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ILLIBERAL BUT DEMOCRATICALLY DRESSED UP?

The two most contested laws in Spain



Main thesis

1. The law against gender-based violence promoted by *PSOE* and *Podemos*, and the amnesty law and lawfare points included in the governance agreement between *PSOE* and *Junts*, might contain potential illiberal and anti-institutional aspects due to their impact on the separation of powers and the rule of law.
2. The future of Spanish democracy depends on the respect of checks and balances and the division of powers by the Spanish political elite. Meanwhile, the justification of political ends through questionable legal means represents the most serious challenge to the rule of law in Spain.

Introduction

Although being a country with a wide historical record of contested political actions, Spanish national politics have been particularly intense and divisive over the last 15 years. The economic crisis of 2008 could be labelled as the big bang, the ‘external’ event that shook our politics to its core. Beyond severe and long-lasting socio-economic damage, three key political consequences can be highlighted. First, alongside the economic crisis, several corruption cases affecting the major political parties were discovered (e.g., the *Gürtel* case for *PP*, the *ERE* scandal for *PSOE*, and the 3% case for *CiU*). Because of these being widely discussed in the media, citizens have raised their expectations regarding the political elite. Second, this discontent with Spanish politicians was even more acute when citizens noticed that the country was facing one of the worst economic crises it has faced since the re-establishment of democracy. The EU narrative at the moment, clearly dominated by Germany, stressed that Spaniards lived beyond their means. This justified the imposition of a reduction on public (especially social) spending, increasing public discontent. Third, political discontent materialized in several social movements all over the country, with the most well-known case the protests under the label of “Indignados”. These popular movements had indeed two key political implications: the emergence of new political parties (e.g., *Podemos* and *Ciutadans*) and the accentuation of national cleavages (e.g., Catalonia).

This situation allowed for new opportunities to encourage fresh voices in the political sphere. New candidates, discourses and political parties appeared and updated the traditional discussions using ‘new’ cleavages. However, this uncertainty also saw an increase in political conflict. During these 15 years, populism spread throughout many liberal democracies and it did so too in Spain. Together with populism, Spain is also immersed in a situation of rising polarization, which might have many causes (e.g., the emergence of extreme and populist parties and change in political narratives) but certainly one outcome: a divided society. It is in such a situation that one can say that politics in Spain is particularly intense, with the analysis of illiberal components of certain political acts becoming especially pertinent.

The law against gender-based violence, while aiming to strengthen protection for victims, faces criticism for not considering the opinions of legitimized institutions, particularly the General Council of the Judiciary (*CGPJ*). Apart from neglecting institutional advice, the fierce critique towards of judges by the equality Minister of Equality and the representatives of *Podemos* indicates a will desire for unchecked executive power. The amnesty law, part of the agreement between *PSOE* and *Junts*, is a contentious issue. Besides debates surrounding its constitutionality and ethical considerations, it should be discussed because of

its potentially anti-institutional nature. The commitment to the establishment of investigation commissions to denounce lawfare is deemed fully illiberal, as it represents political interference in judicial matters, challenging the separation of powers.

What is an illiberal political act?

Previous research on what is an illiberal political act is far from being uncontested. Liberal democracy has been severely criticized by various political and social actors that accuse it of an unjust distribution regarding the benefits of globalization and an overthrow of national culture due to an openness to immigration and multiculturalism. This criticism is often accompanied by a fierce attack on modern science because it aspires to universal validity.¹ Many political parties around the globe depart from these ideas and promote ‘illiberal democracy’, which Zakaria³ has noted as involving “democratically elected regimes, often ones that have been re-elected or reaffirmed through referenda”. Such systems are also said to be “routinely ignoring constitutional limits on their power and depriving their citizens of basic rights and freedoms” (22). This definition contains the two key elements of the illiberal phenomenon: anti-pluralism and anti-institutionalism.⁴

Anti-pluralism promotes homogeneity among groups defined by cultural and/or socio-economic bonds (e.g., race, nation, religion, political ideology or social class). In anti-plural societies there is a glorification of the people as one, materialized in a belief in union or oneness.⁵ Politics is limited to one single value or principle (e.g., reason, nature or social class), articulating allegedly the will of the ‘true’ people. Apart from protecting the ‘true’ people, anti-pluralism leads to biased political acts towards out-group members. Examples of anti-pluralist policies are Central European University’s forced removal from Hungary, the imprisonment of Alexei Navalny in Russia, or sanctions against ‘anti-constitutional’ parties in Venezuela. Anti-institutionalism refers to governing without constraining institutions, favouring unchecked political power.⁶ As meta-ethical values are clearly defined, value conflicts are illegitimate. Therefore, independent institutions limiting the will of the government (the ‘true’ people) are needless.⁷ Rights such as freedom of speech or association are limitations on the exercise of the free will of the people. Some anti-institutional policy examples are PiS’ purge of Poland’s Supreme Court, the constitutional changes to ensure eligibility by Putin in Russia, or unfair electoral reforms by the ANC in South Africa and AKP in Turkey.

Spanish law against gender-based violence

The *Ley Orgánica 10/2022, de 6 de septiembre, de garantía integral de la libertad sexual* is a Spanish law approved by the legislative chambers on 25th August 2022. The law has three major areas of intervention: (i) defendants need to prove that sexual consent was given, (ii) several offences such as stalking or female genital mutilation are elevated to crimes, (iii) the

1 Stephen Holmes, *The Antiliberal Idea*, [in:] *Routledge Handbook of Illiberalism*, eds. Andrés Sajó, Renáta Uitz, and Stephen Holmes, New York 2021, pp. 3–15.

2 Helena Rosenblatt, *The History of Illiberalism*, [in:] *Routledge Handbook of Illiberalism*, eds. Andrés Sajó, Renáta Uitz, and Stephen Holmes, New York 2021, pp. 16–32.

3 Fareed Zakaria, *The Rise of Illiberal Democracy*, *Foreign Affairs*, 1997 76 (6), pp. 22–43. <https://doi.org/10.2307/20048274>.

4 Ulrich Wagrandl, *A Theory of Illiberal Democracy*, [in:] *Routledge Handbook of Illiberalism*, eds. Andrés Sajó, Renáta Uitz, and Stephen Holmes, New York, 2021, pp. 94–117.

5 *Ibid.*

6 *Ibid.*

7 Carl Schmitt, *Constitutional Theory [Verfassungslehre]*, Durham 2008.

minimum and maximum years of sentence were adjusted, decreasing the minimum and increasing the maximum. The law responded to several rape cases in Spain that served as catalyst events. In this sense, the law was conceived to strengthen the protection of victims. However, the design of this policy was flawed. The reduction of the minimum sentence can be retroactively applied in Spain if it is beneficial to the convict. Different actors from Spanish society warned about this fact. For instance, the General Council of the Judiciary in Spain (*CGPJ*) criticized the law in its report. Along the same lines, the opposition centre-right People's Party (*PP*) voted against the law in the parliament partly due to concerns about the consequences of the reduction in the minimum sentences. Nonetheless, the government decided to execute their initial policy design.

Right after the publication of the law, many convicts asked for a reassessment of their sentences, resulting in sentences cut for about 1,200 offenders and freedom for 130 convicts.⁸ After this scandal, the left coalition (*PSOE* and *Podemos*) forming the Spanish government 'quickly' split into two factions. On the one hand, Prime Minister Pedro Sanchez and most representatives of the Socialist Party asked for caution when evaluating the first effects of the law, and then contacted the People's Party to amend the law and overcome the flawed design. On the other hand, the equality minister and the representatives of far-left *Podemos* viewed the reduced sentences not as the result of any flaws in the design of the law but due to 'sexist judges'.⁹ On top of that, *Podemos* criticized the agreement between *PSOE* and *PP* as a setback for women's rights.

The assessment of the illiberal aspects of the legislative process revolves around two facts. First, one might wonder about the extent to which not considering the opinion and knowledge of judicial institutions before approving a law is illiberal (anti-institutional). In polarized political systems, strong critique from opposition political parties comes as no surprise, as well as the rejection of this kind of criticism. However, consolidated liberal democracies could overcome these divisions because they have independent institutional public bodies that provide advice to the government when designing a new law. The *CGPJ* is the primary body representing judges in the Spanish political system, and their advice has been critical for many policies in the democracy years. Therefore, the decision not to listen to the criticisms and advice from the *CGPJ* might signal a desire from certain parts of Spanish political elite to reject the separation of powers, only increasing the power of the executive. It is an example of unchecked power and a symptom of 'presidentialization', and it can be considered an illiberal anti-institutional act.

The second action that merits our attention is if some politicians blaming judges that were in charge of implementing this law can also be considered an illiberal (anti-institutional) act. Indeed, a key feature of illiberal governments is to name, bully, fire and replace insubordinate civil servants. The criticism from the equality minister and the representatives of *Podemos* provided evident confirmation that they believed that the law represented the 'true' will of the people, which was undermined by 'sexist' judges. However, the judges were not sexist, they just applied a new norm in line with how it fits in with the current legal and penal code regulations. In fact, recent rulings of the Spanish Constitutional Supreme Court supported this application of the law. Not recognizing an error is not necessarily illiberal, but the fierce critique of public servants applying the law (i.e., simply doing their job) is one of the most clear-cut illiberal cases one can find in the EU in the last 15 years.

8 Noemí López Trujillo, El disenso de criterio en el Supremo sobre las rebajas de penas por la ley del 'solo sí es sí': un análisis de las sentencias, *Newtral*. 27.10. 2023. <https://www.newtral.es/rebajas-penas-supremo-ley-solo-si-es-si/20231027/>.

9 Irene Castro, José Enrique Monrosi, Las acusaciones de machismo de Podemos a los jueces dividen al Gobierno y Yolanda Díaz llama a la prudencia, *elDiario.es*. 16.11.2022. https://www.eldiario.es/politica/acusaciones-machismo-jueces-dividen-gobierno-yolanda-diaz-llama-prudencia_1_9718064.html.

Amnesty law and lawfare

Spanish regional elections were held on 28th May 2023. The results were disastrous for the ruling left-wing coalition. The results displayed a strong and, most of the time, uncontested win for the centre-right in Spain. However, in several regions the People's Party (PP) needed the support of other political parties to be in government. VOX, a far-right and (mostly) illiberal party, has been a common partner in this enterprise. In light of the results, Prime Minister Sanchez moved to hold national elections as soon as possible. The national elections were held on 23rd July, a common holiday period for most Spaniards. Although the People's Party (PP) obtained the largest number of seats in the parliament and senate in the elections, the results were far more contested than in the regional elections. In fact, there was no 'natural' (based on simple ideological considerations) majority to establish a new government for the main Spanish political parties (PSOE and PP). In contrast to other European countries like Germany, grand coalitions are not common in Spain. Based on historic and current political considerations, the rhetoric of the two main political parties excludes the possibility of long-term cooperation. Therefore, after these elections, the two main political parties were forced to look for the support of 'peripheral' or 'regional' political groups such as BNG, CC, PNV, Bildu, Junts or ERC, apart from their common partners (i.e., Podemos/Sumar for PSOE, and VOX for PP).

To negotiate with different political parties is not only legitimate in a liberal democracy but also desirable in order to bring together different viewpoints to solve common problems. The Socialist Party (PSOE), in order to form a new government, engaged in the most controversial negotiations with Junts, a right-wing Catalan political party involved in the Unilateral Declaration of Independence of 27th October 2017. During the electoral campaign, the issue about to what extent PSOE and PP should negotiate with Junts was debated. The key issue was to grant or not to grant amnesty to the people involved in the separatist movement that culminated in the Unilateral Declaration of Independence. Before the elections, PSOE and PP promised that they would not grant the amnesty if they formed a new government. However, after several weeks of negotiations, PSOE and Junts reached an agreement on 9th November 2023 which foresaw the approval of an amnesty law and the creation of several investigation commissions to denounce cases of lawfare.

First, there is strong debate among judicial experts about to what extent the amnesty proposed by PSOE and Junts fits within the Spanish Constitution of 1978. The *Ley 46/1977, de 15 de Octubre, de amnistía* demonstrates that an amnesty law was approved in the past in Spain. However, there are crucial differences between the two efforts: while the first in 1977 was pre-constitutional, directed towards those people who suffered persecution under Franco's regime and approved acknowledgement of the brutal repression enforced by his dictatorship, the most recent one was created in a fully democratic and constitutional political system, and directed at people involved in a unilateral declaration of independence while violating the rule of law. Apart from these obvious differences, the debate seems to centre on two additional questions. The first is if it is ethical to approve a law that was clearly rejected during the electoral campaign. The second is whether the amnesty law was created upon a conviction that it is the 'proper' way to handle the Catalan issue (something that the PSOE could have done some years ago), or if it simply functions as a means of gaining political power (or, in other words, forming a government). These questions involve a complex trade-off between different public values, political ideologies and ethical standards.

Nevertheless, what is most important is the fact that the amnesty law is in essence a political act that overrides the work of many public servants identifying and condemning the offences of the people involved in the Unilateral Declaration of Independence. From this

point of view, an independent institution (i.e., the judicial power) is bypassed to satisfy the political calculations of the government. It should be mentioned that judicial power is not delegitimized in the discourse or narrative of the *PSOE* (but it is for *Junts*). Therefore, the amnesty law is not fully liberal or illiberal, as it seems to be located somewhere in a grey area. Further developments in 2024 and 2025 will probably shed further light on this question.

Second, the agreement between *PSOE* and *Junts* includes the compromise to create several investigation commissions to denounce cases of lawfare in Spain. According to Dunlap,¹⁰ lawfare is defined as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective” (146). Hence, the concept was originally developed to account for the role of judicial powers in handling national and international wars and other security issues. The basic idea is to use legal strategies to reduce the legitimacy of the enemy. Spain during and after 2017 was far from such an extreme situation involving the security of its citizens. However, the concept of lawfare included in the agreement between *PSOE* and *Junts* assumes that Spanish judicial power was strategically used not only to shift discussion on the Catalan issue from political to legal but also to criminalize the efforts made by the people and politicians involved in the region’s separatist movement and unilateral declaration of independence. This message has been repeatedly spread by representatives of *Junts* in the parliament and several interviews.

Moreover, it seems that *Junts* is stretching the truth when it comes to the list of offences faced by the people on trial in this case. *Junts* argues that people are being punished ‘unfairly’ because they granted Catalan citizens the right to vote for their independence, or for promoting a ‘democratic’ act. However, the offences listed by the judges are quite different from this allegedly ‘democratic’ political motivation, including disobedience, misuse of public funds and sedition. Moreover, it is worth noting that these three offences are also well known in most European countries, and they nicely fit in with the common set of integrity violations¹¹ applied in public law. Summing up, this aspect of the governance agreement between *PSOE* and *Junts* aims to overcome judicial decisions or revise judges’ work on the basis of political, not legal, principles. This is an illiberal and anti-institutional act. Judicial independence is indeed seen as a limitation on the exercise of the free will of (some of) the people and politicians of Catalonia. And, since this judicial independence is contrary to the ‘public interest’ of Catalonia as defined by those in support of its independence, it can then be compromised.

Conclusion

This essay has reviewed the illiberal components of two contested political acts in Spain: the recent law against gender-based violence, and the amnesty law and lawfare points included in the governance agreement between *PSOE* and *Junts*. Spain is immersed in a spiral of polarization and internal division around different political cleavages, with Spanish identity among the most contested topics. Polarization might blur the vision of many people, and encourage strong critique when one says something that does not fit within the ‘bubble’ that one is located in. However, it is precisely because of this that this essay is timely.

The analysis shows that to not consider the opinion of the *CGPJ* before the approval of the new law against gender violence, and to blame the judges for applying it, are illiberal and anti-institutional acts. On top of that, the essay considers that current evidence is inconclu-

10 Charles Dunlap, Lawfare Today: A Perspective, *Yale Journal of International Affairs*, (Winter 2008), pp. 146-154. https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5892&context=faculty_scholarship.

11 Karin Lasthuizen, Huberts Leo and Heres Leonie, How to Measure Integrity Violations, *Public Management Review*, 2011 13 (3), pp. 383–408. <https://doi.org/10.1080/14719037.2011.553267>.

sive to argue in favour or against the amnesty law from an illiberal point of view. However, the commitment to develop investigation commissions to denounce cases of lawfare is fully illiberal and anti-institutional. Although dressed up with a ‘democratic’ narrative, the detected illiberal and anti-institutional acts reflect a clear incursion of politics into the realm of judges, signalling the blurring of the division of powers. On this basis, it must be argued that Spanish politicians should try to reduce the amount of illiberalism in their political acts, respecting the basic idea of checks and balances when it comes to political power. It is indeed very dangerous to mix polarization with illiberalism. And, perhaps more importantly, Spanish politicians should respect legal processes to reach their political goals. Political ends must not justify legal means if democracy is to be sustained.

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February 2024

Edited by Adam Balcer
Proofreading: Niall Gray

ISBN 978-83-7893-860-6

DTP: Dolasu



Co-funded by
the European Union