

Is the rule of law under threat? Lessons from Spain, the UK and Brazil

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*The rule of law is generally taken as a fundamental component of a healthy democracy. But as **Javier García Oliva** and **Rafael Valim** write, several countries across the world have recently seen the role of their judiciary compromised or called into question. They consider three illustrative examples: Spain and Catalonia, the UK's parliamentary privilege, and corruption trials in Brazil.*



Brazilian President-elect Jair Bolsonaro and his predecessor, Michel Temer,
Credit: Alan Santos/PR (CC BY-NC-SA 2.0)

The rule of law is one of the first concepts encountered by undergraduates and is fundamental to the values and functioning of any liberal democratic state. Yet we only tend to notice it in our daily lives when it becomes dysfunctional in some way. Just as many of us think nothing of being able to turn on a tap and have instant access to fresh and clean water, we can equally take for granted the existence of an impartial judiciary, who are permitted to exercise their functions without interference. Unfortunately, for a lot of the world's population, both of these benefits are the stuff of dreams rather than reality, and it is vital that those of us who are in possession of such advantages appreciate and safeguard them.

Over the last few months, a number of jurisdictions have seen the role of their judiciary either compromised or called into question. Given that judges, more than any other constitutional actors, are the guardians of the rule of law, the implications of this reality could not be more serious. This blog considers three different contexts and asks whether the danger of sleep-walking into a situation in which citizens lose faith in courts and judges may be more real than we would like to imagine.

Spain and Catalonia

We begin with Spain, a country with recent memories of its transition to democracy, and a corresponding consciousness of what is at stake. Nevertheless, over the past few years some figures in regional governments have been prepared to put the role of the judiciary in jeopardy, as I have discussed in [previous EUROPP blogs](#). When pro-independence politicians in Catalonia tried to organise a referendum in a way which violated protections afforded to all citizens by the [Constitution](#), they did so knowingly flouting two rulings of the [Constitutional Court](#). The judges twice affirmed that whilst debate on reform was, of course, perfectly legitimate, it must be carried out in ways which were in compliance with the highest law of the land.

To make matters even worse, the pro-independence alliance, then led by Carles Puigdemont, had struggled to get the Catalan Parliament to endorse its plan for an illegal vote. Enabling legislation was finally passed, but only after an 11 hour debate during which [52 opposition members walked out of the Chamber in protest](#), accusing Puigdemont and his allies of abuse of process and manipulation of deadlines. Given that regional politicians sought to place themselves above judicial restraint and control, and were accused of denying their opponents an effective voice in the regional assembly, Madrid had no choice but to act. If such behaviour was allowed to go unchecked, the rule of law in Catalonia would have effectively crumbled altogether.

There was no viable option other than to require those behind the illegal vote to face criminal charges. Some, like Oriol Junqueras, the then Deputy President, honourably remained in Spain to do so, even though it meant going to prison. In contrast, Puigdemont opted to flee the jurisdiction, leaving the acrimonious aftermath to play out.

Debate still continues in Spain over the prison sentences being faced by the Catalan politicians and officials, with [threats from their parties in the national parliament to withdraw support](#) for the current Prime Minister's government if he does not intervene on their behalf. Prime Minister Pedro Sanchez has commendably been resolute in refusing to interfere in the business of the courts, indicating that he lacks both the power and the will to subvert due process, and [is not prepared to be blackmailed](#). We would suggest that this stance is necessary if the rule of law is to survive unscathed.

In the cold light of day, the Catalan politicians involved chose to substitute their personal idea of what was right and justified, with what their Constitutional Court had declared lawful. Misappropriating public funds is necessarily a serious offence, whether the motivation is to fund an illegal referendum or buy a holiday home in the

Bahamas. The separation of powers and the rule of law are both doomed, toothless doctrines, if politicians are allowed with impunity to replace the rulings of judges with what they subjectively deem to be a good idea.

In essence, if politicians only have to obey the law if they deem it expedient, or “as a matter of grace and favour”, as the British judge Lord Templeman once phrased it, then there is no buttress left against tyranny by the executive. In that scenario, governments can do whatever they like, and comments from judges are merely polite suggestions. That is a chilling prospect, and the alarming truth is that it is very easy for individual politicians to travel in this direction, whilst arguing (and perhaps believing) themselves to be defenders of the people.

Parliamentary privilege in the UK

The United Kingdom provides a recent illustration of the above problem. The Telegraph newspaper had been investigating allegations made by former employees of the businessman Sir Philip Green, who accused him of sexist and racist harassment. Green vehemently denied these allegations, and successfully obtained an injunction to prevent the newspaper from publishing the story. A Labour peer, Lord Hain, named Green as the accused party in the House of Lords, relying on so called ‘parliamentary privilege’ to shield him from legal repercussions. This doctrine allows members of the UK’s parliament to speak freely in debates without risk of reprisals in the form of litigation or prosecution.

Whilst his stated justification for the disclosure was a commitment to protecting citizens on the street from abuse by the rich and powerful, it is striking that he was not so devoted to this cause that he was prepared to spill the beans in a context where he wasn’t personally insulated from the consequences. Despite the obvious differences, like Puigdemont, he deemed that his personal opinion about what was right and good for society was superior to the determination of a court.

Unsurprisingly, Hain’s behaviour has drawn criticism from judges, lawyers and academics in the field, including many of those associated with the prestigious think-tank the Bingham Centre for the Rule of Law.

If everyone were to do this, then the rule of law would effectively collapse. We would find ourselves either in some form of dictatorship, or the brutish and savage state of nature described by Hobbes. Presumably, were either Puigdemont or Hain to be burgled, they would want the police to come to their aid and the courts to prosecute the offender. Would they expect those people responsible to be allowed to walk free, if they considered themselves a real-life Robin Hood, and were planning to redistribute the appropriated property to individuals in greater need? If you only consider that citizens should be bound to obey legal rules when you agree with them, then surely that would be a reasonable conclusion.

There are, of course, certain extreme situations when most people would hope that they would take a stand and disobey the law. For instance, if we found ourselves living in a state where the legislature passed a statute outlawing homosexual relationships, or demanding the deportation of citizens from a particular race, most

of us would like to believe that we would have the courage to resist. However, such resistance would be challenging, not merely that concrete enactment, but the entire constitutional system which had allowed and produced it. Furthermore, there is a profound and crucial difference between protesting an act of the executive or legislature as a citizen and rejecting the finding of a neutral judiciary in a liberal democracy, when you yourself are acting as a member of the government or parliament.

Brazil's corruption purge

Ultimately, individuals, whether politicians or the average citizen on the street, must be able to trust in due legal process and those entitled to administer it, and developments in Brazil over the last few months raise a different kind of spectre about judges and the rule of law. In short, a number of progressive political leaders found themselves facing criminal proceedings for corruption, to the consternation of their supporters, who regarded prosecutors and judges as having cynically hijacked the process for political ends.

The figure of Lula da Silva was particularly prominent in these events, and ultimately the saga resulted in the forced departure from office of President Dilma Rousseff. This in turn enabled the extreme right to present themselves as a source of hope for reform and renewal. The President-elect, Jair Bolsonaro, has a reputation as an apologist for torture, racism, misogyny, and other values and practices incompatible with the rule of law.

Meanwhile, many of those on the left of the Brazilian political spectrum believe that the judges involved in the corruption purge abandoned any pretext of applying the law in a neutral manner and instead tasked themselves with determining who was fit to represent the people of Brazil. So, in contrast to the Spanish and UK contexts, where political figures usurped and undermined the role of the judiciary, here the judiciary are accused of having sought to exercise *political* power.

Both sets of concerns are equally damaging. Like Caesar's wife, judges must be above suspicion, and equally, they must be permitted to carry out their role without meddling from other constitutional players. Politicians must respect the decisions of the courts or the whole democratic project is endangered, but it is impossible to hope for such respect unless both judges and courts are neutral and seen to be neutral.

However tempting individuals might find it to do what they believe to be expedient in the short term, the cost of transgressing constitutional boundaries is far too high. Both governments and courts are the guardians of the rule of law, but as Juvenal highlighted in ancient Rome, we need to ask ourselves a key question: "*Quis custodiet ipsos custodes?*" (Who guards the guardians themselves?) A compelling answer is that we all have a role in both lifting our voices, and holding those in power, judicial or political, to proper account.

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Note: This article gives the views of the author, not the position of EUROPP – European Politics and Policy or the London School of Economics.

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