

TEMA 7

THE LEGAL JUDGE. THE RIGHT TO THE ORDINARY JUDGE PREDETERMINED BY LAW.

Traditionally, the Meaning of the “legal judge” has been understood as the natural judge, that means the judge that are allocated at the place where the offence has been committed in criminal cases or the judge allocated near the place where the defendant live (domicilio). But “legal judge” also means the ordinary judge predetermined by law, that is, by the rules that establishes the venue (territorial location in which a litigation should be conducted). That is the reason why we understand that that right is violated when a court is created ad hoc, that means after the offence has been committed and created specially to judge that specific case.

Case assignment is the core-business of court organisations, because it touches upon some of the essential aspects of rendering justice: judicial independence and impartiality, organisational flexibility and efficiency. Organising case assignment properly is a necessary, but in itself insufficient precondition for public trust in the absence of bias in the courts, and it is also essential for a timely delivery of justice. The actual organisation has to make certain that cases are not allocated to judges who have, or appear to have, an interest in a case, or who may appear prejudiced otherwise; if a wrongful allocation happens accidentally, the court organisation must have a way to reallocate a case to another judge. This illustrates that case assignment practices touch upon both essential principles of adjudication and the practicability of everyday work in

the courts. Would courts not organize case allocation properly, the general public could maintain the vision that judges are not impartial, inclined to favour parties they have a personal interest with or even may be bribed. Media exposure on judicial impartiality in the courts may have far reaching consequences for public trust. If the general public is of opinion that judges are not integer, it will be likely to hold the judiciary in low regard, and may not accept the authority of judgments. It therefore is essential that case allocation processes are well organized and transparent. Furthermore, under the rule of law, parties should have the possibility to disqualify a judge, as an external check on the case allocation process. Nonetheless, there may be different ways of organizing case allocation processes within these normative margins.

In Spain, the classic meaning of the Legal Judge still applies, however having in mind that our Constitution is the first source of Law (art. 24.2 “all have the right to the ordinary judge predetermined by law”), and it has to be enforced by all public powers, that right is violated when their fundamental features are not followed or applied:

1. Organic Law.

An **Organic Law** is, under the present Spanish Constitution, a law that must be passed by an absolute majority of the Parliament (not merely a majority of those voting). The Spanish Constitution specifies that some areas of law should be regulated by this procedure, such as the Laws of Development of Fundamental Rights and Freedoms contained in the first section of Chapter Two of Title I of the Constitution. Organic laws

are at the same level as ordinary Laws. The difference between the two is in the more restrictive process for creating organic laws and in the matters that they regulate.

So from the formal point of view, the ordinary judge predetermined by law means that it should be a court expressly established by an Organic Law passed by Parliament.

So that means that the Judicial Power Organic Law is, by application of article 122.1 Spanish Constitution, a law that belongs to constitutional law, that is, in the future is not possible to pass a law that determines the creation of Courts with a procedure different from the absolute majority of votes from Parliament, as an Organic Law demands.

2. The Legal Judge predetermined by Constitution has to be integrated in the so called Judicial Power.

And this is because the Judge must be ordinary, which means, that belongs to the ordinary jurisdiction (Judicial Power). With the sole exception of consuetudinary courts as the Council of Good Men of Murcia's Watered Land and the Tribunal of Waters of Valencia's Watered Land (article 125 Spanish Constitution) ; and the military jurisdiction.

3. Independent:

As article 117 Spanish Constitution states: judges and magistrates members of the Judicial Power shall be independent, shall have fixity of tenure, (inamovibles) shall be accountable for their acts (responsables) and subject only to the rule of law (sometidos únicamente al imperio de la Ley). And this is the legitimacy of their Jurisdiction.

4. The Rule of Law. (sumisión al derecho)

Judges are subject only to the rule of law. That means that Judges must avoid subjective thoughts or personal opinions in their judicial functions. The Judges are not allowed to do political functions through their judgments. And that do not mean that they must not have political opinions, but when they are doing their job as Judges, when solving a conflict whiting the process, they cannot have in mind other thing but the enforcement of law, that is, the rule of law.

Only an independent Judiciary is able to render justice impartially on the basis of law, thereby also protecting the human rights and fundamental freedoms of the individual. For this essential task to be fulfilled efficiently, the public must have full confidence in the ability of the Judiciary to carry out its functions in this independent and impartial manner. Whenever this confidence begins to be eroded, neither the Judiciary as an institution nor individual judges will be able fully to perform this important task, or at least will not easily be seen to do so.

Consequently, the principle of independence of judges was not invented for the personal benefit of the judges themselves, but was created to protect human beings against abuses of power. It follows that judges cannot act arbitrarily in any way by deciding cases according to their own personal preferences, but that their duty is and remains to apply the law. In the field of protecting the individual, this also means that judges have a responsibility to apply, whenever relevant, domestic and international human rights law. (See in Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers).

5. The Legal Judge and the judicial competence:

The ordinary Judge predetermined by law is also the Judge that has objective, functional and territorial competence, and the judicial competence rules are of a constitutional nature.

In order to violate the right to the ordinary judge predetermined by law, is necessary that the violation of the rule that establishes the judicial competence implies a violation of constitutional rights, specially the judicial independence. For instance, if we manipulate the rules that establishes for the judges their functional competence, as the rules that establishes the delivery or the distribution of cases among the Judges, or about the constitution of the panel of judges as a court, in order to achieve that a specific court or judge is the one who will resolve and judge the matter because we know that he/she will resolve in a specific way, we will have violated the right to the ordinary and predetermined judge by law.

Likewise, that right is violated when the composition of the panel of judges has been manipulated. For instance, allowing improperly or contrary to the rule that an alternate judge form part of the panel of judges. As Constitutional Court have said, the ordinary judge predetermined by law, demand that the court composition should be also predetermined by law, and in any specific case the established procedure for the designation of the members of the panel should be follow. This is another way to guarantee the right to be judge by an independent and impartial judge/court.

In contrast, are allowed:

- A. When the conditions of Access are predetermined by law, some non-professional Judges called substitute judges (jueces sustitutos), temporary judges (jueces de provision temporal) and alternate judges (magistrados suplentes) can form part of the panel of judges (A court is formed by a panel of at least three judges, imagine that one of them is sick or on maternity leave and no other professional judge can substitute the one sick)
- B. The creation of the National High Court (Audiencia Nacional). However its jurisdiction and competence is predetermined by art. 62 LOPJ, it has been a matter of concern for some legal theorist duo to several reasons: a) This Court was originally created by a pre-constitutional statute in 1977 and it was not an organic Law. If we remind what we said about the nature of the law and the voting conditions in Parliament for passing that law, we easily concluded that one of the conditions above mentioned are not meet. In that sense, however, its creation was validated by LOPJ, and the Constitutional Court held that it was no doubt about the constitutionality of that Court. B) other concerns was in relation to the special issues that are tried only in that Court, as for example, terrorism, crimes against the King and money laundering, racketeering and criminal association (a pattern of illegal activity (as extortion and murder) that is carried out in furtherance of an enterprise (as a criminal syndicate) which is owned or controlled by those engaged in such activity)

That special competence, except in the case of terrorism, has been criticized by Professor Asencio in the sense that the Law has other ways to try those crimes. For

instance, for money laundering there is no Judge in the National High Court specialized in those crimes, so why are those crimes tried only in that court? The Procedural Law has mechanisms as something called “conexion” that are the right one to determine the competence of the ordinary courts. However, as before, the Constitutional Court held that is not an unconstitutional question.

THE PROHIBITION OF EXCEPTIONAL COURTS (Disallowing aspect)

There is a disallowing aspect of the right to legal judge predetermined by law, and this aspect is expressed as the prohibition of exceptional courts, also called ad hoc courts. Those courts are understood as courts which creation was done after the commission of the crime or to judge a specific case (think of Nuremberg Court. Now we have an International Criminal Court), but also those courts which have been manipulated in their composition as we have seen before.

Professor Asencio still have concerns about the competence of National High Court as to the right to legal judge predetermined by law, and except in the cases of terrorism, he understand that the competence on other issues violates that constitutional right, in the sense that, if that right makes reference to the right to natural judge, (that is the nearest judge from the place the crime has been committed --locus delicti rule), and for some crimes, there are several courts nearer to the place of commission than the National Court (which is placed in Madrid, and for all the national territory). The locus delicti rule has not exceptions but the one that refers to National High court and Professor Asencio believes that except in terrorism cases, because is a guarantee of independence and impartiality, no other exception is applicable.

The Constitutional Court, however, as mentioned before is on the different opinion, and in relation to this question, held in their Judgment 56/1990 of 30th of March that:

1. The right to the Legal Judge does not exclude the possibility to establish special rules of competence among the several courts in Spain.
2. The National High Court is not contrary to article 152.1 CE because the power to try some special cases (matters) in that Court has been conferring by the LOPJ with exclusion of the rest of courts in Spain.