

Justice and Independence, an Actual Problem in Spain

Jordi Nieva-Fenoll

2020-10-15T11:36:54

On October 13, the Spanish Government presented a bill to Parliament with one main objective: to reduce the parliamentary majorities to appoint the members of the General Council of the Judiciary. Its purpose is to overcome a political blockage in the renewal of its members, which has already lasted two years. But the government's attempt, somehow awkward, has been quickly compared to maneuvers to control the judiciary in Poland and Hungary. However, this bill and those exaggerated criticisms conceal a much more relevant and, above all, sadder reality.

Politicized judiciary

Many voices have long denounced that Spanish justice is not really independent, at least in its high courts. Spanish [media constantly highlight this](#), usually by pointing to judges as “progressive” or “conservative”, not simply indicating an ideological tendency, but rather intending to stress a political dependency incompatible with the judicial function. Very recently, on September 21, 2020, Luis Navajas Ramos, Prosecutor of the Supreme Court, made [public statements](#) referring to prosecutors in exactly the same way, confirming the suspicion. Those suspicions are also endorsed through two reports. One from [GRECO](#) (Group of States against Corruption) of the Council of Europe, and another from the [European Commission](#).

GRECO has pointed out the Spanish justice system on several occasions for not effectively fighting politicisation in the Spanish judiciary. In its latest report of June 3, 2020, GRECO has again quoted the General Council of the Judiciary, the head institution of Spanish Justice, which would be conditioned by the system of appointment of its members, being excessively political. These members are appointed by a majority of 3/5 in each chamber – congress and senate –, and in this election the judges have little indirect influence.

The European Union report points out the real problem even more clearly, confirming journalistic suspicions. In the 2020 EU Justice Scoreboard, the European Commission has ranked Spain number 19 (out of 27) in terms of independence perceived by the general population, attributing this lack of autonomy mainly to political interference, although also from other powers that be. By the way, the diagnosis of the population is shared by economic actors.

Blocking and exploiting

The last chapter in this story is very recent. The Spanish right-wing “Popular Party” has been blocking the renewal of the General Council of the Judiciary, whose mandate expired two years ago. It has never been easy to reach agreements in this regard between the two majority parties. Therefore, extensions in the mandates of the Council were not uncommon, but today’s extreme situation had never been reached. The difference now is that the political blockade and those responsible are too obvious, according to almost all the voices that have expressed their opinion on the subject, except those of the Popular Party itself.

The main problem is that this extension has been used by the expired Council – with a majority of members promoted by the Popular Party – to continue making appointments to the high Spanish courts, particularly in the Supreme Court and more precisely to its Criminal Chamber. It is this Chamber that is competent to judge the crimes of the members of the Government, as well as deputies and senators, among others. And it is also the last appeals tribunal.

The impact of the last seven years of the judiciary governed by this Council is self-evident. The highest positions in the Spanish judiciary have been decided by a majority of magistrates who are labeled by the media as conservative, in a similar way to what is happening, for similar reasons, in the US Federal Supreme Court. This conservative majority in the Council also explains why the Popular Party is reluctant to renew the body. Considering the [corruption cases](#) that affect the political parties in Spain, being able to appoint the key judges of the Spanish judiciary is undoubtedly a very effective tool. Some persons have even stated that this could help the politicians that have been or could be charged in the future. The senator Ignacio Cosidó, member of the Popular Party, sent a whatsapp to his colleagues in the parliamentary group in November 2018 that was [leaked to the press](#). In this whatsapp he talked of ending up “controlling the Second Chamber from behind” – the Criminal Chamber of the Supreme Court –, and added: “[W]e were risking the future renewals of 2/3 of the Supreme Court and hundreds of appointments in the judiciary, vital for the Popular Party and for the future of Spain.”

Opaque appointments

The problem is not new. It has been dragging on for a long time and is, despite the many years of democracy, a direct consequence of the Francoist influence that obviously existed in the Spanish judiciary until the end of the dictatorship. The first democratic socialist government, in the early eighties of the twentieth century, tried to make the judiciary ideologically more plural through two quite common and controversial mechanisms: the early retirement in [1984](#) of civil servants in general aged 65 – which also affected some judges – and the public offering of a large number of new judge posts, assuming that the new judges, being younger, would be more progressive.

But this was a tremendous naivety. The main problem of the Justice in Spain is not so much its current composition, but access to judicial posts, which is not really transparent. This system has not been substantially modified since the dictatorship, and is currently as follows: after passing a multiple choice exam, the second phase consists of two oral examinations in which only memory is evaluated. Candidates have to expose in a limited time, at breakneck speed – sometimes inaudible and always difficult to follow – five topics from a 320-lesson program of various legal items, mainly Civil, Criminal and Procedural Law. The examinations are celebrated before a commission composed of a judge of the Supreme Court, two more judges, two prosecutors, a university law-professor, a State Lawyer (*Abogado del Estado*), a lawyer and a Clerk from the Administration of Justice. The commission does not justify why the candidate passed or not the exam, but only awards the result.

The composition of this commission is very important. The president is chosen by the president of the Supreme Court – who is chosen by the General Council of the Judiciary – and the State Attorney General, who is chosen by the Government. The two Judges are elected by the General Council of the Judiciary, the two prosecutors by the State Attorney General, and the State Attorney and the Clerk by the Ministry of Justice (art. 304 of the Law of the Judiciary). This means that if a Government has managed to appoint, as usual, a majority of members of the Council, it will also have the key to who will access the post of judge, which will undoubtedly condition the future of the judicial body.

In addition, in this examination, there is a sort of “personal coach” who plays a really opaque role, although supposedly decisive. The “coaches” tend to be active judges who in their spare time help candidates to prepare for the exam. But they are not officially appointed. There are only rumors about the reality of their work and their remuneration as there is absolutely no information available. Most candidates – and some judges – state that it is not possible to undergo the examination without a “coach”. Such strange but very frequent statements are very well known and can be easily verified by checking comments on this topic, by the [judges themselves, on social networks](#).

Conservative path dependency

As I said before, this reality is not new and started under the dictatorship – or even before – and has remained formally the same throughout Spanish democracy. Most of those who already held the position of judges when democracy came, were obviously conservatives. They kept their posts afterwards and there were no renewals beyond the indirect mechanisms already mentioned. Under these conditions, it cannot be surprising that the judiciary in Spain continued to be mostly conservative, because there was a historical continuity.

There is important evidence of that. In Spain there are six “judicial associations”: the Professional Association of the Magistracy (APM), Francisco de Vitoria Association, Judges for Democracy, Independent Judicial Forum, Ágora and the National Association of Judges. Limiting the analysis to the first three– the others have a negligible number of members, although the Independent Judicial Forum is

slowly increasing its membership –, the association to which the media attributes a conservative bias – the APM – had 1,339 associates in 2019. The Francisco de Vitoria Association is usually conceptualized as centrist, despite being a split from the APM; it has 843 associates. The only association labeled as progressive – Judges for Democracy – only has 462 members. Taking into account that in Spain there are about 5,500 active judges and that about 3,000 of them are associated, the ideological bias of the Spanish Justice is quite evident. And the role of associations is also very relevant in promotions in the judiciary.

For this reason, if the members of the General Council of the Judiciary are to be elected directly by the majority of the judges, the composition of the Council will always follow a conservative pattern with not so many chances to become more neutral. For this reason, in 1985 the Socialist Government, with an absolute majority in Parliament, imposed by law that the members of the Council would be appointed by a majority of 3/5 by the Congress and the Senate. Had it not done so, it is obvious that the judicial establishment today would be even more conservative.

Now again, a socialist government, faced with the blockade in the renewal of the General Council of the Judiciary, has presented on 13 October 2020 a Law to the Parliament. It intends to prevent the Council from appointing judges when its mandate has expired, which is logical and might boost negotiations for renewal. The problem is that the law also intends that twelve of the twenty members of the Council would be elected by an absolute majority in parliament, thus reducing the 3/5-majority that is currently required. Not only will this further politicize the election, but it will hardly be accepted by the Council of Europe or even by the European Commission. The parties supporting the Government will soon regret this reform. In a few years, when the right-wing parties are in power, they may appoint the General Council of the Judiciary to their liking and convenience. It is a decision which is as reckless as that of the Democratic party in the US facing the same situation of blockade of the Republican Party back in 2013. Today, on the eve of Trump's third appointment of a Justice for the US Supreme Court, Democrats regret their past decision.

Starting at the beginning

There is no easy solution to all this, but it certainly goes through the first step of the system: the access to judicial posts. The examination must be strictly objectified with the double blind method, without any political influence. This will likely not only make the ideological composition of the Spanish judiciary more plural, but make the professional quality of the Spanish judges indisputable. Unfortunately, complaints in this regard have not been uncommon in recent years, albeit unfair for some excellent judges.

After that reform, in a few years judges shall directly elect their representatives to the General Council of the Judiciary. Promoting this system now would be inappropriate, because it would definitely deepen the conservative political bias. Meanwhile,

what can be done now is to objectify the appointment of high courts' judges. It is necessary to proceed to a rating of merits and seniority that is not easy to build up, but it can be done.

