Spain, Judicial Independence, and Judges' Freedom of Expression: Missing an Opportunity to Leverage the European Constitutional Shift?

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Judicial independence as a European constitutional principle – Freedom of expression of judges in connection with judicial independence – Rule of law backsliding – Catalan secession crisis – Spanish Constitutional Court disqualification doctrine of magistrates – Freedom of expression of judges in favour of the Catalan secessionist movement – Spanish soft law on judicial independence

Introduction

The attacks on judicial independence in certain Central European countries have attracted much attention from scholars and ordinary citizens wary of weakening commitments to the rule of law that is often called 'backsliding'.[1] While populism and autocracy in Europe entail several challenges for our societies, most of which are related to democratic theory, technocracy, and fundamental rights,[2] the European response has focused on safeguarding the rule of law and, in particular,

[1]F. Casarosa and M. Moraru (eds.), 'Triial National Reports. Belgium, Hungary, Italy, Poland, Portugal, Romania, Slovenia, Spain, the Netherlands', *Robert Schuman Centre for Advanced Studies Research* Paper No. 2022-52 (2022); K.L. Scheppele and L. Pech, 'What is Rule of Law Backsliding?', *Verfassungsblog*, 2 March 2018, https://verfassungsblog.de/what-is-rule-of-law-backsliding/, visited 1 June 2023.

[2]G. Martinico, *Filtering Populist Claims to Fight Populism. The Italian Case in a Comparative Perspective* (Cambridge University Press 2021) p. 10-29.

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judicial independence as an intrinsic element of it.[3] The debates that have spread across Europe, however, are too complex for a simple or even straightforward account. A common conception of the rule of law shared throughout Europe seems ephemeral at best. A common understanding on how national judicial systems should protect judicial independence similarly appears wanting and the definition of the prerogatives and limitations of the rights of European judges is subject to great disagreement.[4]

The reactions of the Court of Justice of the European Union and the European Court of Human Rights to rule of law backsliding have not been determined by applying well-settled principles. On the contrary, the two courts have been forced to reconceptualise judicial independence in a search for new ways of protecting it and, particularly, to give coherence and clarification to the emerging body of their case law.[5] Judicial independence seen as an element of the rule of law is gaining a new dimension, one much more elaborated and protected than in the past, as it is being grounded as a constitutional principle of the Union.[6] The European momentum towards the constitutionalisation of judicial independence, an incremental process that gained new impetus with the so-called Portuguese judges case in February 2018, is driven to a large degree by autocratic shifts in certain member states and fully aligns with the European integration project. At the same time, the jurisprudence of the two Courts also offers proof of new developments, new standards, and a new discourse that are behind the growing momentum.

The freedom of expression of judges is one dimension of the European development towards establishing a bulkhead against authoritarian backsliding. The connection with judicial independence has been very clear since the first case concerning freedom of expression of judges handed down by the European Court of Human Rights.[7] However, the refinement of judicial independence has also involved the redefinition – or, perhaps more accurately, reinforcement – of some

[3]P. Craig, 'Definition and Conceptualization of the Rule of Law and the Role of Judicial Independence Therein: Perspective from Practitioners and Academics', in P. Craig et al. (eds.), *Rule of Law in Europe. Perspective from Practitioners and Academics* (European Judicial Training Network 2019) p. 1 at p. 12-14.

[4]R. Bustos Gisbert, *Independencia judicial e integración europea* [*Judicial Independence and European Integration*] (Tirant lo Blanch 2021) p. 335-343. For a recent attempt to systematise the treatment of judicial independence in European case law, *see also* R. Bustos Gisbert, 'Judicial Independence in European Constitutional Law', 18(4) *EuConst* (2022) p. 591 at p. 592-602.

[5]Bustos Gisbert, ibid., p. 315-331.

[6]S. Adam and P. Van Elsuwege, 'L'Exigence d'indépendance du juge, Paradigme de l'Union Européenne Comme Unión de Droit' [*The Requirement of Judicial Independence, Paradigm of the European Union as a Union Based in Law*], *Journal de Droit Européen* (2018) p. 334 at p. 340-341; L. Pech, 'The Rule of Law as Well-Established and Well-Defined Principle of EU Law', 14 *Hague Journal on the Rule of Law* (2022) p. 107.

[7]ECtHR 28 October 1999, No. 28396/95, *Wille* v *Liechtenstein*, para. 64.

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of the substantive rights of judges, such as their freedom of expression.[8] Other pertinent substantive rights of judges are the freedom of association (for protecting their professional interests),[9] the right to personal life and freedom from undue interference[10] and a more robust right to property to avoid vulnerability to financial pressure.[11] However, freedom of expression stands out from these other substantive rights when the rule of law is in crisis. The need to protect judges who publicly dissent from autocratic rulers is particularly pronounced in such times, for defending the judges' freedom of expression is a tool of paramount importance for the judiciary to resist capture. In the end, a subjective right to judges' independence, together with the protection of specific substantive rights of judges, has been claimed in the context of law backsliding.[12]

The momentum in Europe for safeguarding judicial independence and the freedom of expression of judges has consequences for all the member states in the EU and the Council of Europe. Scholarship has focused, for obvious reasons, on the developments in and implications for Central Europe.[13] However, all member states must revaluate their understanding of the European requirements for judicial systems in light of the new framing of and emphasis on judicial independence.[14] The new European standards, which are tightly anchored in constitutional principles, should guide a new appreciation of judicial independence at the national level. After all, one of the most pertinent consequences of the European shift, trigged by the rule of law crisis, is precisely a decrease in the

[8]Bustos Gisbert (2021), *supra* n. 4, p. 111-137. For a guide and comments on recent ECtHR case law on freedom of expression of judges *see* the Centre for Judicial Cooperation Database: https://cjc.eui.eu/data/, visited 1 June 2023.

[9]ECtHR 9 March 2021, No. 76521/12, *Eminagaoglu* v *Turkey*, para. 134; ECtHR 19 October 2022, No. 40072/13, *Miroslava Todorova* v *Bulgary*, paras. 173-181.

[10]ECtHR 10 October 2010, No. 20999/04, *Ozpinar* v *Turkey*, paras. 42-88; ECtHR 9 January 2013, No. 21722/11, *Oleksandr Volkov* v *Ukraine*, paras. 160-187; ECtHR 22 November 2016, No. 22254/14, *Erményi* v *Hungary*, paras. 18-40; ECtHR 25 September 2018, No. 76639/11, *Denisov* v *Ukraine*, paras. 83-134; ECtHR 27 November 2018, No. 45434/12, *J.B. and others* v *Hungary*, paras. 112-138.

[11]ECtHR 26 April 2006, Nos. 3955/04, 5622/04, 8538/04, 11418/04, *Zubko and others* v *Ukraine*, paras. 63-70.

[12]M. Leloup, 'Who Safeguards the Guardians? A Subjective Right of Judges to their Independence under Article 6(1) ECHR', 17 *EuConst* (2021) p. 21-27.

[13]J.E. Moliterno and P. Curos, 'Recent Attacks on Judicial Independence: The Vulgar, the Systemic, and the Insidious', 22(7) *German Law Review* (2021) p. 1159; D. Kosar et al., 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism', 15 *EuConst* (2019) p. 427.

[14]E. Zeller, 'Comment: Austro-Hungarian Partnership? A Brief Comparison between an Old Democracy and a New Democracy', in F. Casarosa and M. Moraru (eds.), *The Practice of Judicial Interaction in the Field of Fundamental Rights. The Added Value of the Charter of Fundamental Rights of the EU* (Edward Elgar 2022) p. 136 at p. 137.

amount of discretion in defining judicial independence that is left in the hands of the states. The two European courts have begun monitoring more intensively the effective independence of national judiciaries.

Meanwhile, for more than a decade, Spain has been facing a different kind of constitutional crisis, one stemming from Catalan secessionism. While primarily a political crisis, the judiciary has played a central role throughout it.[15] Concerns over judicial independence, the impartiality of the judiciary and ultimately respect for the principle of separation of powers have been raised.[16] Had the Spanish judiciary adhered to the European tendency regarding judicial independence, its perceived legitimacy would better resist instances when its independence has been called into question. In the immediate aftermath of the Catalan crisis, the most relevant judicial bodies have been called to adjudicate cases involving judges' freedom of expression. These cases offered the Spanish judiciary an opportunity to pay heed to the emerging European standards for judicial independence.

This article begins by setting the scene in terms of the new standards for judicial independence emerging from the European courts. I first analyse the change of approach towards judicial independence in response to rule of law backsliding, in which objective criteria for judicial independence have emerged alongside the traditional understanding of judicial independence primarily involving the rights of all citizens (subjective independence). Then, I examine the bolstered standards of freedom of expression of judges in connection with the evolving understanding of judicial independence. After setting the scene, the article explores several cases involving the freedom of expression of judges in the context of the Catalan secession crisis. The article concludes that the Spanish judiciary did not resolve these cases in accordance with the emerging European standards for judicial independence. Considering the high-profile and political nature of the crisis, adopting the new approach to judicial independence, one which entails an analysis of structural problems, could have helped the Spanish judiciary bolster its own flagging legitimacy.

The shift in Europe towards treating judicial independence as a constitutional principle

Judicial independence is one example of a dynamic principle in Europe or, to use the well-known interpretative characterisation of the Convention by the

[15]J. Solanes Mullor, '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', 15(3) *EuConst* (2019) p. 574 at p. 575-576.

[16]Ibid., p. 580-583.

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Strasbourg Court, a 'living instrument'.[17] The concept is alive in that it is subject to constant evolution. The two European High Courts have provided the impetus for change through an unending, praetorian construction of the principle during the past 50 years of European integration. Unlike other principles that have been codified, judicial independence remains a principle that has mostly taken shape through case law. Its elaboration primarily through case law offers some advantages, particularly the flexibility to adapt to new realities, but also has disadvantages, notably problems of legitimacy related to the member states' adherence or clarity regarding the scope, boundaries, and the overall coherence of the new doctrines.[18]

Without ignoring the problems related to the justification and limits of the evolution of such doctrines, it is also important to focus on the direct cause of the new approach to judicial independence: the rule of law backsliding. The actions of regimes in Hungary and Poland – but also across all Eastern and Central Europe – to curtail judicial independence are behind the momentum towards an apparent constitutional innovation.[19] This shift can be seen in the jurisprudence of the European Court of Human Rights in the 2013 *Volkov* case, and the Court of Justice of the European Union marked its change of track in 2018 with its ruling in *ASJP*.[20] The Strasbourg Court has moved from its subjective approach to judicial independence to a more structural or objective argumentation. The Luxembourg Court's previously scant case law on judicial independence has expanded dramatically and a similar central emphasis on objective or structural independence could be characterised as the *leitmotif* of the emerging doctrine.[21] The doctrine of both courts is converging towards a new understanding that is more focused on a constitutional principle regarding the structure of national judiciaries, although without repudiating the traditional and ever relevant understanding of judicial independence as a fundamental right all citizens enjoy.

This change of perspective is clearer in the case law of the Court of Justice. Relying on Article 19 TEU, the Court has reformulated judicial independence as a structural principle detached from either the subjective approach rooted in

[17]*See* the first formulation in ECtHR 25 April 1978, No. 5856/72, *Tyrer* v *United Kingdom*, para. 31.

[18]Bustos Gisbert (2021), *supra* n. 4, p. 381-395.

[19]L. Pech and S. Planton, 'Judicial Independence under Threat: the Court of Justice to the Rescue in the ASJP case', 58(6) *Common Market Law Review* (2018) p. 1827 at p. 1845-1848.

[20]*See* ECtHR 9 January 2013, No. 21722/11, *Oleksandr Volkov* v *Ukraine*; ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses* v *Tribunal de Contas*.

[21]M. Moraru and R. Bercea, 'The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociatia "Forumul Judecatorilor din Romania", and their follow-up at the national level', 18 *EuConst* (2022) p. 82 at 94-101.

Article 47 of the Charter or the functional approach, which defines judicial independence for the purposes of sending preliminary references, based on Article 267 TFEU.[22] Connecting judicial independence to Article 19 TEU has enabled the Court to treat it as a constitutional principle at the heart of the Union with a strong structural dimension. As a constitutional principle, this formulation of judicial independence must be respected by all national judicial systems in the EU[23] and enjoys direct effect.[24] The novel development is that judicial independence, whose recognition and protection at the national level was implied by the acceptance of each member state of the values of the EU at the moment of their adhesion to the Union,[25] is now vindicated by the Court of Justice. Only now is the Court of Justice prepared to protect judicial independence in all circumstances, expanding the principle's reach beyond the need for a substantive link with EU law.[26] Linking Article 19 TEU to Article 2 TEU, judicial independence is now considered a principle that should be articulated and respected by national judiciaries because all national judges must apply EU law. Because of that link, the Court of Justice is authorised to supervise compliance.[27] In this respect, the new standard set by the Court for the exercise of its supervisory power is the non-regression rule, meaning the Court will not allow any rule of law backsliding in any member state which, again, strengthens the supervision of national judicial independence at the EU level.[28]

The Strasbourg Court has had more difficulty developing an objective basis for the concept of judicial independence than has the Luxembourg Court. Judicial independence has been traditionally protected above all in terms of the rights of citizens facing judicial processes (Article 6 of the Convention). However, starting in 2013, the Strasbourg Court has strengthened the threshold of protection for judicial independence through two lines of action with a more objective approach. First, the Court has more actively protected the fundamental rights of

[22]A. Torres Pérez, 'From Portugal to Poland: The Court of Justice of the European Union as Watchdog of Judicial Independence', 27(1*) Maastricht Journal of European and Comparative Law* (2020) p. 105 at p.111. *See also* the Opinion of Advocate General Bobek, on 20 May 2021, in ECJ, Joined Cases C-748/19 to C-754/19, *Prokurata Rejonowa w Minsku Mazowieckim and others*.

[23]ECJ 24 June 2019, Case C-619/18, *European Commission* v *Poland (Independence of the Supreme Court)*, paras. 42-59; ECJ 5 November 2019, Case C-192/18, *European Commission* v *Poland (Independence of ordinary courts)*, paras. 98-107; ECJ 19 November 2019, Cases C-585/18, C-624/18, C-625/18, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, paras. 73-86.

[24]ECJ 2 March 2021, Case C-824/18, *A.B. and Others (Nomination of judges of the Supreme Court)*, para. 146.

[25]Art. 2 TEU.

[26]Torres Pérez, *supra* n. 22, p. 112-115.

[27]ECJ 15 July 2021, Case C-791/19, *European Commission* v *Poland (Disciplinary regime applicable to judges)*, paras. 50-62.

[28]ECJ 20 April 2021, Case C-896/19, *Repubblika Il-Prim Ministru*, paras. 63-65.

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judges themselves. The Court has elaborated stringent guarantees for judges whose mandates are unduly terminated and in case of interferences with their convention rights.[29] Second, *Ástráðsson* and its progeny[30] have strengthened the supervisory role that the Strasbourg court has over national judicial appointments. From now on, the Court will keep a closer eye on the composition of national judiciaries and any serious breach of national nomination procedures will be considered a violation of Article 6 of the Convention. This shift clearly reflects the Court's intention to focus its attention on the structural dimension of judicial independence; that is, by protecting both the status of the judges and the process by which they are elected to national judiciaries.

The developments in the Strasbourg case law since 2013 have been grafted onto a principle of judicial impartiality that has long been consolidated: the sufficiency of an appearance of independence. Scholars have emphasised the objective component of judicial independence when courts face cases involving due process.[31] The perception of judges' independence by external observers, taking into account the overall context and circumstances of the judicial process beyond the behaviour of the judge, is an objective criterion largely used in impartiality cases by the Strasbourg court.[32] This qualifies as an institutional requirement because, in the end, if the judicial system as a whole does not fulfil the structural principle of judicial independence, an external observer might not trust the semblance of impartiality in the concrete case at hand. The importance placed on an outward appearance of impartiality is coherent with a structural conception of judicial independence.

Indeed, all the case law of the Strasbourg Court on judicial impartiality under Article 6 of the Convention displays a strong objective orientation. When the Strasbourg Court addresses judicial impartiality, it does so from both subjective and objective perspectives, but the objective analysis predominates.[33] Establishing lack of bias on the judge's part – a subjective test based on the individual conduct of the judge – is normally either presumed or skipped, whereas the Court habitually focuses on the overall context of the judicial proceedings in order to assess whether any doubts from the perspective of an external observer over the judge's impartiality are legitimate.[34] In 1995, the Strasbourg Court used the

[29]Bustos Gisbert (2021), *supra* n. 4, p. 65-171.

[30]*See* ECtHR 12 March 2019, No. 26374/18, *Guðmundur Andri Ástráðsson* v *Iceland*; ECtHR 9 March 2021, No. 1571/07, *Bilgen* v *Turkey*; ECtHR 7 May 2021, No. 4907/18, *Xero Flor w Polsce sp. z o.o.* v *Poland*; ECtHR 22 July 2021, No. 43447/19, *Reczkowicz* v *Poland*.

[31]Bustos Gisbert (2021), *supra* n. 4, p. 52-60; A. Nußberger, 'Rule of Law in Europe: Demands and Challenges for the European Judiciary', in Craig et al., *supra* n. 3, p. 80 at p. 81-82.

[32]Solanes Mullor, *supra* n. 15, p. 577-578.

[33]ECtHR 15 October 2009, No. 17056/06, *Micallef* v *Malta* [GC], para. 95.

[34]Ibid., para. 96.

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expression 'institution's structural impartiality' in *Procola*, a case in which doubts about the impartiality of members of Luxembourg's Counseil d'Etat, who had been behind a governmental advisory opinion that subsequently affected the judicial proceedings of the applicant, were found to have an objective basis.[35] In *Kleyn*, a similar case decided in 2003, involving Netherlands Council of State members who also preformed both governmental advisory and jurisdictional functions, the Strasbourg Court fully applied the objective test, substituting the expression 'institution's structural impartiality', but did not find any violation of Article 6 of the Convention because the Court considered that the advisory opinion and the judicial proceedings were not tied to the same case or decision.[36] Setting aside the use of the terminology 'institution's structural impartiality' and the application of the objective test, the approach to judicial impartiality under Article 6 of the Convention offered a fertile basis for the 2013 shift of the Strasbourg Court to a more objective orientation in response to concerns over judicial independence and rule of law backsliding in Eastern and Central Europe.

Even though the two European High Courts mainly addressed specific circumstances in the context of Hungarian and Polish backsliding, the new approach and standards have forceful horizontal implications.[37] The development of judicial independence as a principle will potentially affect all the member states of the EU and the Council of Europe. At the same time, the new approach has yet to be fully clarified, particularly as regards the interplay between Article 19 TEU, Article 47 of the Charter and Article 267 TFEU in the emerging case law from the Court of Justice.[38] Despite the ambiguities to be resolved, the message of both Courts is clear: judicial independence is paramount, the standard of protection has been raised and the Courts stand ready to exert more intensive scrutiny and control.

The freedom of expression of judges and judicial independence

Ever since *Wille* was decided in 1999,[39] the Strasbourg Court has been consolidating its case law on the freedom of expression of judges under Article 10 of the Convention in close connection with the principle of judicial

[35]ECtHR 28 September 1995, No. 14570/89, *Procola* v *Luxembourg*, para. 45.

[36]ECtHR 6 May 2003, Nos. 39343/98, 39652/98, 43147/98 and 46664/99, *Kleyn and Others* v *The Netherlands*, paras. 200-202.

[37]*See* cases involving other member states such as Romania (ECtHR 5 May 2020, No. 3594/19, *Kövesi* v *Romania*; ECJ 18 May 2021, Joined Cases C-83/19, *Asociatia 'Forumul Judecatorilor din Romania'*) or Malta (*Repubblika Il-Prim Ministru*, *supra* n. 28).

[38]L.D. Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis', 20 *German Law Journal* (2019) p. 1182 at p. 1199-1202; Torres Pérez, *supra* n. 22, p. 112-118.

[39]*Wille* v *Liechtenstein*, *supra* n. 7.

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independence. The Court has deeply entrenched institutional concerns, that is, objective judicial independence, in its analysis of the permissible limitations on judges' freedom of expression. Since its *Baka* ruling in 2016[40] this connection has become even more pronounced. As a consequence of the rule of law backsliding, the predominant argument analyses the freedom of expression of judges from a structural perspective of judicial independence.

The judgment in *Baka* therefore represents a natural evolution of the Strasbourg Court's previous case law. The Court had already established that any limitation on the freedom of expression of judges will be closely scrutinised long before *Baka*.[41] The high standard of protection was rooted in institutional concerns, that is, it was grounded in the principle of separation of powers and judicial independence.[42] When scrutinising national measures that interfere with the freedom of expression of judges, the Court has repeatedly adopted argumentation that relies on the value of objective judicial independence. At the same time, the Court has made clear that it will consider the impact of any restriction of judicial independence on public confidence in the justice system.[43] Accordingly, the Court also recognises the special function of judges in society and, by consequence, that limiting their freedom of expression in order to safeguard the authority and impartiality of the judiciary may sometimes be justified. Judges enjoy the right to free speech, but the constraints on the judiciary – that it be impartial, independent of the political branches, and enjoy the trust of the public – may justify limitations. Both the justification of the higher intensity of the Court's scrutiny as well as its scope are rooted in institutional concerns regarding the judicial power's position and role.

A strongly objective perspective of judicial independence is also behind the Court's ruling in *Baka*. The Court, employing an argument similar to its judgment in *Kudeshkina*, protected the freedom of expression of judges when they participate in public debate on the performance of the justice system.[44] In *Baka*, the Court invoked judicial independence to justify protecting the right to free speech of a judge who had publicly criticised judicial reforms that he saw as violating judicial independence.[45] The Court emphasised the freedom of judges to express opinions in matters of general interest, even politically sensitive ones.[46] The Court went further, declaring in *Baka* that the concerned judge not only had

[40]ECtHR 23 June 2016, No. 20261/12, *Baka* v *Hungary*.

[41]ECtHR 29 June 2004, No. 62584/00, *Štefan Harabin* v *Slovakia*, para. 1.

[42]Ibid., paras. 1-2; *Baka* v *Hungary*, *supra* n. 40, para. 165.

[43]ECtHR 26 February 2009, No. 29492/05, *Kudeshkina* v *Russia*, para. 86; ECtHR 9 July 2013, No. 51160/06, *Di Giovanni* v *Italy*, para. 71.

[44]*Baka* v *Hungary*, *supra* n. 40, para. 165.

[45]Ibid., paras. 168-176.

[46]Ibid., para. 165.

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the right, but even the duty to participate in public debate over rule of law backsliding in Hungary, especially given his position as the President of the Supreme Court and of the National Council of Justice.[47]

Baka is relevant because it strengthened the protection of judges who participate in public debates over the critical position they occupy in national frameworks of separation of powers – especially when their independence is under attack – even though such debates necessarily concern politically sensitive issues in their national arena.[48] The Court's sensitivity to the freedom of expression of judges has been manifested in several judgments that followed *Baka*. In *Kövesi,* the Court protected declarations regarding judicial reforms by the chief of the national anticorruption prosecutor's office, precisely because of the specific duties of his office and its relevance for public debate.[49] In *Guz*, the Court stood behind the right of a judge to sharply criticise the internal promotion system for judges in Poland.[50] The forced relocation of a judge because of opinions he had issued in relation to the judicial system of Turkey was not declared in principle contrary to Article 10 of the Convention in *Eminağaoğlu* because the opinions did not 'compromise their independence and undermine their image of impartiality'. That said, the Court ultimately nevertheless found that a violation of that article had occurred because the restrictions on the applicant's right to freedom of expression were not accompanied by effective safeguards against abuse.[51] Here the Court again referred to institutional concerns in order to determine the legal standard to be applied and held that judges may express opinions of political nature as long as they do not compromise or undermine judicial independence and the perception of impartiality. Finally, in *Żurek*, the Court found a causal link between the publicly expressed personal opinion on judicial reforms in Poland by a sitting judge and the disciplinary measures to which he was subjected The Court once again reaffirmed its position that the opinions of a judge on the functioning of the judicial system are of general interest and protected under Article 10 of the Convention.[52]

For 20 years, then, the Strasbourg Court has protected judges' rights to free speech differently from the freedom of expression that they enjoy as ordinary citizens, by extending the free speech of judges to include institutional concerns or, put in other words, their freedom is to be assessed in light of the role of the

[47]Ibid., para. 168.

[48]For a critical assessment of the shortfalls of *Baka*'s judgment, *see* D. Kosar and K. Sipulová, 'The Strasbourg Court Meets Abusive Constitutionalism: Baka v Hungary and the Rule of Law', 10 *Hague Journal on the Rule of Law* (2018) p. 83 at p. 94-97.

[49]*Kövesi* v *Romania*, *supra* n. 37, para. 205.

[50]ECtHR 15 October 2020, No. 965/12, *Guz* v *Poland*, paras. 83-98.

[51]ECtHR 9 March 2021, No. 76521/12, *Eminağaoğlu* v *Turkey*, paras. 148 and 152.

[52]ECtHR 16 June 2022, No. 39650/18, *Żurek* v *Poland*, paras. 220-229.

judge in the overall institutional system. Indeed, the Court has shown itself less preoccupied with the judge's rights as a citizen and instead developed a standard of protection from the point of view of the institutional position that the judge occupies in European constitutional democracy. By virtue of this position, intensive supervision has been justified by the special role of the judiciary in the institutional framework, and the scope of the protection has been rooted in institutional concerns: the freedom of expression of judges and limitations upon it are to be assessed in terms of safeguarding judicial independence, impartiality, and public confidence. Following *Baka*, the Court has emphasised that such justification for heightened scrutiny protects the political opinions of judges when they are expressed in the context of public debates over the situation of the judicial power.

The institutional dimension adopted by the Court is thus threefold. First, it provides justification for heightened scrutiny of disciplinary and other state measures that limit judges' freedom of expression.[53] Second, it establishes and defines the principles that justify limitations of judges' freedom of expression: judicial independence; impartiality; and public confidence in the judicial power. Third, particularly since *Baka*, the objective dimension creates protection for judges to exercise their freedom of expression to criticise political powers, in public, political debates, when the aim is the defence of judicial independence. The objective dimension has two sides in that it justifies limitations on judges' behaviour but also expands the scope of their free speech protections.

The freedom of expression of Spanish judges in the context of the Catalan secession crisis

The perception of judicial independence in Spain

Catalan secessionists in Spain denounce the central government's failure to respect the separation of powers *de facto*, offering as proof the uncanny politicisation of all central institutions against the pro-independence movement.[54] In the eyes of those advocating secession, these are violations of constitutional values that stem from institutional breakdown. This breakdown is demonstrated, according to the

[53]In few cases state measures have been upheld as legitimate and proportional measures under Art. 10 of the Convention. *See*, for instance: ECtHR 8 February 2001, No. 47936/99, *Pitkevich* v *Russia*; ECtHR 12 May 2009, No. 27791/06, *Luigi Tosti* v *Italy*; *Di Giovanni* v *Italy*, *supra* n. 43; ECtHR 8 December 2020, No. 33794/14 *Panioglu* v *Romania*.

[54]J. Solanes Mullor, 'The Catalan Secessionists' Challenge: Reconciling Their Quest for Independence and Constitutionalism', in M. Belov (ed.), *Territorial Politics and Secession. Constitutional and International Law Dimensions* (Palgrave Macmillan 2021) p. 215 at p. 221-224.

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secessionists, by the lack of impartiality of judicial proceedings involving pro-independence leaders, and the use of the judiciary and the Spanish Constitutional Court to suppress the Catalan secessionist movement.[55] The secessionists' argument, in the end, is that the principle of democracy and fundamental rights are violated by the failure of the central government to respect the separation of powers that occurs when the institutions charged with protecting them – particularly the judiciary – are controlled by political adversaries. The argumentation of the Catalan secessionists suggests rule of law backsliding is underway in Spain, inasmuch as judicial independence is seriously questionable.

Such argumentation appears difficult to sustain in light of Spain's track record in the European Court of Human Rights. Spain, since it ratified the Convention in 1979, has only been condemned nine times for breaches of judicial impartiality.[56] Two of those cases concerned the impartiality of military courts,[57] two others involved *Audiencias Provinciales* (Provincial Courts),[58] three the *Audiencia National* (National High Court),[59] one the *Tribunal Superior de Justicia de Comunidad Autónoma* (Regional High Court)[60] and, finally, in only a single case was the impartiality of the country's Supreme Court taken up.[61] The Constitutional Court, for its part, has never been the object of scrutiny for breach of impartiality. Since 1979, Spain has never been convicted of violating the principle of judicial independence or for politically interfering in jurisdictional matters. Although such raw data might not reveal the entire truth, it nonetheless backs up the affirmation that, in the eyes of the Strasbourg Court based on the cases that have reached it, judicial impartiality and independence have not been perceived as a structural problem in Spain.

Despite this positive track record, several indicators draw attention to a decreasing institutional and public confidence in the independence of the Spanish judiciary. Chronic politicisation, deadlock, and failed attempts to reform the *Consejo General del Poder Judicial* (General Council of the Judiciary) are all seen as

[55]Solanes Mullor, *supra* n. 15, p. 580-583.

[56]Ibid., p. 580.

[57]ECtHR 28 October, No. 79/1997/863/1074, *Castillo Algar* v *Spain*; ECtHR 25 October 2002, No. 45238/99, *Perote Pellón* v *Spain*.

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

[59]ECtHR 6 December 1988, No. 10590/83, *Barberá, Messegué and Jabardo* v *Spain* (Plenary); ECtHR 17 January 2012, No. 5612/08, *Alony Kate* v *Spain*; ECtHR 6 February 2019, No. 4184/15 and four other applications, *Otegi Mondragon and Others* v *Spain*.

[60]ECtHR 17 January 2003, No. 62435/00, *Pescador Valero* v *Spain*.

[61]ECtHR 22 October 2008, No. 21369/04, *Gómez de Liaño y Botella* v *Spain*.

causes for the diminished perception of judicial independence in Spain.[62] In the anti-corruption context, the Group of States Against Corruption (GRECO) has called for an evaluation of the legislative framework of the General Council of the Judiciary and its effect on real and perceived independence.[63] The European Commission, in its reports on the rule of law, has also brought up the need to renovate the General Council as soon as possible, stressing the urgency of changing its election procedure following its renovation.[64] In response to criticism from the Council of Europe, the European Commission, and even Spanish judges themselves, various proposals have been made to reform the elections to and composition of the General Council.[65] These included a proposal by the governing coalition to reduce the parliamentary majority needed for the second round confirmation of appointments to the General Council from three-fifths to an absolute majority[66] and the counter proposals from the opposition to have all the members of the General Council elected by the judges themselves, therefore reducing the legislature's considerable power over the body's composition.[67] All the attempts made until now have failed. The deadlock over appointments to the General Council and the misalignment with GRECO's recommendations persists. Both reflect the troubling depth of the discord between Spanish political parties. Moreover, the most recent general statistics indicate that only 38% of the population regards the independence of the Spanish judiciary as somewhat or very good.[68] National statistics have also revealed a concerning level of negative

[62]A. Torres Pérez, 'Judicial Self-Governance and Judicial Independence: the Political Capture of the General Council of the Judiciary in Spain', 19(7) *German Law Journal* (2018) p. 1769 at p. 1795-1799.

[63]Since 2013, GRECO has identified the election of the General Council as a structural problem in Spain. *See* the last report: GRECO, 'Fourth Evaluation Round. Corruption prevention in respect of members of parliament, judges, and prosecutors. Second Evaluation Report. Spain', 87 Plenary Meeting, 22-25 March 2021, paras. 36-44.

[64]*See* the last report: European Commission, *2022 Rule of Law Report. Country Chapter on the rule of law situation in Spain*, SWD(2022) 509 final, p. 2.

[65]D. Mier Galera and J. Solanes Mullor, 'National Report: Spain. TRIIAL – Trust, Independence, Impartiality and Accountability of Judges and Arbitrators Safeguarding the Rule of Law under the EU Charter', *Robert Schuman Centre for Advanced Studies Research Paper* No. 2022/52 (2022) p.156 at p. 173-178.

[66]Legislative proposal to the Congress of Deputies nº 122/000090 of 13 October 2020 by Unidas Podemos (presentation 13/10/2020; withdrawal 07/05/2021).

[67]In 2018 (nº 122/000260 of 20 July 2018) and 2021 (nº 122/000186 of 27 December 2021), *Ciudadanos* advanced legislative proposals to the Congress of Deputies to allow the election of the judicial members of the General Council by their peers. In 2020, other political parties formulated similar legislative initiatives: Legislative proposal to the Congress of Deputies nº 122/000091 of 23 October 2020 (*Vox*) and Legislative proposal to the Congress of Deputies nº 122/000092 of 30 October 2020 on reform of the Organic 6/1985, of 1 July, of the Judicial Power (*Partido Popular*).

[68]European Commission, *2022 EU Justice Scoreboard*, CM(2022) 234, figures 50 and 52.

assessment: 50.8% of the general population perceived judicial independence in Spain as somewhat or very bad in 2019.[69]

These developments make it difficult to argue that Spain is itself also facing some sort of rule of law backsliding. The rhetoric of Catalan secessionists, however, makes strong use of arguments in this line. Only certain indicators suggest that the erosion of public confidence in judicial independence may be the result of a combination of the General Council crisis and the Catalan secession challenge. Yet even if it could be determined that Spain does not suffer from any genuine structural problem related to judicial independence, it remains evident from the polls that the appearances and perceptions of it are open to question. There are examples that will be addressed in the following sentences that indeed outline a departure from the European standards regarding structural independence. That the Spanish judiciary argues against this perception, particularly in the Catalan secession cases, is to be expected.

The first departure: the Spanish Constitutional Court's disqualification doctrine for its magistrates

The Spanish Constitutional Court has had the opportunity to reconsider, in light of the new European standards for judicial independence, its disqualification doctrine for its own magistrates during the Catalan secession crisis. Catalan secessionists confronted the Court, seeking the disqualification of magistrates who they felt did not possess the requisite impartiality and independence. The Constitutional Court could have used the opportunity, especially given the decreasing public perception of judicial independence in Spain, to revise its disqualification doctrine to bring it more into line with an objective approach, that is, by incorporating structural considerations into its disqualification doctrine. Analysis of the Constitutional Court's argumentation, however, still reveals a narrow understanding of the disqualification doctrine that is deeply attached to the subjective notion of judicial independence.

Before the Catalan secession crisis, the Constitutional Court held that the causes for disqualification of ordinary judges were also applicable to its magistrates,[70] but that, because of the special nature and composition of the Constitutional Court, these causes should be restrictively interpreted and applied.[71] To wit, the members of the Constitutional Court can include people

[69]Centro de Investigaciones Sociológicas (CIS), *Barómetro de julio 2019 [Barometer of July 2019]. Estudio No. 3257*, question n. 25, p. 10.

[70]*See* Art. 219 Organic Law 6/1985, of 1 July, of the Judicial Power.

[71]Order Constitutional Court 394/2006, of 7 November, para. 2; Order Spanish Constitutional Court 383/2006, of 2 November, para. 3.

who did not train to be judges or follow the prescribed career track, and they cannot be substituted. While institutional concerns over the proper operation of the Constitutional Court underscores the justification for restrictive interpretation, the Constitutional Court failed to take a more objective position from which it could analyse its independence and impartiality in the overall institutional framework.

The disqualification doctrine came up at two separate moments during the Catalan secession crisis. The first was when the 2006 reform of the Catalan Statute of Autonomy underwent constitutionality review. There were several requests for the disqualification of one of the magistrates on the Constitutional Court because of his prior academic work on the statute's reform. When the disqualification request took the form of an individual constitutional complaint, the Court considered the work as academic activity that did not affect the judge's impartiality.[72] Subsequently, however, in the context of a separate complaint involving the same judge – this time a constitutional challenge on the basis of additional information – the Court found the same work that was previously qualified as academic activity to be work commissioned by an administrative body of the Catalan regional government. That new fact thus disqualified the judge from participating in the decision on the constitutionality of the reformed Catalan Statute of Autonomy.[73] The argumentation of the Constitutional Court in the two cases shows a strong subjective perspective in which the relationship between the judge and the parties was determinant. The Constitutional Court appeared to acknowledge that it had made a mistake in the first case, as new information led it to reconsider the nature of the work done by the judge. Regardless, the Constitutional Court did not include in its analysis any institutional argumentation. Its justification for the judge's disqualification in the particular case was narrowly argued from the possible existence of a conflict of interests between the judge and one of the parties.

In 2006, the Constitutional Court seemed poised to abandon its restrictive interpretation and accept disqualifications. Before 2006, disqualifications were rarely imposed, so the Catalan Statute of Autonomy case seems to have opened the door for a more lenient stance on the matter. In 2021, however, following individual constitutional complaints to review the convictions of the Catalan secessionist leaders, the Court returned to its restrictive stance, refusing to grant the disqualification of two magistrates who publicly expressed their opposition to the Catalan secessionist movement in the media and academic publications. The Constitutional Court returned to a restrictive interpretation based on institutional concerns over the Court's special nature and composition, considered

[72]Order Constitutional Court 18/2006, of 24 January, para. 5.
[73]Order Constitutional Court 26/2007, of 5 February, para. 8.

together with the difficulty of reaching the minimum quorum to decide a case if the magistrates were disqualified from the cases.[74] The Constitutional Court glossed over the academic work and public statements of the two magistrates that had direct bearing on the cases, without discussing them in any detail. The Court accepted the statements made to the press by one of the magistrates because they were published five years before the magistrate joined the Constitutional Court and then ended its analysis with the brief, abstract affirmation that 'no one can, then, be disqualified as a judge because of his ideas and, therefore, it would be not constitutionally possible to remove magistrates, even when certain attitudes are true'.[75] The Court rejected the disqualification of the other magistrate because her statement was made in a dissenting opinion issued in a criminal case unrelated to the original, individual constitutional complaint before the Constitutional Court.[76]

This argumentation by the Spanish Constitutional Court runs against the current of the reoriented European approach to judicial independence. To begin with, both the underlying theoretical doctrine and its case-by-case application continue to rely predominantly on the subjective justification for judicial independence and impartiality. The Constitutional Court emphasised that the statements of one magistrate dated from 'five years before he was elected magistrate to the Constitutional Court, even when any criminal case was raised against the applicants'.[77] This acknowledgment clearly reveals the Court's attachment to the case at hand, which therefore is used to forgo any assessment of the appreciation or impact of those statements in the larger context of the Catalan secession crisis and the possible implications of public perception of bias on the part of one of the parties for the overall independence of the Constitutional Court and the even the judicial system as a whole. The Constitutional Court has declined the opportunity to embrace a more objective perspective in which concerns over the judicial body's institutional credibility may be pertinent in determining whether a constitutional magistrate should be disqualified from a given case. The Constitutional Court's discourse narrows the analysis to the relationship between the magistrates and the parties to the case, without acknowledging the institutional context of judicial independence, meaning the public's confidence in the Court's independence from political motives or pressure and a credible outward appearance of the Court's independence in the institutional framework of Spain's decentralised but unitary judicial regime. Against this backdrop comes the allegation of the Catalan secessionist movement

[74]Order Constitutional Court 107/2021, of 15 December, paras. 3-4.
[75]Ibid., para. 4.
[76]Ibid.
[77]Ibid.

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that the principle of separation of powers and of judicial independence in Spain have broken down. In their favour, some indicators, both at the international and national levels, suggest low public confidence in Spanish judicial independence. Poll numbers and reports from European and national institutions have already been mentioned. For the Constitutional Court to reject requests for the disqualification of its magistrates using arguments that have been augmented, if not totally forsworn, by the two High Courts of Europe, aggravates doubts over the structural independence of the Spanish judiciary.

The second departure: disciplinary proceedings before the General Council of the Judiciary and judges' free speech

The Catalan secession crisis also created tensions within the judiciary regarding the freedom of expression of judges who have expressed political opinions favourable to secession. The response of the Spanish judiciary to that tension has also largely disregarded the move in Europe towards an institutional analysis of judicial independence. These cases are particularly relevant. This is because, ultimately, the perception of the Spanish courts and their General Council's management of the many different opinions that serving judges have on the Catalan secessionist challenge will bear directly on public perception and outward appearances.

In 2014, 33 judges signed a manifest supporting the organisation of a referendum to decide Catalonia's political future.[78] An organisation that called itself *Manos Limpias* (Clean Hands) denounced those judges before the Disciplinary Commission of the General Council. The General Council initiated disciplinary proceedings, but then decided not to impose any sanctions.[79] Afterwards, the Permanent Commission of the General Council dismissed an appeal lodged by *Manos Limpias* and confirmed no sanctions for the judges.[80] Despite that, 20 judges of the 33 concerned brought the case before the Strasbourg Court, alleging that they were subjected anyway to official disciplinary actions which expressed by themselves a strong criticism to their opinions. The Strasbourg Court declined to condemn Spain for violation of Article 10 of the Convention for two reasons: first, the General Council had not imposed any

[78]Editorial Board, 'Una treintena de jueces catalanes defiende que el derecho a decidir es posible dentro de la Constitución' [Thirty-three Catalan judges defend that the right to decide is possible in accordance with the Constitution] (*La Vanguardia*, 13 February 2014), https://www.lavanguardia.com/politica/20140213/54400249237/jueces-catalanes-derecho-decidir-dentro-constitucion.html, visited 1 June 2023.

[79]Decision of the Disciplinary Commission of the General Council of the Judiciary, of 17 December 2014, para. 7.

[80]Decision of the Permanent Commission of the General Council of the Judiciary, of 18 June 2015, paras. 9-12.

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sanction; and, second, the disciplinary proceedings were initiated by a complaint from a third party.[81] These formal factors – the lack of sanctions and of *ex officio* proceedings – precluded substantive review by the Strasbourg Court of the action of the General Council.

In contrast, the General Council debated the expulsion of Judge Santiago Vidal Marsal, and finally suspended him for a period of three years from his office in 2015.[82] Judge Vidal, together with other jurists, composed a draft of a potential future Catalan constitution and offered the text for discussion at multiple events organised by cultural and political organisations that support Catalan secession. In total, the suspended judge participated in more than 100 public events, most of which were unequivocally political. The General Council suspended him from his duties as a judge on the basis of Article 417.14 of Organic Law 6/1985 for 'inexcusable ignorance in the fulfilment of judicial duties'. Unlike the case of the 33 judges signing a manifest, the disciplinary proceedings resulted in a sanction imposed by the General Council. Following the General Council's resolution, a contentious-administrative appeal against it went to the Spanish Supreme Court.[83]

The reasoning of the General Council and the Supreme Court differed deeply, although both agreed on the sanction imposed. The Strasbourg Court's doctrine in the Grand Chamber *Baka* decision, a case decided after the General Council decision but before the judgment of the Supreme Court, explains the difference. The General Council did not consider the judge's speech as scientific or academic but rather qualified it as political.[84] The judge's participation at political events, together with his links with political associations and the political alignment of his opinions with the Catalan secessionist movement, therefore qualified his behaviour as a breach of his judicial duties. *Baka* and its progeny, however, make clear, at the European level, that participation in political debates per se is not a breach of judicial independence. On the contrary, in politically sensitive cases where the judicial system is involved, judges are entitled to take part under the protection of the right to free speech. The Supreme Court in its subsequent judgment took account of the shift in *Baka* and accordingly considered the practical aspects rather than the discourse of the judge associated with the Catalan secession movement. The Supreme Court thus took care to reiterate the right of the judge to express publicly his views on the best paths for the future of Catalonia, for its political objectives and the different ways to achieve them.[85] However, the Supreme Court approved the sanction handed down by the General

[81]ECtHR 28 June 2022, No. 36584/17, *MD and others* v *Spain*, paras. 73-91.
[82]Decision of the Plenary of the General Council of the Judiciary of 26 February of 2015, para. 4.
[83]Judgment Supreme Court 2614/2016, of 14 December 2016.
[84]Decision of the Plenary of the General Council of the Judiciary of 26 February of 2015, para. 4.
[85]Judgment Supreme Court 2614/2016, of 14 December 2016, para. 11.

Council because of the judge's participation, alongside Catalan secessionists, in a campaign against the Spanish constitutional order, actions that went beyond mere discourse and ideas.[86] In its argumentation, the Supreme Court took a moderately objective approach to judicial independence and its connection with freedom of expression. It invoked the criterion of public confidence, arguing that certain public conduct on the part of a judge against the constitutional order may breach that confidence.[87]

The *Vidal* case ended with the judge's restatement in office,[88] although not without obstacles. When his suspension ended, Judge Vidal sought to return to his position, but the General Council denied him reinstatement on the grounds that he failed to meet the requirements of the aptitude declaration established by Article 367.1 Organic Law 6/1985.[89] The Supreme Court, in reviewing the denial, sent a request for constitutional review to the Spanish Constitutional Court, which ultimately declared that provision unconstitutional.[90] The provision in question had established a blanket rule which effectively left, without any pre-established legislative criteria, the discretionary power to reinstate suspended judges in the hands of the General Council. Significantly, while the Constitutional Court annulled the provision, its legal reasoning centred on the principle of legal certainty, which limits restrictions of such discretion to those that further legal certainty and predictability. The Constitutional Court made no reference to possible implications of the broad discretionary power enjoyed by the General Council to define the contours of judicial independence, in particular whether the provision declared unconstitutional left room for arbitrary or politically motivated decisions of the General Council for not restating a judge to his or her duties.[91] In short, judicial independence was not deemed a highly relevant factor by the Court.

A way out: connecting with European standards through soft law

Developments in Spanish soft law, however, indicate that a better understanding of the latest European approach to judicial independence is gaining ground. Notably, in 2018 the function of the General Council to collect, update and promulgate judicial ethics was established by legislation for the first time.[92]

[86]Ibid.

[87]Ibid., para. 10-III.

[88]Judgment Supreme Court 296/2019, of 7 March 2019.

[89]Decision of the Permanent Commission of the General Council of the Judiciary, of 8 March 2018.

[90]Judgment Constitutional Court 135/2018, of 13 December 2018.

[91]Ibid., para. 7.

[92]Art. 560.1.24 Organic Law 6/1985, of 1 July, on the Judicial Power, as amended by Organic Law 4/2018, of 28 December.

The same reform legally recognised the Judicial Ethics Committee within the General Council, which had been created in 2016. The documents produced by the General Council under the auspices of its new function and by the Judicial Ethics Committee, particularly those in response to judges seeking guidance on judicial ethics, have been sensitive to the evolution of European standards for judicial independence and the freedom of expression of judges.

Spanish soft law on judicial ethics began with the publication of the Principles of Judicial Ethics of 16 December 2016, a text elaborated by judicial associations and the civil society organisation and subsequently endorsed by the General Council.[93] This text was strongly influenced by international soft law on judicial ethics, although no explicit references to the case law of the European Court of Human Rights are made in its preamble.[94] It firmly connects judicial independence to institutional concerns, recognising the need for judges to maintain 'active commitment' to promote respect and confidence in the judicial system in society for the legal system to function properly.[95] Out of respect for the vital importance of impartiality, judges are called to avoid conduct, within or outside judicial proceedings, that may undermine public confidence in the legal system.[96] The text recognises the right of judges to express their opinions in their social interactions and to the media, as long as caution is taken not to affect the appearance of impartiality.[97] While the document firmly establishes the freedom of expression that judges enjoy as citizens, it also recognises the importance of self-restraint and moderation that should be exercised to preserve their independence, the appearance of impartiality and public confidence in the judicial system.[98]

The new standards enshrined in the Principles have been consistently applied by the Judicial Ethics Committee since their creation. In one particularly relevant report, the Committee analysed proper behaviour of judges in social networks.[99] The Committee concluded that judges may join and take part in social networks and, accordingly, are free to express potentially political opinions, but reaffirmed

[93]General Council of the Judiciary, *Principios de Ética Judicial [Principles of Judicial Ethics]*, 20 December 2016, https://www.poderjudicial.es/cgpj/es/Poder-Judicial/En-Portada/El-Pleno-del-CGPJ-asume-el-documento-de-principios-de-etica-judicial, visited 1 June 2023. *See also* for a general approach on the relevance of soft law for the European conventional system and EU law: R. Bustos Gisbert, 'La influencia de los textos no vinculantes del Consejo de Europa sobre independencia judicial en el TEDH y en la UE' [The influence of soft law of the Council of Europe on judicial independence in the European Court of Human Rights and the EU], 47 *Teoría y Realidad Constitucional* (2021) p. 161.

[94]*Principles of Judicial Ethics*, Preamble.

[95]Ibid., para. 3.

[96]Ibid., para. 16.

[97]Ibid., para. 19.

[98]Ibid., para. 31.

[99]Judicial Ethics Committee, Consultation 10/2018, of 25 February 2019.

the institutional concerns that call for increased discipline when exercising freedom of expression.[100] Maintaining respect for the outward aspect of impartiality and for the independence and dignity of the jurisdictional function thus represent criteria that should guide the conduct of judges in social networks.[101] In another relevant report, the Committee analysed instances where judges criticised the decisions of other judges in the media. That report similarly recognises that freedom of expression extends to judges who participate in the media, while calling for self-restraint and reserve out of respect for the crucial importance of independence, impartiality and integrity.[102]

The field of judicial ethics does not have a long record in Spain, but interest in it grew dramatically during an intense rule of law crisis in Europe. Since 2016, the Judicial Ethics Committee has adopted a modern perspective of judicial independence and freedom of expression, which have been developed in line with the international soft law on judicial ethics and an appreciation of the shift in the European approach. The Committee has not hesitated to take up contemporaneous debates on freedom of expression and judicial independence which question the role and responsibilities of judges in relation to new technologies, social networks and the media. In balancing respect for subjective rights and objective values, the soft law and reports of the Committee demonstrate a commitment to freedom of expression while recognising that limitations may sometimes be needed to safeguard institutional concerns related to the position of the judge, public confidence in the judicial system and the institutional framework. Therefore, judges should be mindful of the value of public confidence and the appearance of impartiality and independence when expressing personal opinions in the public sphere. The position of judges in society and the prerogatives and advantages that position affords them make respect for these values necessary for overcoming a sceptical assessment of the judicial function that narrowly limits it to the interest or effect in a particular case. Judicial ethics in their current form assume a broader perspective which contextualises the problems of freedom of expression and judicial independence from the point of view of their impact on the overall institutional framework.

Conclusion

Judicial independence and the freedom of expression of judges are not new to European constitutionalism. Therefore, it is difficult to pinpoint a genuine reshaping of those two values in the response of the European courts to the rule of

[100]Ibid., para. 5.
[101]Ibid., paras. 8-9.
[102]Judicial Ethics Committee, Consultation 5/20, of 3 December 2020, para. 3.

law crisis in Eastern and Central Europe, as judicial independence has always been recognised as an intrinsic part of the rule of law, as has the need to safeguard the separation of powers in European constitutionalism. The freedom of expression of judges and its connection to judicial independence has also been expressly raised since the Strasbourg Court's case law dating back to the early 2000s.

The constitutional innovation brought on by the rule of law crisis, then, does not pertain to the realm of theory as much as to that of action. A two-fold transformation has occurred. On the one hand is a change in orientation. The objective (institutional) and subjective (citizens' fundamental rights) dimensions of judicial independence were well-known, but the rule of law backsliding brought out the need to emphasise the objective perspective. Structural problems, namely the political capture of the judiciaries of Hungary and Poland, triggered a structural response, for which the protection of judicial independence required disengaging from the familiar path of the due process clause. This shift of emphasis has not only implied recourse to previously established values, such as the appearance of independence and impartiality and public confidence on the judicial system as crucial aspects of the rule of law, but has also led to new standards of protection, such as the non-regression rule. The second aspect of this transformation that primarily occurred at the level of action is the intense Europeanisation of those principles. The European courts, particularly the Court of Justice under Article 19 TEU, have deeply assimilated judicial independence as a central component of European integration. Judicial independence is no longer left to the protection of the member states, as the Court of Justice and the European Court of Human Rights have now actively taken the lead in supervising and controlling judicial independence, even at the national level.

The transformation invites a reassessment of the current standards of protection of judicial independence and the freedom of expression of judges in all European states. Spain offers a relevant example because of its struggles with the political and constitutional crisis brought on by the Catalan secessionist movement. Catalan secessionists continue to allege that the lack of judicial independence, the breakdown of the principle of separation of powers and the capture of the judicial power by political adversaries prevent them from obtaining a fair hearing. Some surveys, whose results may be attributed to the Catalan secession crisis and the politicisation and deadlock of the General Council, indicate that the Spanish public's trust in the independence of its judiciary is decreasing.

It is in this context that I would suggest that following the European shift in approach to judicial independence could help Spanish courts navigate these national turbulences to their benefit. Recent cases involving the freedom of expression of judges related to the Catalan secession crisis, however, do not, upon examination, show adherence to the European approach. The decisions pertaining

to the disqualification doctrine for magistrates of the Constitutional Court and cases involving judges who expressed opinions in favour of the Catalan secessionist movement neglect the new objective orientation for judicial independence. Their deep reliance on the subjective dimension of judicial independence and failure to incorporate a structural analysis yield arguments that fall short of countering the core claims of the Catalan secessionists. The European shift in approach broadens the scope of judicial independence, calling for more attention to and respect for concepts such as public confidence in the judicial system and the credible appearance of independence from the political branches. The EU's response to rule of law backsliding attempts to strengthen judicial independence as an institutional principle to counter political attacks seeking the capture of national judicial powers. Yet invocation of institutional and structural arguments by the Spanish courts are still rare.

Certain circumstances could spell trouble for Spain should it continue to disregard the new European standards for judicial independence. On one side are the constant reminders from GRECO and the European Commission that Spain needs to resolve its General Council crisis. On the other side are the disconcerting statistics indicating that Spanish society has less and less confidence in the effective independence of its judiciary. Perhaps together these will spur action. The soft law coming out of the budding Judicial Ethics Committee is a promising start. Attention to the new orientation, language and standards for judicial independence that emerged from the European response to the rule of law backsliding in Hungary and Poland could help Spanish courts resolve their own profound constitutional crisis, namely the Catalan secessionist challenge, which is far from over.

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