ATTACKS ON JUSTICE - SPAIN

Highlights

After considering the events that have taken place in the legal field since 2002, we can conclude that no relevant attacks on judicial independence have occurred that would affect the very fabric of its foundation. Nevertheless, it is important to mention a few circumstances which have influenced or led to the introduction of certain legislation, procedures and judicial practices, in particular the 3/11 Madrid bombings, claimed by Al Qaida, and the gradual social awareness of the level of gender-related crime, primarily involving violence against women. This awareness has compelled government, Congress and the Senate to enact a series of laws compelling both prosecutors and judges to take special measures with regard to acts of gender-based violence. Another issue worth mentioning that will later be addressed in greater depth is the changing relationship between the autonomous regions and the judiciary on matters such as the conflict in the Basque country, where an overall climate of pressure and threats is unfortunately still affecting the independence of the judiciary. We should add that pressure from the media with regard to these matters is also intense.

BACKGROUND

Politics and social life during this period have been shaped both by the 3/11 Madrid bombings, a tragic series of criminal offences involving gender-based violence and the passage of the *Political Parties Law* that paved the way for outlawing the Basque separatist party Herri Batasuna.

On 11 March 2004, three days before Spain's general elections, a series of ten terrorist attacks took place on four different trains in four different stations in Madrid. Claimed by the radical Islamic terrorist group Al Qaida, these bombings were seemingly staged as retaliation for Spain's foreign policy with regard to Islamic issues, especially the deployment of Spanish military forces in Iraq. As a result of these terrorist acts, 191 people died and over 1,800 others were wounded, some of them severely. The bombings, which provoked massive media coverage and a sense of uneasiness that was unheard of in Spain, set in motion a series of events that ultimately led to the enactment of new legislation on immigration, borders and boundaries, counter-terrorism and police and judicial cooperation both across the European Union and internationally.

Figures provided by the Institute of Women's Studies of the Ministry of Labour and Social Issues showed that 54 women died as a result of gender-based violence in 2002. This number unfortunately rose to 71 in 2003 and 72 in 2004. As of 8 August 2005, 36 more cases of gender-related murders have been recorded. In order to fight this social scourge, efforts have been made by the public services, judicial authorities and legislatures at all levels. Their actions resulted in the enactment of *Law 27/2003*

which provides for a so-called "protection injunction" or "protection order" to be issued on behalf of victims of gender-based violence. This legal tool, which can be used in the fields of both criminal and civil law, allows judges to take immediate executive measures. It also provided for the establishment of a National Observatory on Domestic Violence (26 September 2002), which is responsible for recording and monitoring all judicial proceedings and rulings on gender-based violence and providing a permanent source of up-to-date statistics and knowledge.

On 28 December 2004, *Organic Law* (hereinafter OL) *1/2004* on comprehensive protection measures to tackle gender-related violence was passed. This law not only sets the legal framework for comprehensive legal assistance and protection for victims of gender-based violence but also establishes harsher penalties for the perpetrators of gender-related offences and provides for the creation of special courts.

The Basque question is also an issue that undoubtedly affects judicial independence. On 17 March 2003, in accordance with the provisions of the *Law on Political Parties*, the Spanish Supreme Court declared the Basque separatist radical party Euskal Herritarok/Herri Batasuna illegal. This ruling would become a milestone, the first of its kind in Spain since democracy was restored in 1975. In retaliation for this ban, part of the Basque Government launched an attack on the independence of the judiciary. They called on the General Council of the Judiciary to appoint a regional judge to the Court to try Jose María Atutxa, President of the regional parliament, for the offence of disobedience. He had refused to dissolve Euskal Herritarok/Herri Batasuna as a parliamentary group within the regional chamber. Candidates initially put forward by the Basque Government for the post of regional judge were thought not to be completely impartial, with doubts being raised about their independence, and they were rejected by the General Council of the Judiciary until a candidate who had been proven to be impartial in the Atutxa case was found.

Finally, and marking another legal milestone in Spain's recent history, it is important to look at the social and political debate that took place as a result of the passage of *Law 13/2005* on 1 July 2005, allowing homosexual couples to marry and enjoy the same legal benefits and rights as heterosexual couples. A few judges have responded by questioning the law's constitutionality and filing appeals before Spain's Constitutional Court, which settles matters relating to the constitutionality of laws. The Court must now decide whether the provisions of the *Homosexual Marriage Act* are contrary to Spain's Constitution and, pending its decision, homosexual marriages have been suspended.

JUDICIARY

Independence of the judiciary

The *Organic Law* (OL) *on the Judiciary*, *Law 6/1985*, pursuant to article 122 of the Spanish Constitution, establishes the core structure and organization of the judiciary and is the primary legislation regulating matters that are directly related to the organization and independence of the judiciary. During the period under examination, this crucial law was amended on six occasions. Related legislation was therefore

introduced, including *OL 19/03* and *OL 2/04* and the recent government bill relating to the impending amendment of *Law 6/1985*. *OL 19/03*, passed on 23 December 2003, abolished the former procedure for entering the judiciary. Previously, this last consisted of a contest between legal experts and an examination. The reform replaced it with a single procedure: the classic competitive exam. This law also advocates and guarantees the right of appeal in all criminal proceedings and creates a court of appeal at the *Audiencia Nacional*, the central criminal court that has nation-wide jurisdiction. In doing so, it was complying with a request made by the UN Human Rights Committee in its resolution of 20 July 2000.

The purpose of *OL 2/2004*, which entered into effect on 28 December 2004, was to reform the 1985 *OL on the Judiciary*. It devised and established a new procedure for appointing judges to senior positions in the major regional and national courts (the Presidents of the High Courts for the autonomous regions and the justices sitting in the Supreme Court at national level). Under the new system, such senior judges have to be appointed by a new reinforced qualified majority vote of the members of the General Council of the Judiciary, the body responsible for governing the Spanish judiciary. The number of votes required for a majority was increased from eleven (half of the members plus one) to thirteen (three-fifths of the 21 members of the Council, which is made up of 20 members plus its President). The new Socialist Government approved the reform but the General Council of the Judiciary remains in the hands of a conservative majority. This has led to delays in the appointment of several Supreme Court judges as well as some Presidents of High Courts at regional level. The current opposition, headed by the conservative Popular Party, regarded the reform as an unjustified change of the rules of political fair play and an attempt to exert influence on the judiciary. This brought about a political crisis that was finally resolved when all the judges whose positions had been in doubt were eventually appointed.

At the moment, a further amendment of the *OL on the Judiciary, Law 6/1985*, is being voted on although both legal and political forces have already examined the draft. The reform introduces the new idea of the Supreme Court as being a court of cassation, which would concentrate solely on standardizing legal doctrine, and leaving the role of last resort court to the High Courts at regional level. It establishes regional Councils of the Judiciary, which will act under the supervision of the General Council of the Judiciary, as well as what has become known as *"justicia de proximidad"* ("neighbourhood justice"), to be administered by non-professional, politically-appointed judges whose term of office will be limited. It has also raised further controversy in that these new judges would not be members of the judiciary but rather legal experts with at least six years' experience, and would be appointed by the General Council of the Judiciary following proposals submitted by the regional High Courts based on a list of three candidates originally proposed by city councils. Such an appointment system has been questioned on the grounds that it raises doubts about independence, stability and technical training.

Law 15/2003, which came into force on 28 May 2003, establishes the salary scheme for judges and prosecutors. The purpose of the law was to guarantee the economic independence of members of the judiciary and of the prosecution service by establishing an objective, fair, transparent and stable salary scheme, based on the level of commitment, performance and decision-making associated with each position. A

performance-monitoring system based on objective standards was to be introduced to keep track of the number of rulings and other judicial decisions handed down by each judge. This so-called "module" system requires all judges to compile a list of rulings and other decisions every six months on which their monthly salary will be determined. If they do not attain a pre-determined number, then an administrative investigation will be opened to determine the causes for their failure to do so. This system has been widely criticized because it gives more importance to sheer numbers than to the nature and complexity of the questions and cases they judge. It also forces changes in the patterns and behaviour of the judiciary as well as in the way judges act, all of which may also threaten the independence of the judiciary.

As a result of the recent terrorist activity throughout Europe and of the evolution and globalisation of terrorism, new anti-terrorism legislation has been introduced in Spain, as it has been the case in other European countries. In this respect, it is important to mention: *Law 7/2000*, amending *Law 5/2000*, on the criminal responsibility of minors involved in terrorist acts; *OL 6/2002*, which contains crucial provisions concerning the circumstances in which a political party may be declared illegal; and *OL 1/2003*, passed on 10 March 2003, that guarantees the personal safety of members of municipal authorities. Articles 42 and 51 of *OL 2/1986* on the security forces and article 3 of *OL 3/1987* on political party funding have also been amended in this context.

Other reforms ensure full compliance with prison sentences in terrorist cases. *Law 7/2003* prohibits inmates who have been sentenced to prison terms for special terrorist crimes from enjoying certain prison benefits until they have served half of their sentence. The maximum prison sentence has been increased to 40 years for cases involving two or more acts of terrorism (the legal maximum is 30 years). In the economic field, *Law 12/2003*, passed on 21 May 2003, deals with the prevention and blocking of terrorist funding and allows financial operations alleged to have links with terrorism to be monitored.

The co-existence in Spain of both a Supreme Court, as the highest authority and court of last resort with regard to interpretation of the law, and a Constitutional Court, as the highest judicial authority with regard to interpretation of the Constitution, means that it is possible for the same case to be heard in both courts and for two different rulings with contrasting views on the subject to emerge. Difficulties in determining the jurisdiction of the two courts have led to tensions over the past few years, with the Supreme Court taking the view that the Constitutional Court overextends its influence by judging cases related to legal provisions other than those contained in the Constitution and acts as a third third-level appeal court, thus rendering the final rulings of the Supreme Court meaningless. These tensions reached their height on 23 January 2004 when the Supreme Court held the Constitutional Court justices civilly liable on the grounds that they had been negligent in discharging their duties. As a result, the Constitutional Court, in a ruling dated 3 February 2004, accused the Supreme Court of invading its exclusive sphere of jurisdiction, arguing that no other court has the right to judge constitutional matters. It is clear that both courts should follow the same guidelines and try to work in harmony and the friction between them, while not earth-shattering, shows that new provisions concerning their coordination and respective spheres of jurisdiction are needed.

Cases relating to independence of the judiciary

As stated at the beginning of this report, attacks on judicial independence have not been so severe as to affect the very fabric of its foundation. In fact, in a 2003 judicial survey, judges gave judicial independence a rating of 8.5 out of 10. This view may not be so accurate, however, when looking at the judiciary in the Basque country or the threat of terrorism, for which the judiciary has always been a prime target. Although no judges have been killed by the terrorist group ETA since 7 November 2001 when José María Lidón Corbi was murdered, a strategy of terror has remained evident in other actions perpetrated by them because the ultimate goal shared by all terrorist organizations is to instil fear and terror throughout society and, in the case of ETA, Basque society in particular. ETA's terrorist threat against the judiciary has never disappeared, as evidenced by the explosion of a bomb on 25 July 2003 at a court building in Estella and the discovery on 1 January 2005 of an ETA plot to destroy the courts in Vitoria with a car bomb. All judges in the Basque country and many others throughout Spain are obliged to have bodyguards and there is a lingering climate of fear because threats against judges and their families can be seen in graffiti on city walls, in every phone call threatening judges who deal with street riot cases (the so-called *kale borroka*) and in every insult hurled by supporters of ETA and other radical separatist groups such as Jarrai.

Other than these examples of limitations on the free exercise of judicial functions, rather than feeling their independence is under attack, judges feel under pressure as a result of the level of attention given by the media to socially-sensitive issues, such as gender-based violence or terrorism. Judges are also affected by the public debates provoked by some judicial decisions, which can often lead to significant widespread reactions and even criticism but are not seen as direct attacks on judicial independence. This is also the opinion of the General Council of the Judiciary, which has stated in all its decisions denying institutional protection in cases of such behaviour that such incidents are not real attacks on independence. Nevertheless, it has also stressed, although not ruled on, the fact that a reduction of the degree or shape of criticisms could help ensuring a proper performance of judicial duties.

Corruption within the judiciary

Corruption within the judiciary has surfaced in only a few instances, such as in the cases of Judges Pascuall Estevill and Justo Gómez who were convicted of corruption and prevarication (2002-2004). Investigations were also opened into the cases of several judges from the *Audiencia Nacional* (the Madrid-based special court that deals with cases of terrorism, drug-trafficking, money laundering and political corruption) who were accused of releasing alleged drug dealers. In these cases, however, their actions were shown to be more a sign of judicial negligence in the supervision of their pre-trial detention than a question of corruption. We should point out that the General Council of the Judiciary has tightened its supervisory service and increased its monitoring of decisions involving the release of suspects and the granting of early release to inmates, especially in the wake of some well-known cases in which those concerned went on to commit further offences.

LEGAL PROFESSION

A discussion of the legal profession would not be complete without examining the changes in the law relating to the right to legal assistance, immigration cases and criminal procedure.

As far as illegal immigration is concerned, under Spanish law, immigrants who are turned away at the border are automatically provided with legal assistance for proceedings which result in the person concerned being sent back to his/her home country where they can no longer be located. This causes procedural difficulties and raises doubts about the usefulness of such procedures.

Under current criminal procedure (the *Law on Criminal Procedure*, as amended by *OL 38/02*), anyone indicted for a crime who is not under arrest cannot be denied legal assistance. They therefore have access to legal counsel and can choose to make a statement or remain silent before the attending judge.

OL 1/04 also guarantees immediate legal assistance to victims of domestic violence.

As far as terrorism is concerned, Spanish law is similar to that of other Western countries, although some special rules were accepted by the Constitutional Court. Under the *Law of Criminal Procedure* as amended by *OL 13/03*, the *Code of Criminal Procedure* states that anyone who is arrested must be brought before a judge within 72 hours but, if they are suspected of belonging to, or collaborating with, an armed group (including terrorist organizations), that time may be extended by an additional 48 hours. The *Code of Criminal Procedure* also stipulates that a judge may order any detainee to be held *incommunicado* while in police custody for either three or five days, while those accused of belonging to, or collaborating with, an armed group (including terrorist organizations) may be held *incommunicado* for a further five days. This can be further extended by an additional three days. Detainees who are held *incommunicado* are guaranteed most of the rights accorded all other detainees, including the right to be informed immediately, in a manner they can understand, of the grounds for their arrest and of their rights. They are also told that they have the right to remain silent and not to incriminate themselves or confess guilt. However, as long as they are held *incommunicado*, they are unable to notify relatives, or another person of their choice, of their arrest or where they are being held, receive or send correspondence or other communications or receive visits or appoint their own lawyer. They must be assisted by a public defender with whom they are unable to consult in private at any time.

As far as legal assistance is concerned, article 302 of the *Law of Criminal Procedure* allows the examining magistrate to declare confidential some or all judicial and police actions undertaken during the investigative phase. This restriction must be lifted at least ten days before the closing of the investigative phase. The Constitutional Court has stated that the secrecy of the investigation prevents interference and manipulation and limits the right to defence but does not mean that detainees are left defenceless because it does not prevent them from fully exercising this right as soon as the requirement for confidentiality is lifted.

PROSECUTORS

While the new salary scheme applies to prosecutors as well as judges, we should point out that the reforms introduced by *Law 14/03* changed the way in which the status of prosecutors was previously regulated (*Law 50/81*). Under *Law 14/03*, there is a new promotion system, based on a new set of criteria for determining excellence and specialization, for all senior posts within the prosecution service. Traditionally, such posts were permanent but, with the change in the law, they have become temporary.

Attempts to strengthen the leading role of prosecutors in criminal investigations have led to debates about the appropriateness of giving prosecutors all the responsibilities in the investigation phase and leaving judges to supervise only issues that involve fundamental rights.

According to the law, judges cannot order pre-trial detention without being requested to do so by a public prosecutor or someone bringing a private action. In most cases, this means that such a request depends solely on the public prosecutor because the victim is much less likely to bring any such action. Furthermore, under Spanish criminal procedure, the decision to forward a case from an investigative court to a sentencing court depends not only on the examining magistrate but on the public prosecutor or private complainant as well.

In the fight against gender-based violence, the prosecutor again plays a leading role. The most recent legal reforms introduced as a result of *Laws 27/03 and 1/04* address the question of protection orders for victims of domestic violence and the measures that must be taken to provide them with comprehensive protection, both of which are much harsher in the case of complaints of domestic violence. They allow criminal and civil measures to be adopted as soon as a complaint has been filed at a hearing in which the prosecutor can request preventive measures, such as ordering the accused to keep away from the victim or temporarily withdrawing paternal custody.

The regulations introduced to facilitate proper enforcement of the law gave the domestic violence courts sole jurisdiction for such offences. However, the fact that they are overburdened by the number of cases ultimately has consequences for judicial independence.

Lastly, we should also mention that the new provision for fast-track trials (*juicios rápidos*) gives the accused the chance to agree with accusation brought by the prosecutor, which not only has consequences for the sentence imposed but also means that the punishment established by law is reduced by two thirds.

ACCESS TO JUSTICE

In two separate individual complaints filed against Spain, the UN Human Rights Committee ruled that the inability of the Supreme Court, as the sole body of appeal, to review evidence submitted to lower courts was a violation of article 14 of the 1966 *International Covenant on Civil and Political Rights* (ICCPR). Under *Organic Law*

19/03 amending *Law 6/85*, an appeals chamber was formally established in response to the finding by the UN Human Rights Committee that the previous right of appeal, involving limited review by the Supreme Court, was not consistent with Spain's obligations under the ICCPR.

We should add that preference has been given to procedures and cases concerning domestic violence.

Between 1999 and 2003, Spain was the subject of 14 judgments handed down by the European Court of Human Rights. Five of these rulings concerned violations of the right to a fair trial and four concerned the excessive length of proceedings. In 2004, the Strasbourg Court issued five rulings relating to Spain or Spanish cases:

- *Ipamark S.L. versus Spain* (The case was not admitted by the European Court because it considered the domestic court to be justified in its decision not to admit the case).
- *Master Sánchez versus Spain* (Concerning interpretation of the conditions for accessing the appeals system: not admitted by the European Court of Human Rights).
- *Navarrese García versus Spain* (Judges cannot be responsible for summoning the plaintiff at fourth and fifth addresses provided by the actors involved)
- *Sáenz Maeso versus Spain* (Spain was condemned for violating the principle of proportionality between the requirements of admissibility for an appeal and its excessively rigorous application)
- Q*uiles versus Spain* and *Alberto Sánchez versus Spain* (Spain was found responsible for unlawful delays).

LIST OF LEGAL REFORMS DURING THE PERIOD

22 December 2000: *Law 7/2000*. Amendments to *Law 10/1995* of 23 November 1995, establishing a new *Criminal Code*, and *Law 5/2000* of 12 January 2000, regulating the criminal responsibility of minors in cases of terrorism.

31 May 2001: *State Agreement on Reform of the Justice System* (*Pacto de Estado para la Reforma de la Justicia*).

27 June 2002: *Law 6/2002* on political parties.

24 October 2002: *Law 38/2002*, partially amending the *Code of Criminal Procedure Code* in order to establish immediate fast-track proceedings for certain offences.

10 March 2003: *Law 1/2003*, guaranteeing democracy in municipal councils and the physical safety of councillors.

26 May 2003: *Law 14/2003*, amending *Law 50/1981* (30 December 1981) regulating the status of prosecutors.

26 May 2003: *Law 15/2003*, on the salaries of judges and prosecutors.

30 June 2003: *Law 7/2003*, on measures to ensure that sentences are fully

served.

31 July 2003: *Law 27/2003*, regulating protection orders for victims of domestic violence.

23 December 2003: *Law 19/2003*, amending *Organic Law 6/1985 on the Judiciary*.

28 December 2004: *Law 1/2004*, on measures for comprehensive protection in cases of domestic violence

28 December 2004: *Organic Law on the Judiciary 6/1985*, as amended by *Organic Law 19/2003* of 23 December 2003 and *Organic Law 2/2004* of 28 December 2004.

1 July 2005: Law 13/2005, amending the Civil Code with regard to the right of homosexuals to marry.