algar v Spain*; ECtHR 25 October 2002, Case No. 45238/99, *Perote Pellón v Spain*.

²¹ ECtHR 26 January 2011, Case No. 38715/06, *Cardona Serrat v Spain*; ECtHR 1 March 2016, Case No. 61131/12, *Blesa Rodríguez v Spain*.

²² ECtHR 6 December 1988, Case No. 10590/83, *Barberà, Messegué and Jabardo v Spain* (Plenary); ECtHR 17 January 2012, Case No. 5612/08, *Alony Kate v Spain*. The *Otegi* case must also be included here.

²³ ECtHR 17 January 2003, Case No. 62435/00, *Pescador Valero v Spain*.

single case decided by the Supreme Court.²⁴ The Constitutional Court has never been scrutinised for a breach of impartiality. The data could possibly be construed as misleading or, even more likely, incomplete since not all cases that suffer from a potential breach of impartiality make it to the European Court. Although raw data might not perhaps reveal the entire truth, it can nonetheless back up the affirmation that, in the eyes of Strasbourg and on the basis of the cases that have reached it, judicial impartiality has not really been a structural problem for Spain.

The *Otegi* case has cast a shadow over this good track record and moreover at the worst possible moment, in the midst of the Catalan secession crisis. In response to actions of the Spanish judiciary, secessionist leaders point to the European Court's judgment to cast doubt over the entire judicial system, especially the ongoing criminal cases against some of the leaders.²⁵ A decisive legal defence invoked by most of those accused of crimes is the allegation of bias on the part of the Spanish judiciary—i.e. particular hostility towards aspirations for independence and the leaders who profess it—both at the preliminary investigatory phase and subsequently at trial.²⁶ During the pre-trial phase, Judges Carmen Lamela Díaz and Pablo Llarena Conde were accused of partiality; in addition to several disqualification petitions being lodged against both judges by the legal defence teams, Llarena Conde was even sued for bias before a court in Belgium.²⁷ In the trial phase, the President of the Supreme Court panel hearing the case was also accused of partiality.²⁸ Despite the fact that the raw data does not indicate generalised bias within the Spanish judiciary, the secessionist movement is building its case and *Otegi* has been a central pillar of that endeavour.

A similar line of action has arisen regarding the independence of the Spanish judiciary. The Spanish judiciary has often been accused of a lack of independence, that is, of letting itself be unduly influenced, in breach of the separation of powers principle, by the Spanish government against the Catalan secessionist movement.²⁹ Once again, past litigation at the

²⁴ ECtHR 22 October 2008, Case No. 21369/04, *Gómez de Liaño y Botella v Spain*.

²⁵ See Editorial Department, 'Otegi se reúne con Puigdemont y cree que la sentencia de Estrasburgo puede ayudar al juicio del 1-O' [Otegi meets Puigdemont and believes that the Strasbourg's judgment can help the 1-O trial], *La Vanguardia*, 7 November 2018, www.lavanguardia.com/politica/20181107/452789659642/puigdemont-otegi-sentencia-estraburgo-juicio-1o.html, visited 8 May 2019.

²⁶ See A. Martín Plaza, 'Las defensas sostienen que el juicio "atenta contra la disidencia política" y cuestionan la imparcialidad del tribunal' [The defences argue that the trial "goes against political dissent" and casts doubt about the impartiality of the court], *RTVE*, 12 February 2019, www.rtve.es/noticias/20190212/juicio-proces-defensas-sostienen-causa-politica-ponen-duda-imparcialidad-del-tribunal/1882760.shtml, visited 8 May 2019.

²⁷ J. Nieva-Fenoll, 'Spanish Jurisdiction at Stake: Puigdemont's Judge to be Judged by a Belgian Court', *Verfassungsblog*, 3 September 2018, www.verfassungsblog.de/spanish-jurisdiction-at-stake-puigdemonts-judge-to-be-judged-by-a-belgian-court/, visited 8 May 2019.

²⁸ Judge Manuel Marchena Gómez is accused of affinity with the political party *Partido Popular*. See C. Enrique Bayo, 'Marchena, un juez denunciado durante años por su afinidad y parcialidad en favor del PP' [Marchena, a judge denounced because of his affinity and partiality over years in favour of the PP], *Diario Público*, www.publico.es/politica/judicial-tela-juicio-marchena-juez-denunciado-anos-afinidad-parcialidad-favor-pp.html, visited 8 May 2019.

²⁹ The 'WhatsApp's messages in the Cosidó scandal possibly provide the best ammunition to the attack the independence of the criminal court trying the secessionist leaders. Judge Manuel Marchena Gómez was nominated for the presidency of the *Consejo General del Poder Judicial* and, in this context, Ignacio Cosidó Gutiérrez, former general director of the *Policía Nacional*, sent a verified message via WhatsApp saying: '[...] we will control the second chamber of the Supreme Court behind the scenes [...]. The second chamber is the criminal chamber in charge of the ongoing trial against a few of the Catalan secessionist leaders. After this scandal became known, Judge Marchena renounced his candidacy for the *Consejo General del Poder Judicial* and

European Court of Human Rights fails to support any conjecture that this might be a structural feature; Spain has since 1979 not once been found to be in violation due to a lack of judicial independence—nor for political interference with jurisdictional matters. Nonetheless, the chronic politicisation of the *Consejo General del Poder Judicial* (General Council of the Judiciary) and the negative consequences of the political capture of its prerogative to make highest-level appointments to the Spanish judiciary have been taken up with alacrity by the secessionist movement to delegitimise the judicial process against it.³⁰ In the context of fighting corruption, the Group of States Against Corruption (GRECO) has pointed out the need to evaluate the legislative framework of the General Council of the Judiciary and its effect on real and perceived independence.³¹ The latest Eurobarometer poll results have similarly been used to argue that the Spanish judiciary lacks independence. The most recent data show that 55% of the participants in the Eurobarometer survey perceived the independence of the Spanish judiciary to be ‘fairly bad’ or ‘very bad’.³² Alongside the accusations of partiality, the other main argument used by the secessionists to attack the integrity of the Spanish judiciary is its alleged lack of independence.

Lastly, two European Court of Human Rights cases decided in 2018 have added even more significance to the state of integrity of the Spanish judicial process, again in relation to ETA and terrorism. In the *Arrózpide* case involving the review of criminal convictions for three members of ETA, the European Court upheld Spain in the claims raised under Arts. 7 and 5.1 of the European Convention but declared that Art. 6.1 had been violated because individual constitutional complaints (*recursos de amparo*) filed before the Spanish Constitutional Court had been incorrectly dismissed.³³ In that decision, the management of the admissibility phase of *recursos de amparo* by the Constitutional Court was found to have been unduly compromised.³⁴ However, the *Portu Juanenea* case is even more relevant, with

remained in his position as President of the judicial panel in the ongoing criminal trial against certain secessionist leaders. See G. Russell, ‘Leaked Catalan WhatsApp row sees judge pull out of bid for top Spanish job’, *The National*, 21 November 2018, www.thenational.scot/news/17236299.leaked-catalan-whatsapp-row-sees-judge-pull-out-of-bid-for-top-spanish-job/, visited 8 May 2019. See also Editorial Department, ‘Cosidó, en el foco de la polémica tras su whatsapp a los senadores del PP diciendo que “controlarán” la Sala Segunda del Supremo’ [Cosidó, in the spotlight of the scandal because of his whatsapp to the Popular Party senators saying that they “will control” the Second Chamber of the Spanish Supreme Court], *el Economista*, 19 November 2018, www.economista.es/politica/noticias/9528666/11/18/Cosido-en-el-foco-de-la-polemica-tras-su-whatsapp-a-los-senadores-del-PP-diciendo-que-controlaran-la-Sala-Segunda-del-Supremo.html, visited 8 May 2019.

³⁰ See *supra* n. 29 and *infra* n. 31.

³¹ See GRECO, ‘Fourth Evaluation Round. Corruption prevention in respect of members of parliament, judges and prosecutors. Evaluation Report. Spain’, 62 Plenary Meeting, 2-6 December 2013, para. 80. Afterwards, GRECO stated that this recommendation has been partially implemented by Spain (see GRECO, ‘Fourth Evaluation Round. Corruption in respect of members of parliament, judges and prosecutors. Interim Compliance Report. Spain’, 78 Plenary Meeting, 4-8 December 2017, para. 38). Also, pointing out the negative effects of the politicisation of the General Council on the perception of judicial independence, see A. Torres Pérez, ‘Judicial Self-Government and Judicial Independence: the Political Capture of the General Council of the Judiciary in Spain’, 19-7 *German Law Journal* (2018) p. 1769 at 1795-1799.

³² European Commission, ‘The 2019 EU Justice Scoreboard. Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. Com(2019) 198/2’, p. 44.

³³ ECtHR 23 October 2018, Case Nos. 65101/16 and two other applications, *Arrózpide Sarasola and others v Spain*, paras. 98 - 109.

³⁴ The Spanish Constitutional Court declared all the *recursos de amparo* inadmissible due to the non-exhaustion of domestic remedies. Some of the applicants had brought a special action to set aside the cassation judgments by the Spanish Supreme Court under section 241.1 of Organic Law No. 6/1985, of 1 July, of the Judicial Power. The Supreme Court declared those actions inadmissible because of their lack of relevance and declared that the special action was unnecessary because the alleged complaints of violations of fundamental

Spain condemned for the ill-treatment of two ETA convicts.³⁵ The decision of the Court declared that Art. 3 of the Convention had been violated both on substantive and procedural grounds, meaning that the ill-treatment had indeed occurred and that the Spanish judiciary had failed to fully investigate the claim.³⁶ These cases which, like *Otegi*, involve ETA and terrorism, are highly pertinent to the Catalan secessionist movement; they contribute to the perception of a crack in the veneer of the integrity of the Spanish judicial system.

The second front: freedom of expression, hate speech/hate crimes

The Catalan secessionist movement has always conceived of independence as a political idea that enjoys the protection of the right to free speech.³⁷ Couched in those terms, the claim seems incontestable. Although opponents of the independence movement, as well as the judicial response to it, have claimed that the basis for prosecution and conviction involved actions—behaviours, facts and instruments—and not ideas, the secessionists have insisted that they are victims of political and judicial persecution of their beliefs in breach of their fundamental right of freedom of expression.³⁸ Thus, in the secessionist imagination, the Spanish judiciary plays the role of the oppressor of a legitimate goal— independence—an instrument of an opposing political faction, thus making it both biased and lacking in independence without respect for freedom of expression.

This allegation, of course, must be proven by the Catalan secessionist movement; even then, the European Court of Human Rights could still intervene. However, at this moment it is fair to alert the Spanish judiciary to the image it is projecting. Two cases, in particular, reveal the excessive protection bestowed upon Spanish institutions—namely the monarchy—against legitimate political critics. Arnaldo Otegi Mondragón was condemned in 2005 to one year’s imprisonment for accusing the king of being the head torturer in the Basque Country’s political struggle for independence. In that case, although the *Tribunal Superior de Justicia del País Vasco* (the Basque Country High Court of Justice) ruled in favour of Otegi and qualified his declarations as legitimate criticism, the Supreme Court overturned the decision and convicted Otegi. The Constitutional Court upheld the Supreme Court decision and rejected the individual constitutional appeal. In 2011, the European Court of Human Rights took up the case, declaring that freedom of expression

rights had already been examined in the cassation judgments. The European Court of Human Rights recalled that, in 2013, the Spanish Constitutional Court had declared that an action to set a judgment aside was not required if the court that delivered the appealed decision at last instance had already ruled on the alleged violation of the fundamental rights whose protection would then have been sought in the *recurso de amparo*. The European Court thus declared lack of certainty, to the detriment of the applicants, and a violation of their right to access to a court.

³⁵ ECtHR 13 February 2018, Case No. 1653/13, *Portu Juanenea and Sarasola Yarzábal v Spain*.

³⁶ *Portu Juanenea and Sarasola Yarzábal v Spain*, *supra* n. 35, paras. 69 – 95.

³⁷ See the preamble of Law No. 19/2017, of 6 September, on the self-determination referendum, which was declared unconstitutional by the Spanish Constitutional Court (STC 224/2017, of 17 October). The preamble contains several references to freedom of expression as grounds for the self-determination and holding a referendum. See also A. Edling and T. Melia, ‘A Troubling Trend: Free Expression Under Fire in Catalonia’, *Pen America*, 11 January 2019, www.pen.org/free-expression-catalonia/, visited 8 May 2019.

³⁸ See, *inter alia*, the Declaration of Independence of 27 October 2017, which reports the alleged existence of a prosecution in breach of the civil and political fundamental rights of Catalan citizens. See also S. Jones, ‘Catalan leaders’ lawyers attacks “vaudeville” case as trial begins’, *The Guardian*, 12 February 2019, www.theguardian.com/world/2019/feb/12/trial-of-catalan-separatist-leaders-begins-in-madrid, visited 8 May 2019.

had been violated and thus condemning Spain.³⁹ In a similar vein, in 2008 Enric Stern Taulats and Jaume Roura Capellera were convicted by the *Audiencia Nacional* and ordered to pay a fine for doing harm to the king. During a demonstration for Catalan independence, the two men had burned a portrait of the king and queen. In 2018, the European Court of Human Rights declared, once again, that the freedom to express legitimate political criticism had been violated.⁴⁰

The most relevant aspect of these two cases is that the Spanish judiciary, and especially the Constitutional Court in *Stern Taulats*, had qualified the two cases as instances of hate speech/hate crime and applied this categorisation to defend an exception to the freedom of expression.⁴¹ In both of its judgments in these cases, the European Court of Human Rights rejected the application of that category, leaving no doubt that the declarations and actions of the applicants, although perhaps provocative, could not be qualified as hate speech or a hate crime.⁴² In *Stern Taulats*, the European Court stated that political criticism, even provocative criticism, could not be included in the hate speech/hate crimes exception which is clearly directed at speech and behaviours that defend or justify hate on racist, xenophobic, anti-Semitic or other discriminatory grounds.⁴³ In short, the Spanish courts had erroneously conceptualised the hate speech/hate crimes category and maintained a position incompatible with Art. 10 of the Convention. As the *Stern Taulats* decision was directly connected to a Catalan secessionist demonstration and decided as recently as 2018, it, in particular, damages the reputation of Spanish courts in terms of their respect for freedom of expression.

A case similar to *Otegi* and *Stern Taulats* is currently pending in Strasbourg: *Tasio Erkizia*.⁴⁴ Spanish courts sentenced Tasio Erkizia to one year's imprisonment for encouraging terrorism (*enaltecimiento del terrorismo*) during a memorial ceremony for a former head of ETA.⁴⁵ Erkizia had exhorted his listeners to seek 'the best and optimal way to damage the State and to lead the Basque country to a new democratic scenario' and the Constitutional Court once again qualified his statements as hate speech/hate crime.⁴⁶ The European Court of Human rights might thus condemn Spain once again for violating the freedom of expression by incorrectly applying the category of hate speech/hate crime.⁴⁷ Another condemnation will weaken the image of the Spanish judiciary even further. In addition, another front is emerging within the realm of freedom of expression and the challenges that Spanish courts are facing in connection with the demonstrations held before the Catalan regional parliament in 2011. The Supreme Court sentenced Olga

³⁹ ECtHR 15 March 2011, Case No. 2034/07, *Otegi Mondragon v Spain*.

⁴⁰ ECtHR 13 March 2018, Case Nos. 51168/15 and 51186/15, *Stern Taulats and Roura Capellera v Spain*.

⁴¹ STC 177/2015, of 22 July, para. 4.

⁴² See *Otegi Mondragon v Spain*, *supra* n. 39, para. 54; *Stern Taulats and Roura Capellera v Spain*, *supra* n. 40, para. 40.

⁴³ See *Stern Taulats and Roura Capellera v Spain*, *supra* n. 40, para. 41.

⁴⁴ Case No. 5869/17, *Tasio Erkizia v Spain*, communicated to the European Court of Human Rights on 28 March 2017.

⁴⁵ The conviction was ultimately upheld by the Spanish Constitutional Court (see STC 112/2016, of 20 June).

⁴⁶ STC 112/2016, of 20 June, para. 6.

⁴⁷ R. Bustos Gisbert, 'No hay atajos en la defensa del Estado de Derecho' [There are no shortcuts in the defence of the rule of law], *Agenda Pública*, 16 February 2018, www.agendapublica.elpais.com/no-atajos-la-defensa-del-estado-derecho/, visited 8 May 2019.

Alvarez Juan to three years' imprisonment for crimes against institutions of State, and her case is now on the Strasbourg docket.⁴⁸

It seems, therefore, that the Spanish courts, having chosen to dig in, are toeing a line whose compatibility with Strasbourg case law is dubious. Several other cases at the national level have also been qualified as hate speech or a hate crime. Especially troubling are those included in the so-called *Operación Araña*, which involves the prosecution, by the Spanish police and courts, of alleged acts that amount to defending terrorism on social media.⁴⁹ Some of those cases have resulted in criminal convictions while others ultimately ended in acquittal or were simply dropped after investigation. In any case, there are well-founded reasons to believe that this behaviour is also incompatible with Strasbourg case law, thus adding more fuel to the fire of Catalan secessionist imagination, especially since not a few of the cases that have been qualified as hate speech/hate crime are directly related to the Catalan struggle. In this regard, although several cases have been launched by the Public Prosecution Office, most were ultimately shut down and dismissed by the courts for a lack of evidence of hate speech or a hate crime.⁵⁰

A change in the position held by the Spanish judiciary is thus urgently needed, especially at the highest level—not only the Constitutional and Supreme Courts, but also the *Audiencia Nacional*—in terms of its conception of hate speech/hate crime and the scope of freedom of expression. The European Court of Human Rights has already pointed out

⁴⁸ Case No. 33799/16, *Olga Alvarez Juan v Spain*, communicated to the European Court of Human Rights on 15 September 2016.

⁴⁹ O. López-Fonseca, 'Operación Araña: dos absoluciones, 42 condenas y 33 casos pendientes', *El País*, www.elpais.com/politica/2017/03/30/actualidad/1490904752_997815.html, 31 March 2017, visited 8 May 2019.

⁵⁰ First, the criminal proceedings launched against several Catalan high school teachers for hate speech directed at officers of the *Guardia Civil* and *Policía Nacional* prompted by their actions during the unconstitutional 'referendum' of 1 October; the hate speech is alleged to have been uttered while they were in their classrooms. Nine teachers at a public school in Sant Andreu de la Barca were accused. The Spanish judiciary has thus far closed investigations into five teachers without finding any criminal evidence; four teachers are still under criminal investigation. See Editorial Department, 'Archivadas cinco de las nueve denuncias por delito de odio contra los profesores del IES Palau' [The Spanish judiciary closes five of the nine accusations for hate crimes against the teachers of the IES Palau], *La Vanguardia*, 10 May 2018, www.lavanguardia.com/politica/20180510/443475909733/juez-archiva-cinco-nueve-denuncias-delito-odio-profesores-ies-palau.html, visited 8 May 2019. Moreover, the *Audiencia Provincial de Lleida* did not qualify the behaviour of eight teachers at a public school in La Seu d'Urgell as hate speech/hate crime following indictment by the Public Prosecution Office. The *Audiencia Provincial* also decided to close that investigation. See AAPLL n° 322/2018, of 12 June 2018.

Second, the case of a police officer with the Catalan regional police who had been accused of hate speech directed at the *Policía Nacional*, of which he was finally acquitted in first instance. His case is pending in second instance (see Editorial Department, 'La justicia archiva la causa contra el mosso que llamó nazis a la Policía y la Guardia Civil' [The judiciary closed the case against the Catalan regional officer who called nazis the *Policía Nacional* and *Guardia Civil*], *El Español*, 6 May 2019, cronicaglobal.elespanol.com/vida/archivan-causa-mosso-nazis-policia_242451_102.html, visited 8 May 2019).

Third, the *Audiencia Provincial de Barcelona* closed a case involving hate speech/hate crime brought against several citizens for insulting the *Guardia Civil*. See Editorial Department, 'Insultar la Guàrdia Civil no és odi, sinó crítica, segons l'Audiència de Barcelona' [Insulting the Guardia Civil is not hate, but criticism, according to the Audiencia de Barcelona], *El Nacional.Cat*, 13 January 2019, www.elnacional.cat/ca/politica/delictes-odi-guardia-civil-policia-audiencia-barcelona_343380_102.html, visited 8 May 2019.

Fourth, the *Tribunal Superior de Justicia de Catalunya* (Catalan High Court) dismissed charges of hate speech/hate crimes brought against the current President of the regional Catalan government for his negative opinions on Spaniards expressed in newspaper articles and tweets. See ATSJ n° 30/2018, of 4 October.

Fifth and finally, Héctor López Bofill, a professor of constitutional law, was acquitted of hate speech/hate crimes for several tweets that the public prosecution office deemed were a justification of violence and a threat to judges, prosecutors and civil servants. See SAPB, n° 63/18, of 7 December 2018.

mistakes in that regard and more convictions could follow. At the same time, the cases analysed here show that there are various alignments within the Spanish judiciary. Some courts, especially lower courts, have shown sensitivity vis-à-vis Strasbourg case law. General allegations implying that the Spanish judiciary consistently disregards freedom of expression might perhaps seem ill-founded but the recent tack taken by the Spanish courts in regard to their categorisation of hate speech/hate crime, especially in light of the declarations of violations by the European Court of Human Rights, could prove especially counterproductive at this moment of constitutional crisis.

CONCLUSION

Without really understanding how things got to this point, and with some voices even decrying the current situation as wholly undesirable,⁵¹ Spanish courts find themselves shouldering the brunt of the task of defusing the current constitutional territorial crisis. The response to the Catalan secession crisis, one of the most formidable attacks ever to be launched against the Spanish constitutional edifice erected in 1978, has been predominantly judicial in nature. This has put the Spanish judiciary in the spotlight. Thus, in the end, the credibility of the Spanish constitutional system will hinge on the response of the judiciary. In short, Spain is facing a severe constitutional crisis that affects the core values of its constitutional legitimacy—democracy, rule of law, human rights, separation of powers and territorial distribution of powers—and the judiciary is being called upon to solve it. The judiciary will surely be blamed if it responds poorly and, if that happens, a judicial crisis will only serve to compound the ongoing constitutional crisis. To put it even more curtly, a perfect storm is brewing.

Since its very inception in 1978-79, the Spanish constitutional order has matured under the watchful eyes of the European system and its human rights convention control. The judiciary, including the Constitutional and Supreme courts, is accustomed to being under the permanent supervision of international courts. Not that there haven't been a few errors and admitted shortfalls along the way, but Spanish courts have compiled a decent track record in terms of compliance that, in the view of the Court in Strasbourg, does not indicate serious structural problems. Its track record should be seen as a hearty endorsement of taking recourse to the Spanish judiciary for addressing the current constitutional crisis. The Spanish judiciary, however, has recently been hounded by two worrisome attitudes. On the one hand, the integrity of the judicial process has been questioned in relation to the separatist struggle in the Basque Country. The *Otegi* case casts doubt on the impartiality of Spanish courts, a key component of their credibility and legitimacy. On the other hand, a problematic application of the hate speech/hate crimes category by the Spanish courts has raised doubts about their respect for the freedom of expression. The Catalan secessionist discourse has taken advantage of both of the Spanish

⁵¹ A. Munárriz, 'Entrevistas en el 40º Aniversario de la Constitución. Entrevista a Luis López Guerra' [Interview in the 40º Anniversary of the Constitution. Interview to Luis López Guerra], *InfoLibre*, 10 December 2018, www.infolibre.es/noticias/politica/2018/12/29/luis_lopez_guerra_espana_confiado_estado_exclusiva_poder_judicial_89652_1012.html, visited 8 May 2019.

courts' shortcomings, pouncing to allege structural bias against aspirations of independence and freedom of expression. Allowing the separatists to claim the higher ground in the midst of this severe constitutional crisis would be an inexcusable mistake.

Notwithstanding, there is still time to rectify the line of action. The criminal prosecution of Catalan secessionist leaders is ongoing and any error of impartiality or lack of independence in the pre-trial phase can be corrected during the trial phase.⁵² Impeccable judgment in the trial phase, in full compliance with all the requirements of Art. 6 of the Convention, will reinforce the credibility of measures taken by Spanish courts. Moreover, especially in the lower courts, sensitivity to the Strasbourg court's case law on the proper application of the hate speech/hate crime category has been on the increase. The highest courts should take heed of this appreciation and, especially, of the Strasbourg's convictions in that respect. At the same time, Spain finds itself under the spotlight because of these cases. The courts are thus not only scrutinised by national actors; international eyes are watching as well. Somehow or another, it can be expected that some of the cases will make it to the European Court of Human Rights and that the Spanish judiciary's actions will then be subjected to Strasbourg's scrutiny. There are, incidentally, twenty-two cases related to the Catalan secessionist crisis currently on the Court's docket.⁵³ The Spanish judiciary should take care to maintain its credibility at all cost in this time of crisis; the entire constitutional order depends on it, and keeping its credibility intact will, at the very least, require compliance with the Strasbourg standards for Articles 6 (the right to fair trial) and 10 (freedom of expression).

⁵² See ECtHR 6 January 2010, Case No. 74181/01, *Vera Fernández-Huidobro v Spain*, paras. 131-136.

⁵³ See Editorial Department, 'Estrasburgo tiene pendientes 22 casos sobre el proceso soberanista catalán' [Strasbourg has 22 pending cases regarding the Catalan secessionist process], *La Vanguardia*, 24 January 2019, www.lavanguardia.com/politica/20190124/454285143425/estrasburgo-tiene-pendientes-22-casos-sobre-el-proceso-soberanista-catalan.html, visited 8 May 2019.