

**POPULATION CRITERIA AND BUDGETARY DETERRENT: DETERMINING FACTORS IN THE QUALITY OF THE SPANISH CRIMINAL JUSTICE SYSTEM  
THE PROBLEM IN SPANISH PENAL DISTRICT COURTS<sup>1</sup>**

**CRITÉRIOS POPULACIONAIS E IMPEDIMENTOS ORÇAMENTÁRIOS: FATORES DETERMINANTES NA QUALIDADE DO SISTEMA DE JUSTIÇA PENAL ESPANHOL  
O PROBLEMA NOS TRIBUNAIS DISTRITAIS PENAISS ESPANHÓIS**

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**Submissão: 16/08/2020 / Aceito: 08/10/2020 / Publicado: 20/04/2021**

**Abstract**

What is the quality of justice? As Melcarne and Ramello (2019)<sup>3</sup> have recently pointed out, there is no clear interaction between quality and quantity in understanding or measuring judicial performance. However, the lack of human resources is often blamed for delays in the delivery of decisions (quantity) in most judicial systems - and could in fact mean a violation of the principle of due process. However, the study shows how difficult it is to assess quality, since even quantity (in fact calculable) cannot always be a trustful variable to measure it. In Spain, it is possible to assume that penal judges work more or less the same. Yet, not all judgments have the same quality. The problem is in the District Courts (some of insufficient size) with provincial criminal jurisdiction. They constantly run the risk - and do so - of breaching the principle of judicial impartiality. This does not happen in the Spanish Supreme Court or in the large District Courts. It is a problem in the judicial performance of justice and in the Administration of Justice. Yet, there are no budgetary or even regulatory stimuli to resolve this situation. A situation that implies a breach of the principles of due process and therefore of the fundamental rights of the accused.

**Keywords:** Budgetary deterrent. “Cases distribution rules”. (Provincial) District Courts. Economic deterrents.

**Resumo**

Qual é a qualidade da justiça? Como Melcarne e Ramello (2019) apontaram recentemente, não há uma interação clara entre qualidade e quantidade no entendimento ou medição do desempenho judicial. No entanto, a falta de recursos humanos é frequentemente responsável por atrasos na

<sup>1</sup> This paper was submitted and presented at the 6<sup>th</sup> *Economic Analysis of Litigation Workshop*, June 24-25, 2019, Granada (Spain), under the former title: “Impartiality in Spanish Penal Courts. From Serrano Algar v. Spain to a great economic problem in the Spanish administration of justice and its quality of justice”.

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<sup>3</sup> Melcarne, Alessandro; Ramello Giovanni and Spruck, Rok (2019): “Quality v. Quantity: understanding the interplay between different dimensions of judicial performance”; paper presented at the 6<sup>th</sup> *Economics Analysis of Litigation Workshop*, 24-25 June 2019, Granada (Spain).

DOI: <https://doi.org/10.46699/rduno.v3i4.5765> | Edição Vol. 3, Núm. 4, 2020.



entrega das decisões (quantidade) na maioria dos sistemas judiciais - e pode, de fato, significar uma violação do princípio do devido processo. No entanto, o estudo mostra como é difícil avaliar a qualidade, uma vez que mesmo a quantidade (de fato calculável) nem sempre pode ser uma variável confiável para medi-la. Na Espanha, é possível presumir que os juízes penais trabalham mais ou menos da mesma forma. No entanto, nem todos os julgamentos têm a mesma qualidade. O problema está nos Tribunais Distritais (alguns de tamanho insuficiente) com jurisdição criminal provincial. Correm constantemente o risco - e o fazem - de violar o princípio da imparcialidade judicial. Isso não acontece no Supremo Tribunal espanhol ou nos grandes tribunais distritais. É um problema no desempenho judicial da justiça e na administração da justiça. Ainda assim, não há estímulos orçamentários ou mesmo regulatórios para resolver essa situação. Situação que implica violação dos princípios do devido processo e, portanto, dos direitos fundamentais do arguido.

**Palavras-chave:** Impedimento orçamental. “Regras de distribuição de casos”. Tribunais distritais (provinciais). Impedimentos econômicos.

## INTRODUÇÃO

Most of the time, faster than the administration of justice, the principles of its performance have changed. These principles have been adopted and applied within the framework of the rule of law as pillars of the quality of justice. In fact, they are implemented as fundamental rights of due process. This has been the case of the principle of impartiality. We are addressing a fundamental right that establish the right to an impartial judge and of course the right to be treated equally under the rule of law. Under article 6, the European Court of Human Rights (ECtHR) has condemned many cases similar to those presented in this document, against many countries, for violating the principle of impartiality in their judicial performance. From *Piersack v. Belgium*, October 1<sup>st</sup>, 1982 to *Blesa Rodríguez v. Spain* December 1<sup>st</sup>, 2015 or *Pereira da Silva v. Portugal*, Mars 22<sup>nd</sup>, 2016 the ECHR has reflected –and ruled- over the principle of impartiality, and especially, developing the idea of natural justice “no-one is judge in his own cause”. Naturally, this principle has evolved considerably in our justice systems. Rules or legislation and especially case law have been more and more precise and strict with its meaning and requirements. What it has not changed is the responsible to implement it: the Administration of Justice. Nor have the means to do so: the Government Budget for the Administration of Justice.

The distribution map of the Spanish District Courts throughout the territory has two main determining factors: i. Regional distribution by provinces, which has experienced only slight changes dates form 1833, and still has relevance in the Spanish Constitution and in the distribution of Spanish District Courts (Provincial Jurisdiction). ii. The population, with the ratio of judges to 1,000 inhabitants being the objective criterion for determining the provision of “sits” for judges adopted by the Administration of Justice. Alongside these traditional and static (albeit objective)

DOI: <https://doi.org/10.46699/rduno.v3i4.5765> | Edição Vol. 3, Núm. 4, 2020.



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criteria, the Administration - or the "rules of distribution of cases" of the Tribunals - must adapt to two dimensions of the principle:

i. Subjective impartiality test. This dimension through the rules of abstention and challenge aims to ensure that there is no relationship between the parties and the facts of the case. This relationship, possibly based on many different circumstances, focuses on the Judge as an individual. The relationship to the case or parties is personal, due to the specific circumstances of the particular individual (Judge). The European Court of Human Rights has ruled only once in favour of the applicant on the basis of this criterion of assessment of the breach of impartiality (Werner v. Poland, 15th November, 2001). The cornerstone of this test is the following assumption: "As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (see, among other authorities, the Padovani v. Italy judgment of 26 February 1993)". (Hauschildt v. Denmark, May 24th, 1989).

ii. Objective impartiality test. In this test, the viewpoint moves away from the personal circumstances of the Judge (or the Tribunal) to focus on some "functional incompatibility" that could lead to a conflict of interest with the parties or the case. Contrary to the previous test, "it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see, mutatis mutandis, the De Cubber judgment previously cited, Series A no. 86, p. 14, para. 26)". (Hauschildt v. Denmark, May 24th, 1989. But is a tagline, see also as an example Maurice v. France, April 23<sup>rd</sup>, 2015 seventeen years later).

This way of understanding the principle of impartiality is mainly due to the ECHR jurisprudence, and quite slower, gradually, the Spanish Constitutional Court and the Spanish Supreme Court have endorsed it too. Nevertheless, through certain areas of interpretation, the three Courts decisions still show that there is an undesirable scope for uncertainty. It is the main problem of this jurisprudence. There is an absolute rule of conduct for examining this issue when there has been prior contact with the case by one of the Judges appointed for trial: "That kind of situation may give rise to misgivings on the part of the accused as to the impartiality of the judges" (ECHR, Castillo Algar v. Spain, October, 28<sup>th</sup>1998), "misgivings which are understandable, but which nevertheless cannot necessarily be treated as objectively justified. Whether they should be

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so treated depends on the circumstances of each particular case” (again *Hauschildt v. Denmark*, May 24<sup>th</sup>, 1989). Uncertainty is served. We will explain this issue in more detail as we develop our case.

How has the Administration of Justice adapted to this test?

For the first dimension, the answer is easy. It is a natural principle and common understanding that a Judge should not have personal interest on the case for any reason. The rules of challenge and abstention have been in the procedural codes for more than a century.

Quite differently has developed the second dimension. The notions of "appearances", "suspicions", "objectively justified" are "nebulous" concepts that end up in mere (but relevant to fundamental rights) administrative problems. Many Spanish small penal District Courts (and many other European courts) slacklining on daily basis in between a void only to be filled by court interpretation. Previous contact with the case by any member of the Trial Court, especially during the pre-trial phase, “may give rise to misgivings on the part of the accused as to the impartiality of the judges” (ECHR, *Castillo Algar v. Spain*, October, 28<sup>th</sup>, 1998). Still, “it is true that the mere fact that a judge had already taken pre-trial decisions cannot by itself be regarded as justifying concerns about his or her impartiality. What matters is the scope and nature of the measures taken by the judge before the trial” (*Werner v. Poland* 15<sup>th</sup> November, 2001).

To “ropewalking” safely through this situation, Courts themselves, led by the 2011 Supreme Court Decision (Recusal Incident 1/2011, June 20) have established “case distribution rules” so that the judges called upon to serve on the Trial Chamber have had no prior contact with the case. We will see the significance of this decision, nowadays of a strong political importance, as we will see. Nevertheless, Spanish small District Courts with a “unique” penal Section necessary face this situation everyday: as every District Court, they are the appeal chamber – compulsorily constituted by three Judges- for the previous decisions of the Investigating Judge (pre-trial or investigation phase). Later, they are the Trial Chamber –also compulsorily constituted by three Judges- for offences over 5 years of imprisonment; and they are the appeal Chamber for Sentences of the Penal Courts (they have the jurisdiction to try offences punishable by less than five years' imprisonment). Nonetheless, again a Trial Chamber and the last ordinary remedy (appeal) for this offences<sup>4</sup>.

They simply cannot apply any “distribution rules” to hand the cases to penal sections that do not have any previous contact (mainly through appeals) with the case. There are, of course,

<sup>4</sup> Rules of Jurisdiction of District Courts are found in article 82.1 of the *Judiciary Act*.



possibilities for substitution (replacement) of such “contaminated” judges: there are rules of challenge and abstention on the subject and detailed rules for replacement (“substitution rules”) of judges when ruling in favor of the applicant. However, we will try to point out how the quality of Justice decreases and the great difficulty of achieving the application - and of applying - the “substitution rules”.

Since *Castillo Algar v. Spain* (October 28<sup>th</sup>, 1998) the Spanish Administration of Justice over the last twenty years has done nothing to change this situation. As we will show, it is true: there are not economic incentives to do so. Nevertheless, this situation can change if lawyers start to do their job properly regarding this matter. In addition, as equally important, Judges should put an end to the blur line of interpretation and endorsed objective criteria by assessing as a breach of impartiality every time the Trial Courts have had ruled over previous appeals on the case. This is not a question of analysing the facts of the case, but only the nature of the remedies. The light should not be on the facts of the case, neither on the wording of the judgement, but only on the nature of those appeals. We will see later how important is to remark this question.

As we will demonstrate in our case law, there is an appeal on every criminal proceeding of a very special nature: the appeal against “order charging applicant” (or “the order to indict the plaintiff”). The order issued by the Investigating Judge ends the pre-trial phase and identifies the facts of the case as a possible criminal offense. Here is where our research focuses on, our impartiality problem. It is the appeal on this order “a circumstance judges sitting in it had previously sat in the chamber that had upheld the order charging applicant” the “kind of situation may give rise to misgivings on the part of the accused as to the impartiality of the judges” (*Castillo Algar v. Spain*; October 28<sup>th</sup>, 1998). The small criminal District Courts in Spain are in charge of these appeals and their members subsequently form part of the Trial Chamber in the same case - in fact, they are “the sitting judges” of the single criminal section of the Chamber/Tribunal.

## **THE “MAGNITUDE” OF THE PROBLEM. THE SPANISH PENAL DISTRICT COURTS DISTRIBUTION**

With the data provided by the Spanish Magistrates Council, we can see that there is a fairly similar proportion of Judges per 100,000 inhabitants throughout the country<sup>5</sup>

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<sup>5</sup> Source: “La justicia dato a dato”, Consejo General del Poder Judicial, 2018.



Andalucía	11,4
Aragón	11,4
Asturias, Principado de	15,1
Balears, Illes	12,3
Canarias	12,8
Cantabria	13,6
Castilla y León	12,9
Castilla - La Mancha	10,0
Cataluña	10,8
Comunitat Valenciana	11,4
Extremadura	11,0
Galicia	13,0
Madrid, Comunidad de	11,3
Murcia, Región de	10,8
Navarra, Comunidad Foral de	10,7
País Vasco	10,7
Rioja, La	12,0
<b>SPAIN</b>	<b>11,9</b>

In fact, it is the criterion used by the Council to appoint judges and create new posts. The “Law 38/1988, of 28 December, on Judicial Measures and Distribution of Judicial Bodies”, includes this criterion as purely objective, incorporating possible corrections to deal with workloads in particular circumstances. There is one determining idea: Judges should have more or less the same workload. Densely populated district courts cover less territory, and vice versa. The system has been working under this design for decades.

This situation is even identical if we take into account the Courts of our later Case Law. For instance, if we take into account only the Criminal Judges of the District Court (provincial jurisdiction) and comparing Extremadura and Vigo (our jurisprudence) with Madrid (the largest District Court in Spain), the proportion of Judges per 100,000 inhabitants is 1.02 in Extremadura, 1.35 in Vigo and 1.15 in Madrid<sup>6</sup>. There is no significant difference. Even, not having the litigation rate on different Courts and territories, but taking a look at crime statistics, we can also presume some facts. In Extremadura, the crime rate is 25.1 crimes of more than 1000 inhabitants; 29.1 in Galicia (where the District Court of Vigo is located); and 59.2 in Madrid. With these data, it would not be too risky to say that the judges of the District Courts of Madrid work a little more, as they deal with more cases.

<sup>6</sup> The exact number of Penal Judges in District Courts: Consejo General del Poder Judicial, “Situación de la demarcación y planta judicial a 1 de enero de 2019”. Population Source: National Institute of Statistics, (INE). [https://www.ine.es/ss/Satellite?L=es\\_ES&c=Page&cid=1254735905566&p=1254735905566&pagename=INE%2FINELayout](https://www.ine.es/ss/Satellite?L=es_ES&c=Page&cid=1254735905566&p=1254735905566&pagename=INE%2FINELayout)



The correlation between crime rates is the only one that could work to measure possible differences in workload in District Courts. However, the data provided on crime rates refer to the Autonomous Communities (Spanish autonomous regions) and not to the provincial ones. As we said before, the distribution of District Courts owes much more to a nineteenth century providence division. Thus, small District Courts are in all Autonomous Communities. As can be seen in table 1 below, - the first number is the homicide rate, the second includes serious and minor crimes -, the crime rate in Spain, with few exceptions -outside of our case as it actually occurs in the large District Courts- is quite homogeneous<sup>7</sup>.

<b>Total</b>	0,62	45,6
<b>Andalucía</b>	0,86	39,8
<b>Aragón</b>	0,68	30,7
<b>Asturias, Principado de</b>	0,68	25,8
<b>Balears, Illes</b>	0,68	62,7
<b>Canarias</b>	1,14	41,4
<b>Cantabria</b>	0,34	30,4
<b>Castilla y León</b>	0,46	31,1
<b>Castilla - La Mancha</b>	0,39	33,6
<b>Cataluña</b>	0,60	62,7
<b>Comunitat Valenciana</b>	0,51	46,8
<b>Extremadura</b>	0,37	25,1
<b>Galicia</b>	0,30	29,1
<b>Madrid, Comunidad de</b>	0,55	59,2
<b>Murcia, Región de</b>	0,74	37,5
<b>Navarra, Comunidad Foral de</b>	1,70	42,2
<b>País Vasco</b>	0,28	41,5
<b>Rioja, La</b>	0,32	26,5
<b>Ceuta</b>	1,18	55,6
<b>Melilla</b>	0,00	64,8

There is also the exception of Melilla. With the highest crime rate in Spain, this city is also one of the smallest District Courts, with only three magistrates appointed in one of the criminal sections of the Court. It can then be deduced that Madrid, or Melilla, work a little harder compared to other District Courts, those of Cantabria for example, with a comparatively high ratio of judges per inhabitant and a crime rate significantly below the national average. They deal with more cases

<sup>7</sup> Source: National Institute of Statistics, (INE).



but still, the correlation is irrelevant. Most District Courts have jurisdiction over about the same number of citizens with very similar crime rates.

### **The small District Courts. The hostage of the problem**

There are 60 penal District Courts in Spain with provincial jurisdiction. The biggest one is Madrid, with 15 penal Sections and 75 penal Judges appointed. The smallest are the ones with not even one penal Section but a mix-Section for Penal and Civil matters. In this situation, we find the District Courts of Cuenca (4), Guadalajara (4), Huesca (4), Palencia (5), Salamanca (5), Segovia (3), Soria (3), Teruel (3). Ávila (3), Zamora (4), Santiago de Compostela (5), La Rioja (5), Ceuta (3), Algeciras (5), Jerez de la Frontera (3), Melilla (3) (the number next to the name of the region refers to the number of Judges appointed to this Section). Total of sixteen District Courts.

The next District Courts by size are the ones with only one penal Section. In this situation are the District Courts of Albacete (3), Álava (4), Elche (7), Badajoz (4), Burgos (5), Cáceres (4), Mérida (5), Cartagena, León (5), Lugo (4), Ourense (4), Vigo (4), Gijón (3), Lleida (4). Total of 13.

The rest have two or more penal Sections. This is to say, they are able to apply the “cases distribution rules”. Although, they also failed to do so sometimes.

The 29 of the 60 criminal district courts with mixed sections or one criminal section have 118 appointed judges. This means 22% of the total number of Criminal Judges assigned to the District Courts. Now, considering again the homogeneous distribution of Judges per inhabitant, and the no less homogeneous crime rate throughout the country, (even considering the exception of Madrid, Barcelona or Valencia - as densely populated regions and therefore with larger District Courts and higher crime rates -) we can presume that these District Courts and Judges assumed no less than 20% of the workload (cases). We will provide an approximate number of cases to show that it means a lot of work, a lot of cases, a lot of personal situations.

### **CASE LAW: A PARADIGMATIC EXAMPLE OF THE PROBLEM. PRINCIPLE OF IMPARTIALITY AND JUDICIAL PERFORMANCE**

The following two sections present two different cases to illustrate the main practical example on which this document focuses: a breach/violation of impartiality due to the

DOI: <https://doi.org/10.46699/rduno.v3i4.5765> | Edição Vol. 3, Núm. 4, 2020.



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impossibility of applying the “case distribution rules”. Both, however, represent “correct” judicial performance under the rule of law. However, there are differences in the length of court processes, performance and decisions, and thus in the economic and human cost of decisions. Necessarily, there are also different consequences on the quality of justice and judicial performance in both decisions. The cases are significant because they show the only two options when justice works properly in a case in these circumstances. Circumstances of human resources and distribution of Sections and Judges, nothing more. However, there are consequences for the quality of justice. Economic, moral and political. The only other option is to hand down a judgement that breaches the principle of impartiality and therefore a fundamental right of the accused and to allow the decision to be *res judicata*.

### Case 26/2018 Penal District Court of Cáceres

The first fact to remember is that at the District Court of Cáceres, as in many other (small) towns there is only one penal chamber (court) to deal with all penal cases, both as an appeal chamber and as a “trial” court. This Chamber has four Judges appointed –Panel has to be formed by three judges for every decision<sup>8</sup>.

#### *Procedural facts. The reality in small district courts*

The facts of the case (in which I had to play the role of defence counsel at first and then act as legal counsel to one of the accused parties) are as follows:

1. The Court of Instruction number 6 of the city of Cáceres, following a private criminal complaint, initiates the investigation of a case of economic fraud between individuals in the marketing of real estate linked to an illegal mortgage on the property. After the private accusation and other accused parties depositions, on 15th April, 2015, my client, Mr X, is charged with some criminal responsibility on the facts by the Investigating Judge (IC number 6).

2. The same Investigating Court Number 6 after Mr. X's statement, by judicial decision, establishes an order of “dismissal of the criminal proceedings” in favour of Mr. X. This decision is of course appealed by the private accusation; the sole Criminal Chamber of the District Court of Cáceres overturned the decision and ordered the continuation of the investigation into Mr. X's

<sup>8</sup> Source: Consejo General del Poder Judicial, “*Situación de la demarcación y planta judicial a 1 de enero de 2019*”.



criminal responsibility. A few words about Mr. X's participation in the facts are included in the present decision.

3. Without further investigation or action taken, and after the decision of the District Criminal Court, the Pre-Trial Judge issues the final “charging order” against all accused, including Mr. X. All defendants appealed this decision, but the same Chamber (or again, the same three Judges who make up the Chamber) confirms it in all of them, including again Mr. X (September 27, 2017).

4. Once the trial date had been set and the members of the Court in charge of the Trial had been appointed, -without surprise the same three Magistrates-, the legal deadline for filing a challenge incident expired. However, Mr. X, by an informal statement given three days before the trial, persuades the Court to take into account the above facts and precisely how this might influence his impartiality. The main argument in the informal declaration of Mr. X.'s legal representation is nothing more, and nothing less, than a consideration of the facts presented and the possibility of not passing the “objective test of impartiality” in accordance with the jurisprudence of the Supreme Court and the ECHR.

5. The three Magistrates decided unanimously to abstain from the case (October 1<sup>st</sup>, 2018).

6. The resolution is delivered to the President of the Board of Courts of Cáceres, in whose capacity and in accordance with its competence and “**substitution** rules” -not rules for the distribution of case- an instruction is issued ordering the Magistrates of the District Court of Cáceres, but attention, of the Civil Chamber, to judge the case.

7. Since problems are usually further complicated if they can, these Magistrates appealed to the Council of the Magistracy the previous order of the President of the Board. The Council rejected the appeal on 14 March 2019. I personally had the opportunity to speak with one of the appointed judges. Based on grounds of **substitution** rules –not distribution rules- of article 199 of Judiciary Act (LOPJ), the appeal made some reflections on specialization of courts and judges only as ancillary argument.

8. In the meantime, Mr. X received a court decision assigning new members to the court and setting a new date for his trial. After noting to the District Court that one of the judges who abstained had been reassigned to the trial, the clerk of the court informed us that this was an error. Those members had been assigned to another case in which a similar problem had arisen.

9. Finally, although rejected by the Judicial Council, the President of the Board agreed to the appeal and three new judges were appointed. The three Magistrates come from: one from the

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District Criminal Court of Badajoz (Extremadura); another from the Administrative District Court of the Supreme Court of Extremadura (Casiano Rojas); and the last one, Carmen Romero Cervero, from the Administrative Court number 2 of the city of Mérida (also in Extremadura).

10. Trial finally was held on September 23<sup>rd</sup>, 2019. Not important, but Mr. X was found not responsible for any criminal offense on October 28<sup>th</sup>, 2019.

*Substantial facts. The rule of law*

The main arguments we put down in our informal “paper”, or *in fine* in a challenge incident, to vindicate the breach of impartiality and thus the breach of the fundamental right of due process where the following:

1. As we have pointed out in fact number 2, when the one Penal Chamber of the District Court reversed the decision (“dismissing criminal proceedings” order) on Mr. X taken by the Penal Court N. 6 (Cáceres), it made some considerations on the penal responsibility of Mr. X. The Decision called the attention of the Investigating Judge on the fact that Mr. X. may have been the factual corporate administrator, which either could carry criminal responsibility and, considering the application of the “piercing the corporate veil” doctrine, could also bare clear civil (economic) responsibility.

Later on, as we have pointed out in fact 3, the same Chamber (or again, the same three Magistrates that formed the Chamber) confirms the final “order charging applicant” taken by the Investigating Judge, including again on Mr. X (September 27<sup>th</sup>, 2017). In the decision, the Chamber measures the legal facts and arguments on the criminal evidence against Mr. X. It also makes some considerations about Mr. X's participation and guilt in a hypothetical fraud crime. The decision expressly mentions the possibility of an unlawful association for profit - a requirement of an economic fraud offence - between the companies that participated in the purchase. The decision stated that there could be "a possible association between corporations with the same private profit motive" by also selling a debt on the property sold - a mortgage. It also expressly refers to the perfect knowledge of this illicit operation that Mr. X. had as a *de facto* corporate administrator. It was unquestionable that Mr. X. was the largest shareholder of the selling companies. For the Chamber there could lay the criminal intention of Mr. X., which is demanded on the economic crime.

2. Our conclusion on these facts brings a simple observation: In fact, the decisions adopted by the Chamber contained explicit considerations on the possible participation and guilt of Mr. X.

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in the facts. Although making the considerations only on a circumstantial level and on probability basis, these Magistrates have certainly examined and forejudge certain facts and circumstances that are the main subject of the future trial.

3. In particular, the actual coincidence of the members of the Chamber who made the previous decisions and the tribunal designated to carry out the trial and sentence were as follows: The President of the Trial Chamber was a member of the first decision of the Chamber (reversing the order of “dismissal of criminal proceedings”), in fact he was the rapporteur. The other two members of the court were also members of the Chamber in the second decision (confirming the final “charging order” made by the Pre-Trial Judge), and one of them was again the rapporteur.

4. After presenting our due respect to the Chamber, we began a brief itinerary through the Spanish and international jurisprudence on the subject, focusing also on the well-known distinction made by the ECHR between subjective and objective impartiality made for the first time in the “Piersack Case” (1982), then remembered in “De Cubber Case” (1984) and “Hauschildt Case” (1989). The first sentence against Spain is “Castillo Algar Case” (1998).

5. In the informal paper, we began with one of the most precise judgments on the subject, in our humble opinion, handed down by the Spanish Supreme Court. The decision introduces an expression in itself more precise than others frequently used by Spanish and international courts: “functional incompatibility”. In common English, I think the expression is simply “conflict of interests”. Which by the way actually reflects the issue quite well. As the Spanish Supreme Court Sentence 703/2016, September 14th (Judge Del Moral, rapporteur) remarks, this expression has less negative charge than “polluted Chamber”, or “undue relation of the judge with the case” or others. Also with this expression, we can approach an objective cause of a breach of impartiality “regardless of the personal capacity and the righteousness of judgment of the judge”, which is out of question. Because, we add, in previous decisions on our case, what the Magistrates really did was do their duty. However, this “conflict of interests” or “functional incompatibility” constitutes precisely a violation of the principle of immediacy - which is impossible to satisfy - (and therefore reflects the principles of *audi alterem partem* and orality), which constitutes a fundamental element of the right to a fair trial (due process). Nevertheless, they are essential elements for building a due judicial impartiality.

6. Within Spanish and international jurisprudence, there has been a clear evolution in the focus of this principle. Considering the procedural circumstances of our case, in which the Trial



Chamber - or one of its members - has already taken part in the case by deciding on appeals during the preliminary investigation phase, we can infer two main assumptions:

A) With almost no exception, the Spanish Supreme Court and the European Court of Human Rights have ruled that there has been a violation of the principle of impartiality when members of the Court of Appeal (District Court) have overturned an earlier order of “dismissal of criminal proceedings” by the Pre-Trial Judge on the former suspect - later, and by that decision, on the accused. In fact, to find the first important precedent of this jurisprudence we have to review not a Judgment but an Order. It is the famous Order on the terrible accident at the Tous dam, in which eight people died and millions in personal and civil losses occurred, in 1993 (Order of 13 February 1993, Judge Cotta Márquez de Prado, rapporteur), followed by the Judgment of 10 November 1993 (Judge Granados, rapporteur). Since then, there has been a considerable number of judgments that have ruled in the same way: Judgment 1783/2005 (Judge Colmenero, rapporteur), St. 883/2012 and 53/2016 (both Judge Sánchez Melgar, rapporteur), 380/2016 (Judge Gímenez García, rapporteur), St. 889/2016 (Judge Conde Pumpido, rapporteur), or St. 897/2016 (Sánchez Melgar, rapporteur). We will see more later.

The Spanish Constitutional Court also endorsed this position in the famous CESID Case. The CESID is the former Spanish Intelligence Service. On that Sentence 39/2004, from March 22<sup>nd</sup>, the Court does mainly two things:

i. It points out how a decision to withdraw a “dismissal order” should review both the facts and the legal arguments supporting it. Furthermore, in fact, by reversing the decision, the Appeals Chamber (District Courts) issues an indictment “ex novo” based on charges and evidence that the Pre-Trial Judge has not considered or has otherwise considered.

ii. The Constitutional Court does, however, elaborate on the wording of judicial decisions taken by members whose impartiality is at stake because they are also part of the Trial Chamber. The Court does not stop at the above formal argument, it also descends to see whether in these judicial decisions the judges “reveal or not an opinion on the criminal responsibility of the accused”.

B) To blur things a little bit more, we need to consider the most common circumstance: when the Court of Appeal simply upholds the “order charging applicant” issued by the Pre-Trial Judge. In those decisions, it seems possible for the Court of Appeal to make a “pure” legal aseptic analysis of the appeal. In the words of the European Court of Human Rights, the appellate court in the present situation must have “the care to state the limits of the order” in which the applicant is

DOI: <https://doi.org/10.46699/rduno.v3i4.5765> | Edição Vol. 3, Núm. 4, 2020.



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charged, “indicating that the procedural, provisional character of the decision”; meaning that “it did not in any way prejudge the outcome of the proceedings with regard to either the legal classification of the offence or the accused's guilt” (ECHR, Garrido Guerrero v. Spain, March, 2<sup>nd</sup> 2000).

However, the ECHR has also recognized as a factual assertion doubts about the district courts as impartial, because one or more of its judges had previously acted in the courtroom that had confirmed the appellate “order charging applicant”. As we can reckon from all its decisions on the subject for the ECHR simply “that kind of situation may give rise to misgivings on the part of the accused as to the impartiality of the judges” (ECHR, Castillo Algar v. Spain, October, 28<sup>th</sup>1998).

However, whether such misgivings should be treated as objectively acceptable depends on the circumstances of each particular case; “the mere fact that a judge has already taken decisions before the trial cannot in itself be regarded as justifying anxieties as to his impartiality. What matters is the scope and nature of the measures taken by the judge before the trial” (Hauschildt v. Denmark, 24<sup>th</sup>, May 1989, and again in Case of Saraiva de Carvalho v. Portugal, 22<sup>nd</sup>, April 1994).

7. Finally, we point out in our challenge to the Chamber two last circumstances:

i. The fact that on Mr. X same Magistrates had already revoked a “dismissing criminal proceedings order”; and used some “wording” on Mr. X., also in the appeal on the “charging criminal proceedings order”, which could arouse such misgivings on the part of the accused as to the impartiality of the judges.

ii. The current situation of the District Court of Extremadura, with a single Criminal Section with four Magistrates appointed to hear all appeals and judge all crimes over 5 years imprisonment. This situation was inevitable; it is not the Magistrates “fault”. By the way, under the same problematic situation are all of the small District Courts.

### *Chamber's decision*

1. The Chamber begins its decision by mentioning, in accordance with article 217 of the *Judiciary Act*, the obligation to abstain from trial in certain circumstances “without the need to promote an incident of challenge by the accused”. This “curious” assertion must be underlined; after all, it was we who promoted it. Why didn't the House pay attention to this obligation before?

2. The Decision continues mentioning the Supreme Court's **Sentence 318/2018** of June 28<sup>th</sup>, (Judge Palomo Del Arco, rapporteur). The Chamber's decision claims that, under this

DOI: <https://doi.org/10.46699/rduno.v3i4.5765> | Edição Vol. 3, Núm. 4, 2020.



Sentence, there has been a change of the former jurisprudence on the subject. It is true, but not so much on the substantial arguments, but to a greater extent in relation to the managerial dimension.

The Judgement focuses on two main questions:

i. It really doesn't add anything new on the classical arguments about the principle of impartiality. In fact, it collects the most famous ECHR Cases and Spanish Supreme Court and Constitutional Court on the subject. It also settles a specific distinction when, within appeals, different subjects are being discussed. Although under this distinction the idea that it is possible a legal and aseptic analysis of the decision appealed is being supported, it also seems to acknowledge how difficult it is to stay in this dimension when the appeal is on the "order charging applicant". It is important to remember that this order comes to be indeed a reflection on the evidence and guilt of the accused. We will return to this point later.

ii. Twenty years after the *Castillo Algar v. Spain* case, what is new in this decision, is to remember how the "cases distribution rules" within the Courts have changed according to this matter: "Our jurisprudence is essentially resolute in cases where the appeal is over such substantial resolution as it is the "order charging applicant"; and thus must the different sections of the District Courts cross cases, so some of them can handle the incidents during the pre-trial phase, and the other can take care of the trial phase and its own incidents. Whether there is only a unique penal Section, enough organic means should be provided in order to appoint Chambers with Magistrates who have not taken any illicit contact with the pre-trial phase". It mentions how the cases distribution rules changed in the Supreme Court. It is important to mention that these is rules changed in accordance with a Decision of the Special Section of the Supreme Court itself.

3. The Decision is thus in complete harmony with our arguments and the three Magistrates decided to abstain themselves form the trial phase.

### *Trial length and quality of justice*

1. Almost a full year has been "wasted" with this incident. The trial was held eleven months later that it was possible. Procedures are usually already long –especially in the eyes of the accused-, the personal cost of bearing over time cannot be measured, but there are no doubts it is a difficult and an unpleasant situation, which could cost real high personal damage.

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2. It seems that justice or due process guarantees lay on the accused shoulders. After all, there has been a shifting of the burden of proof. However, this situation is strictly a problem of administration of justice, it is not a real juridical controversy, and it does not happen on every court, only in the small ones.

3. There is a clear breach on the principle of specialization. We cannot develop here this problem, but a very serious economic offense was sentenced by Judges whose specialization for many years has been administrative law. In fact, they owe their office to this specialization. They are on a list (voluntary) to substitute other judges under many circumstances (sickness for instance), and they get extra pay for this duty<sup>9</sup>.

The Spanish General Council of the Judiciary (2018) gathers -as a quality of a justice indicator- the percentage of the sentences adopted by the judges “in office” (89,1% in the District Courts) (2018), which precisely means that they have sentences adopted by means of normal distribution rules –not substitution-. According to these particular criteria, the sentence on Mr. X lacks this quality outcome. Unfortunately it is just an aggregate number the same data are not available on every single District Court. Nevertheless, this data show that either sentences on small District Courts are under less quality outcomes, because they lack specialization or (worst) they lack impartiality.

### **Sentence 233/2019 of the Supreme Court (penal Chamber), April 9<sup>th</sup>**

This Decision as the previous one finds a breach in the impartiality. It is important for several reasons:

1. It is recent and it comes from the Supreme Court, which both facts prove that this problem is still persistent and of daily basis. Also, given the fact that the Supreme Court is to be the “last chance”, it is still possible to “approve” judicial performance –the fundamental right is being protected-, but, after all, it means that the administration of justice did not work properly “at the time of the first trigger”.

2. The facts of the case and its problem with Magistrates taking decisions on appeals during the pre-trial and phase and then sitting in the courtroom (of three) to sentence are accurately as of the precedent case.

<sup>9</sup> Every region Supreme Court has to elaborate their own “substitutions rules” with the list of the names of the substitution judges of their region and hand it to the Council of the Magistracy.





3. The case is built from a well-prepared police drug operation (as one of the accused is a police officer). Nonetheless, there were procedural problems. All the defendants were found guilty. Yet, none had filed any challenge incident. However, Judge Barreiro (Rapporteur) did not refuse to acknowledge the violation of the principle of impartiality and rendered null and void the earlier District Court judgement.

4. The decision does not even give any consideration to the fact that the accused have not lawfully presented to the Chamber their allegations concerning their misgivings of impartiality. At this point, it is important to remember how since *Castillo Algar v. Spain* has been ruled by the ECHR that while “the courts of the respondent State cannot be said to have been denied an opportunity to put right the alleged violation of Article 6”, “the fact that neither the applicant nor his counsel challenged the (two) judges concerned before the start of the trial” does not mean the applicant has not therefore exhausted domestic remedies in respect of his complaint of impartiality (see, *mutatis mutandis*, the *Gasus Dosier. und Fördertechnik GmbH* judgment and the *Botten v. Norway* judgment of 19 February 1996, Reports of Judgments and Decisions 1996.I, p. 140).

On this specific question, both the Spanish Supreme Court and the Constitutional Court have writhed their own arguments and decisions; one time by clearly pursuing the core idea in the ECHR words; and some others, applying strictly legal challenging rules and thus arguing the applicant has not exhausted previous legal remedies regarding his complaint of impartiality. In any case, what both the Supreme Court and the Constitutional Court mostly do is a *fortiori* statement (within the decision) concerning the participation of Judge; at least, they do it every time the challenge of the Judge is just part of the appeal, therefore after the substancial decision is taken. These were the facts in *Castillo Algar* Case.

While the Supreme Court and the Constitutional Spanish Court have sometime shaken their foundations, by establishing through their sentences a blur concept called “informal noticed of challenge”, however the most unexpected blow actually comes from the ECHR itself. In the Case *Blesa Rodríguez v. Spain* (1st, December 2015), under exactly the same circumstances of *Castillo Algar* Case, the ECHR rejected the complaint of impartiality (on one of the Judges). The Court following the Supreme Court and Constitutional Court opinions, ruled that “The applicant has not therefore exhausted domestic remedies”, and for the first time ever, “the Court shares the Government’s opinion that the Supreme Court’s *a fortiori* statement concerning the participation of Judge A. at the investigation stage of the proceedings was a mere observation”.

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As a mere observation, sometimes the problem seems to be the impossibility of the ECHR to go in this matter beyond particular case law. Not long ago one its “wise” reflections on the subject was that “in applying procedural rules, the courts must avoid both excessive formalism that would impair the fairness of the proceedings and excessive flexibility such as would render nugatory the procedural requirements laid down in statutes”. The reflection is collected in “Guide on Article 6 of the European Convention on Human Rights”, updated to 30 April 2019, and was made in *Hasan Tunç and Others v. Turkey*, (31<sup>st</sup>, January 2017). Forthright, it is to say almost nothing.

If the jurisprudence of the ECHR persistently states “the mere fact that a judge has already taken decisions before the trial prevents from being considered as sufficient justification for its impartiality. What matters is the scope and nature of the measures taken by the judge before the trial” (*Hauschildt v. Denmark*, 24th, May 1989, and again in *Case of Saraiva de Carvalho v. Portugal*, 22nd, April 1994)- legal certainty is not enhanced very much, it even decreases when introducing our basic procedural argument.<sup>10</sup>

5. The Decision does not mention the previous Sentence 318/2018, 28<sup>th</sup> June, -nevertheless Judge Barreiro is in the courtroom in that decision- but it also writes on the relevance of the judicial review within the pre-trial phase. “should not be underestimate under circumstances of formal legality, not even with respect to constitutional requirements relating to cases of wiretapping. Nevertheless, it should be outlined the significance of the “order charging applicant” (article 779.1.4 *Criminal Procedure Act*). It is important to note that this court order means the “filter” within the criminal process of imputation of criminal responsibility to the accused [...] And this type of judicial decisions have been reviewed by the ECtHR on several occasions, also in Spanish cases, including the relevant importance of decisions on appeals (revision) on this type of sentences when the Court of Appeal merely confirms the decision taken in the “order charging applicant”. Mention should be made of the judgments handed down against Spain by the European Court of Human Rights, *Castillo Algar v. Spain*, 28 October 1998, *Perote Pellón v. Spain*, 25 July 2002 and *Gómez de Liaño y Botella v. Spain*, 28 October 1998, *Perote Pellón v. Spain*, 25 July

<sup>10</sup> Nevertheless, in the partly dissenting opinion of Judge Dedov, the Judge points out how the consistency with the ECHR case-law shows “There are some examples as to how impartiality could be examined on the merits without any barriers”. For instance, in *Romero Martin v. Spain* ((dec.), no. 32045/03, 12 June 2006). “The circumstances were similar to those of the present case (the applicant had not sought the withdrawal of judges in the lower courts), but where, by contrast, the national supreme courts and this Court examined the merits of the complaint on the basis of both subjective and objective criteria and found it unsubstantiated”. I fully endorse his position: the applicant has exhausted domestic remedies in respect of judge A.



2002 and *Gómez de Liaño y Botella v. Spain*. Spain, 22 July 2008. In all these decisions, the European Court of Human Rights ruled in favour of the applicant concluding that the principle of objective impartiality had been breached; and the circumstances in all these cases were that the District Court [or one of its members] had also confirmed the “order charging applicant” issued by the Pre-Trial Judge”. In our former words, this order is indeed a reflection on the evidence and the guiltiness of the accused.

### *3.2.1 Trial length and quality of justice*

1. The facts of the case are from January 2014, and the Sentence of the Vigo District Court is from June 1<sup>st</sup>, 2017. The Supreme Court revokes the decision in April 9<sup>th</sup>, 2019. More than one year and a half later after the first decision, and more than four years later the offence has to be judge again; and, that means to repeat the whole procedure.

2. The burden of the accused is even higher in this second case. The lawyer took longer to exercise the accused rights; thus the answer of the justice system has come later.

3. Probably, the worst consequence is that a vicious circle is being created. Because of the delay in justice (unfair trial + fair trial), it is more likely that the defendant in this case will see his or her jail sentence significantly reduced. If the conviction for the same crime can finally be softened, it encourages lawyers to look for this type of court conviction and assume the risk of a late claim. This incentive will be even more beneficial in direct correlation with the evidence of the crime. The real criminals with little evidence in their favour will benefit most from this circumstance.

## **ECONOMIC APPROACH TO THE PROBLEM AND DETERRENTS FOR A CHANGE**

There could be good economic reasons not to change the situation in the small District Courts, but there were (and still are) good political reasons for avoiding this conflict of interest within the highest court.

DOI: <https://doi.org/10.46699/rduno.v3i4.5765> | Edição Vol. 3, Núm. 4, 2020.



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## **Everybody knows the problem. The Special Case N. 20907/2017. The Catalan independence leaders' case**

As we have already mentioned, the breach of impartiality (or at least the difficult position of the Judge) when a Judge of the Trial Chamber has already had previous contact with the circumstances of the case, was precisely pointed out in Spain by the Spanish Supreme Court when -by a judicial decision not by another “distribution rule”- changed its own “cases distribution rules”.

In fact, the Supreme Court Sentence on the Catalan independence leaders' (October, 14th 2019) goes back to this decision. Actually, this decision was previously reckon in the “noticed of challenged” incident against Judge Marchena (President of the Chamber and trial) et. others. Judge Díez-Picazo (rapporteur) based on this previous Decision rejected the arguments of the defence lawyers. The same way, the later Sentence endorses (and literally reproduces it) the Decision over the challenge incident. According to this Judgement, briefly, the Decision, which changed the distribution rules, wanted to avoid the previous contact with the case of the trial judges. This contact is unlawful when the Judges deal with the material (through appeals) of the pre-trial phase ruled by the Investigating Judge. Furthermore, the distribution rules changed “so that judges responsible for appeals against decisions of the pre-trial judge cannot be appointed to the Trial Chamber. This is how the distinction between the Appeals Chamber and the Trial Chamber began to work, since in no case can the judges of the Criminal Chamber of the Supreme Court be part of the second chamber if they have already been part of the first”. Furthermore, due to this statement, thirteen out of the fifteen Judges of the Supreme Court Chamber have had already some contact with the this Special Case. In addition, according to this statement, thirteen of the fifteen Judges of the Supreme Court Chamber have already had some contact with this Special Case. Judge Marchena has stated before the Magistrates Council that “the idea of this Chamber, which has examined more than 500 witnesses, 12 hearings of defendants and ‘cubic meters’ of documents, can judge on similar facts with different actors, has put us in a difficult situation”.

The words of the President of the Criminal Chamber of the Supreme Court show how the scope of the notion of “contamination of a Judge”, or “conflict of interests” or “functional incompatibility”, as we believe it is better to say, goes far beyond our case.

DOI: <https://doi.org/10.46699/rduno.v3i4.5765> | Edição Vol. 3, Núm. 4, 2020.



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## Economic (and normative) deterrents to the quality of justice

There are several severe barriers to addressing this problem under an orthodox economic analysis of judicial performance. There is an almost total lack of reliable data. The questions or premises for this type of analysis could be twofold:

i. What is more expensive: a) to provide more judges?; b) or the cost of cases repealed and repeat it, and cost of appeals (Supreme Court, Constitutional Court, ECHR)?

ii. Where breaches of impartiality have happened, did Judges produce less quality decisions? A) Are judges “contaminated” harder, or tougher? Does it have any effects on sentencing? Is there any substantive correlation? B) The fact that this happens in small places, with lack of resources and “personal” knowledge or acquaintance, does or not have any correlation with the sentencing? C) Indeed, after revoking the sentence, how many decisions do in fact have changed the previous Courts’ Judgements?

It is impossible to answer any of these questions by providing correct empirical data. Let me approach it, from another perspective.

It is true that there is not a good economical (budgetary) reason to endow the District Courts with only one Penal Section (or Chamber) with more Judges. It was pointed out by Jiménez Asensio already more than fifteen years ago and it is still correct: there is not enough work to enlarge these District Courts. Jiménez Asensio (*Imparcialidad Judicial y Derecho al Juez imparcial*, Aranzadi, 2002) drew attention to this problem that has just been brought to the table by the CEDH in the Castillo Algar case. But we came across an assumption that the Spanish judicial system itself had and has (and works for): Spanish criminal judges have more or less the same workload. Thus, the problem in small district courts persists in exactly the same circumstances and no administration has taken special measures or provided the special remedies mentioned in judgement 318/2018. At best, District Courts apply “substitutions rules” if the lawyer does his job properly. This means increasing the length of the trial and increasing the cost of the lawyer. But then again, it is difficult to draw any meaningful conclusions on the impact that the Fundamental Right to an impartial Judge may have on the economic consequences, both on the cost of Justice as a public service provided by the State, and on the cost to litigants. It could be possible to measure the cost of repeating trials, but according to the only data we can know, cases that get to the Supreme Court, the court has only ruled on the repetition of ten cases in the last three years

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analogous to our case law<sup>11</sup>. One presented here. Clearly, from this perspective there are no encouragements to change the situation. Nor are there any in the personal and economic cost to the accused and to the Administration of Justice for undue delay in the case. On this question, there are several difficult economic aspects to assess. Financial compensation for undue delay (acquittal) and reduction of sentence for offenders can be used as an indicator of this issue. Penalty reductions are practically impossible to systematize, as they depend on factors that are extraordinarily diverse and difficult to quantify. It may even lead to a two-step reduction in the sentence if the delay in processing the trial has been excessive. For example, if the pre-trial phase lasted three, or four years, and the repetition of the trial as a consequence of the lack of judicial impartiality occurs with an additional two years of delay, in this case, the reduction in sentence may be up to two degrees and it would mean a substantial reduction.

On the other hand, if the defendant, who has to endure a new trial because there has been a deficit of judicial impartiality, were acquitted, in this case, only the compensation for the abnormal functioning of the Administration of Justice would come into play. Indemnities for undue delays are, in general, scarce and do not follow a fixed and defined pattern. The most common is a compensation of 2,000 € per year of undue delay, as a way of compensating the moral damage that has caused the citizen to be subjected to a criminal procedure that has been prolonged over time, without it having been the fault of the defendant himself.

In any case, it is practically impossible to find systematic criteria, given the enormous variety of specific cases that occur in each case.

Regardless of the difficulties of quantifying all these costs, given the dispersed variety of situations that occur in reality, and the insufficiency of a reliable statistical basis, the fact is that this is not an excessively significant aspect in direct economic terms. It is much more relevant from the point of view of the possible moral damage suffered by the participants in the criminal proceedings to be repeated, and, above all, much more significant from the point of view of the quality of justice, and, in particular, from the point of view that justice can inspire in citizens.

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<sup>11</sup> From October 30, 2016 - October 28, 2019, for exactly analogous reasons of impartiality, the following cases were sentenced by the Supreme Court (Criminal Chamber) with nullity (and must be repeated): 233/2019, September 8<sup>th</sup> (Judge Barreiro); 574/2018 November 14<sup>th</sup> (Judge Colmenero); 358/2018, July 18<sup>th</sup> (Judge Martínez Arrieta); 353/2018, July 12<sup>th</sup> (Judge Varela Castro), 318/2018, 28<sup>th</sup> June (Judge Palomo del Arco); 621/2017 September 18<sup>th</sup> (Judge Varela Castro); 576/2017 July 19<sup>th</sup> (Judge Palomo del Arco); 515/2017, July 6<sup>th</sup> (Judge Colmenero); 187/2017, March 23<sup>rd</sup> (Judge Palomo del Arco); 897/2016, November 30<sup>th</sup> (Judge Sánchez Melgar).

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They both represent a failure in judicial performance. But they are again not economically significant to change the situation in small district courts. Then again, accused and lawyers bear different and substantial circumstances other actors in bigger courts do not.

This problem is not correspondingly display all over the Spanish territory. It is in the small territories of the country where it is present. We thus facing a classical problem: administrative services are not provided or implemented in the same way. The problem here is that we are dealing with a fundamental right that establishes the right to an impartial judge and, of course, the right to be treated equally in the rule of law. And, the problem in small district courts is that either the defendant has delay problems if he is able to enforce the substitution rules, or he gets the trial repeated (perhaps even a good option for the offenders), or he lets an illegal court try his case. Any of these final situations undoubtedly harm the quality of the Spanish criminal justice system

### **If defence lawyers do their job properly...and Judges too**

We said it before. This situation could change if lawyers start to do their job properly on this matter. Or, equally important, if Judges put an end to the blur line of interpretation and endorse objective criteria by assessing as a breach of impartiality every time the Trial Courts have ruled over previous appeals on the case.

If that is the case, economic incomes could change. We can try to do an estimation on the cases under this “functional incompatibility” of penal Judges in small district Courts.

There are 174.923 new cases in 2018 handed to the District Courts. Assuming our former premise stating that the small district courts carry out the 20% of the workload, this means 39.984,6 cases . We can filter the number under many circumstances. How many cases will carried out without appeals in the pre-trial phase? How many are going to be tried by the same judges? Fortunately, not a large number of offences are committed in Spain with prison sentences of more than five years. There are the numbers. Nonetheless, commonly the rest of it will be appeals on the previous Penal Court judgement –with jurisdiction to try offences under five years of imprisonment-. Yet, what is worth for the first judgement in our case law, is binding for the sentence appealed. Why isn't this a public policy justice problem? Because only 6.7% of the decisions of the Criminal District Courts are appealed by the parties . And there is not any significant correlation with the small District Courts, which rates of appeals are quite homogenous to the total media. Symptom of good quality?

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For the last time: In 2018 the District Court of Cáceres handed down 379 judgments. The District Court of Vigo 316<sup>12</sup>. The last judgement in Cáceres is an appeal on a serious felony injury with a sentence of two years of imprisonment (December 28<sup>th</sup>, 2018). In Vigo, the last Judgement on a serious offence (not petty crime) is number 306 (December 18<sup>th</sup>, 2018). This is an appeal reversing the decision of the Criminal Court to acquit the accused for “inconsistency of sentence”. It also on a felony injury. Ruled by the sitting judges of those District Courts, by law they have had some previous contact with the case unless the defendant lawyers have not appeal any of the decisions of the Investigating Judge. I find it impossible. In these cases there are medical reports brought by the victim, criminal claims for social security benefits affecting the civil liability of the accused, and of course and “order charging applicant”. Pro bono lawyers could be sanction by the Bar Association if they don’t appeal the “order charging applicant”. And yet, they are not handing appeals on the basis of the arguments presented in this article. This is the main line that would determine the problem. Once again, lawyers and Judges –with their obligation to abstain- are not doing their job properly. However, if they did, then I am sure there would be good budgetary reasons for changing this situation.

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<sup>12</sup> As other examples in the District Court of Madrid (with fifteen penal Sections within the Penal Chamber) Section 1 handed 420, and Section 23, 562. Other District Courts with only one penal section handed 487 (Albacete), 164 (Segovia) or 136 (Ávila).

DOI: <https://doi.org/10.46699/rduno.v3i4.5765> | Edição Vol. 3, Núm. 4, 2020.





Colmenero); 187/2017, March 23rd (Judge Palomo del Arco); 897/2016, November 30th (Judge Sánchez Melgar); 703/2016, September 14<sup>th</sup>, (Judge Del Moral)

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