

Judges as Guardians of Promises

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There is always a point in politics at which things boil over. Politicians sometimes do this on a voluntary basis; other times they do it accidentally, since they experience stress, anxiety and even desperation. After all, they are also mortal beings. No matter the cause: things do boil over in politics. This happened in Spanish politics on 16 November, when the Minister for Equality, a Podemos party member, commenting on the judicial application of the Spanish law on the Protection of Sexual Liberty, accused the Spanish judiciary of being macho-ist: “macho-ism can compromise both the impartiality and the integrity of judicial systems; macho-ism may make judges apply the law erroneously and wrongly”, said the Minister. After the eruption of critiques and even insults coming from different quarters against the Minister (“she is just useless” a relevant political leader said), Podemos, in support of the Minister, rounded up her argument: “Spanish judges are fascists”.

The Context: Reforming the Spanish General Council for the Judiciary (GCJ)

This is not merely an anecdote. The words of the Spanish Minister were pronounced in the context of the intense battle, a war of a kind, that is being fought between the government (Psoe/Podemos) and the Spanish Popular Party regarding the renewal of the Spanish General Council for the Judiciary (GCJ), the judges’ governing body. The Spanish system for the election of the members of the General Council for the Judiciary is enshrined in the Constitution. Article 122.3^o of the Spanish Constitution, together with article 567.2^o of the Organic Law 6/1985, of 1 July, on the Judiciary, state that the 20 members of this organ are to be elected by Congress and the Senate by a reinforced majority of “3/5 of their members”. As we know, maths is as important as politics. In the current Spanish political landscape, in which the coalition government between PSOE and Podemos is only supported by an exiguous political majority, this means that the ruling coalition needs the votes of the Popular Party to elect the members of the GCJ. In turn, the powers of the GCJ are key in Spain. For example, the GCJ appoints the magistrates of the Supreme Court. The GCJ is currently an acting organ as its term ended in 2018. Therefore, these appointments cannot be made, according to the Organic Law on the Judiciary, which could eventually lead to the collapse of this Tribunal.

The GCJ should have been renewed in the year 2018. However, since then, the governmental coalition and the Popular Party have not been able to agree on the terms of its renewal. For the governmental coalition, the current system should be kept as it is; for the Popular Party, judges themselves should have (as the Constitution in theory allows for) a bigger say in the appointment of members of the GCJ. The stalemate that these different philosophies have provoked (that maths has provoked) has even trespassed the Spanish frontiers: the European Commission,

in its reports on the State of the Rule of Law in the Union, has insisted time and again that this situation is a “concern”, and the European Commissioner for Justice, Didier Reynders, has urged Spain to “get out of the crisis” in September 2022, for the umpteenth time.

Interestingly, both parties contend that the third branch of government is independent from politics (independent from all, one would not tire to say). However, if the Spanish judiciary is apolitical, why the stalemate? This question leads, directly, to asking about the ideology of judges in Spain. No, Spanish judges are not fascists; no, Spanish judges are not macho-ists. But what do we know about their political inclinations?

The ideology of judges in Spain

The answer to the previous question is plain: nothing. For starters, there are no opinion polls on the political ideology of judges in Spain. I am in fact not aware of any country that does opinion polls on the political ideology of judges, but I may, of course, be wrong on this. From one perspective, this might seem all normal: after all, they are the third, “independent”, branch of government, and therefore their ideology should be of no concern; but this argument is very formalistic. What are we afraid of? Perhaps the systematic polling of the ideological leanings of judges would let stories emerge that are embarrassing for liberal democracies? The lack of information in this terrain has some similarities to a childish condition. Yes, it is like when small kids say: “Papa, I do not want to know the end of the story. I will go to sleep”. When Spanish sociologists are asked about this clamorous deficit of information, they answer: if we tried to do polls on this subject, “they” would stop us. No question who “they” are.

Perhaps to show some accountability, the Spanish General Council of the Judiciary published a report in October 2020 on a parallel issue: “Justice as seen from Judges”. This report was the outcome of an opinion poll in which Spanish judges were asked about their own vision of themselves. Granted: this is rather narcissistic. No doubt, a vast majority of the judges responded that they viewed their role as being the “guardians of (political) promises”. To be sure, a guardian of political promises must view him or herself as purely independent from political influences, something that a majority of the Spanish judges also did.

Therefore, the paradox: judges are independent from politics in Spain (at least this is what they say), but Spanish politicians do not seem to trust that this is true; if not, the GCJ would have been renewed long ago. Here is where we need the help of Legal (and Political) Theory. “Independence” means more, much more, than what the judges are asked about in the previous opinion poll.

Judges as guardians of promises: two sources of political influence

When judges answer the previous question to opinion-pollsters, they are thinking about influences that come from the outside, from the political realm. I shall call this “external” influences. True, a basic tenet for judges to play their crucial role as “guardians of the promises that political actors make”, and more in general, for the credibility of political commitments, is that the legal system isolates them from any sort of political pressure. The problem of “external” influence is likely much more complicated than this, but for the purposes of this article, it is enough to assume that external influences are only of a political sort.

However, what judges clearly do not have in mind is that this institutional structure that has been set up in liberal democracies does not isolate judges from an even more dangerous sort of political influence: the political influence from “within”. Since it is impossible to think that judges do not have political attitudes, how will the system isolate them from their own political ideas?

In fact, the interesting thing about the debate that is currently taking place in Spain is that political actors, as has been shown at the beginning of this article, are more preoccupied about the second, influences from within, than about the first, external influences. And yes, we have to admit that we have gone a very long way in isolating judges from external influences, but have only taken small steps in isolating judges from themselves. In other words, political influence from within poses a crucial dilemma for an understanding of law as credibility, or to put it in different terms, for making judges the real guardians of political promises that must not be contaminated not only from external dynamics, but also (mainly, should we say?), from internal ones.

