

Strasbourg, 5 April 2022

CDL-PI(2022)021

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

in cooperation with

THE UNIVERSITY LA SAPIENZA, ROME and
THE UNIVERSITY OF BARCELONA

International Round Table
SHAPING JUDICIAL COUNCILS
TO MEET CONTEMPORARY CHALLENGES

University La Sapienza, Rome
21 – 22 March 2022

(Hybrid format)

PRESENTATION
by

Mr Juan Manuel FERNANDEZ MARTÍNEZ
Judge, Member of the General Council of the Judiciary

ROLE AND POWERS OF JUDICIAL COUNCIL



The international Round Table was co-financed by the project "Instrumentos contramayoritarios en el estado constitucional (PID2019-104414GB-C32)" of the Spanish Ministry of Research and by the European Union's Horizon 2020 research and innovation programme under grant agreement No. 822590, DEMOS.

A.- INTRODUCTION:

The Spanish General Council for the Judiciary was established by the Spanish Constitution of 1978, following similar models from neighboring countries such as France, Portugal and - notably - Italy. It started functioning as the governing body of the judiciary in 1980.

The composition, structure, rules of procedure, and powers of the Council for the Judiciary are regulated in a law - the Organic Law of the Judiciary¹.

The functions of the Spanish Council of Justice are not jurisdictional but organizational, having always as its main principle of action the full respect and guarantee of the independence of the Judiciary, a substantial component of the rule of law. Thus, the Spanish Constitution gave the judiciary essential functions that had previously resided in the executive branch, as we are going to see below.

It is important to add that it is a national body, as there are no regional justice councils despite the Spanish territorial organization, which is in some ways similar to a federal state².

B.- POWERS RELATED TO THE CAREER OF JUDGES – FIRST-TIME APPOINTMENT TO THE JUDICIAL POSITIONS, PROMOTION TO HIGHER COURTS

B.1.- Introduction

The Spanish Constitution attributes three essential functions to the General Council of the Judicial Power:

- a) first, the appointment and promotion of Judges and Senior Judges;
- b) secondly, the inspection of Courts and Tribunals; and, finally,
- c) the judicial disciplinary regime.

However, in addition to these essential functions, the law regulating the judiciary attributes very broad powers to the Council for the Judiciary. So, it can be stated that all subjects related to the professional career of judges (such as initial appointment, transfer, promotion of judges, transferring, suspending, or removing judges in the Country) are the responsibility of this body.

The Spanish Council for the Judiciary is the only national authority with responsibility to decide on the initial appointment and promotion of members of the Spanish Judiciary, including the appointment of holders of high judicial offices, such as Justices of the Supreme Court and President of regional Courts.

Although the formal appointment of Spanish judges is done by a Royal Decree signed by the King (in his capacity of Head of State) and the Minister of Justice, neither the King nor the Minister can ban or object to the binding proposal for appointment made by the Council for the Judiciary.

¹ Organic laws are a class of laws that require large majorities for their approval and amendment.

² The possibility of creating autonomous Councils of Justice was denied by the Constitutional Court when examining the Statute of Autonomy of Catalonia.

B.2.- Selection of judges in Spain

Regarding the selection of judges in Spain, access to the Judiciary can be done:

- a) By examination, this is the majority mode of Access to the Judiciary. Candidates must pass three exams, two of them oral and public, lasting one hour, in which they present five subjects, chosen randomly. Those who pass these exams are admitted to the Judicial School, where, over the course of a year and a half, they undergo a practical apprenticeship.

The average age of these judges is 28 and the average preparation time for these exams is five years. The number of the judges in Spain is, approximately, 5.500 and more than the half of them, the 56%, are women.

Judges can't belong political parties.

The Judicial Career consists of three categories: Senior Judge of the Supreme Court, Senior Judge and Judge (article 299.1 LOPJ).

- b) The second way is the access to some posts by which jurists of recognized competence are admitted to the Judiciary. More than ten years of professional practice is compulsory.
- c) Finally, it is important to refer to a special way to access to the Supreme Court, by prestigious jurists with more than fifteen years of professional experience.

As an important aspect of the role of judges, I would like to mention irremovability. According to this principle, a judge cannot be removed from his or her post unless he or she voluntarily asks for another assignment.

B.2.- Promotion to management positions within the Judiciary

In order to guarantee the observance of the constitutional imperative of interdiction of the arbitrariness of the public powers (Article 9.3 of the Constitution) and the respect of the fundamental right of access to public functions and positions under conditions of equality (Article 23.2 of the Constitution), there is a regulation on the provision of discretionary appointments in the jurisdictional bodies, which sets out the requirements to be met by candidates for the posts and the importance of each of these requirements. Thus, seniority in professional practice, quality of judgments, publications, teaching, etc. are valued.

The appointments are based on merit and capability of the candidates and the procedure is transparent since the Standing Committee of the Council for the Judiciary conducts interviews with the candidates to monitor and assess their merits. The interviews are broadcast to the media and public through video-link and are also available on the transparency portal of the Council for the Judiciary.

All decisions concerning appointments of holders of high judicial offices are made by the Plenary of the Council for the Judiciary and are adopted by a majority of the members of the Council and must include the reasons justifying the appointment based on merit and capability of the candidates. Furthermore, those decisions can be appealed by unsuccessful candidates by way of judicial review before the Administrative Division of the Spanish Supreme Court.

C.- POWERS AND RULES RELATED TO DISCIPLINE

The independence of judges is not a personal privilege but an instrumental to ensure that citizens' claims are resolved in accordance with the rule of law, without undue influence from other powers outside the judiciary.

CDL-PI(2022)021

But alongside the principle of independence must be the principle of accountability, judges must act in accordance with the law and their misconduct must be sanctioned.

Examination of the responsibility of judges is the exclusive responsibility of the Council of Justice. As I have already said, Spanish Constitution attributes to the Council of Justice the inspection of Courts and Tribunals and the judicial disciplinary regime (in the case of very serious infringements, such liability may also be criminal liability).

The characteristics of this disciplinary regime, in summary, are as follows:

- a) It is governed by the accusatory principle, so that the functions of investigating and judging are separated. Next to it rules the principle of legality. The Council applies the disciplinary authority with strict subjection to the principle of legality, which implies not only the desirable requirement of certainty of the norm, but also the necessity of the application of the sanction only to the predetermined cases and limits.
- b) The investigation is entrusted to a very experienced member of the Judicial Career (the Promoter of the Disciplinary Action) who must be a Magistrate of the Supreme Court or Magistrate with more than twenty-five years of seniority in the Judicial Career). He or she assumes the task of investigating the infractions and sustaining, where appropriate, the accusation. This not only supposes a healthy introduction of the accusatory principle in the disciplinary procedure, but it helps to professionalize and rationalize the instruction.
- c) The judgment is entrusted to Disciplinary Committee. It is composed of seven members of the Council, four of the judicial and three of the non-judicial members of recognized competence. It is up to them to solve the disciplinary proceedings initiated for serious and very serious infractions and to impose, where appropriate, the sanctions that correspond to judges and senior judges, except for those cases in which the sanction proposed is the separation of the service that are the competence of the Plenary.

All information on disciplinary matters is also available in the Transparency Portal of the CGPJ.

D.- POWERS TO GIVE OPINIONS ON LEGISLATION

The General Council for the Judiciary is also responsible for issuing non-binding opinions and recommendations on bills or legal acts on judicial matters, procedural rules and matters related to fundamental rights, criminal law and penitentiary law.

This is a legally guaranteed function but, unfortunately, in recent years the legislature has circumvented it, thus preventing the Council for the Judiciary from expressing its opinion on very important legal reforms. This has been particularly serious with regard to reforms made to the functioning of the Council of Justice itself³, which has not had the opportunity to give its opinion.

³ For the center-right political parties, it is necessary to modify the existing regulatory framework before proceeding to the renewal of the Council. The new regulation must be in line with European standards. Against it are the left-wing parties who consider that the democratic legitimacy to be a member of the Council can only be granted by the Parliament.

E.- POWERS ON BUDGET IN THE JUDICIAL SPHERE

It must be underlined that the General Council for the Judiciary enjoys financial autonomy once its budget has been adopted by Parliament. The budget of the Council covers the following issues:

- a) Selection of judges
- b) Initial and continuing judicial training
- c) Judicial Documentation Center
- d) Judicial Inspectorate
- e) International activities
- f) Human and material resources of the Council itself.

The information on the budget and its implementation status can be found in the Transparency Portal of the General Council of the Judiciary.

Unlike in other States, the Council for the Judiciary does not manage the operating costs of the courts, nor does it have the autonomy to decide on the increase in the number of courts that are needed, but only gives an opinion on the matter.

F.- INTERRELATION BETWEEN THE COMPOSITION OF THE JUDICIAL COUNCIL AND ITS POWERS – CENTRALIZED MODEL VS. FRAGMENTED MODEL

The Spanish constitution designed a model of a mixed Council, so that twelve of its twenty members must be judges and the others, non-judges, jurists of recognised prestige. Non-judges must be elected by Parliament, while the Constitution is silent on judges must be elected. This silence was initially interpreted to mean that judges were to be elected by their peers.

But in 1985 this system was changed and since then all members of the Council have been elected by Parliament. Judges and their associations have a role in shaping the candidates but the final choice rests within the Parliament.

This situation has recently been in crisis, due, above all, to the position of the European institutions, demanding that in states where there are Councils of Justice, at least half of them should be judges, who must be elected by their peers⁴.

The requirement for the appointment of Council members to comply with European declarations has led to the non-renewal of the current Council, whose term of office has expired. The appointment of new members of the CGPJ has been pending since 2018. The appointment of the members of the CGPJ requires a three-fifths majority in the Congress of Deputies and the Senate⁵. Political discrepancies about the election system have so far prevented that important majority from being reached⁶.

The Plenary of the CGPJ has called for the immediate renewal of the constitutional body in different agreements approved in the Plenary Sessions.

⁴ This demand is maintained in Spain by judicial associations and by the vast majority of judges, as revealed by a recent survey commissioned by the CGPJ.

⁵ A significant majority, more than 90%, was reached on the occasion of the election of the members of the current Council. It was also the first Council with parity, equal number of women and men.

⁶ For the center-right political parties, it is necessary to modify the existing regulatory framework before proceeding to the renewal of the Council. The new regulation must be in line with European standards. Against it are the left-wing parties who consider that the democratic legitimacy to be a member of the Council can only be granted by the Parliament.

On the other hand, I have to say with sadness, that the Legislative branch has limited the competences when the Council remains in functions because it has not been renewed within the legally stipulated period, among them, fundamentally, that of not being able to make appointments of the high judicial positions, which is causing serious problems in the proper functioning of Justice⁷.

Finally, to state that the executive branch has important powers in the regulation of the framework of Justice (mainly in determining the number of courts necessary), also having powers of regional governments (basically in providing the material resources necessary for the courts to work). If you would like additional information on this issue, which is a bit complicated, I will gladly give it to you in the subsequent debate.

In conclusion, I would like to mention the mode of operation of the Council of Justice, which is structured, in synthesis, around four commissions: the permanent commission, the equality commission, the disciplinary commission and the commission on economic affairs. The permanent commission is composed of seven members, with exclusive dedication⁸, and is chaired by the President of the Council of Justice. This committee is responsible for the day-to-day running of the Council, preparing all matters to be resolved by the Plenary. The most relevant decisions are adopted in Plenary⁹ session, and the Plenary meets at least once a month. All the information on the functioning of the CGPJ can be found in articles 558 and following of the Organic Law of the Judiciary.

Consultations can be done on the Judicial Branch webpage:

www.poderjudicial.es

⁷ Organic Law 4/2021, of March 29, amending Organic Law 6/1985, of July 1, 1985, on the Judiciary, for the establishment of the legal regime applicable to the acting General Council of the Judiciary.
<https://www.boe.es/eli/es/lo/2021/03/29/4>

⁸ The other thirteen members are part-time, combining their work on the Council with their original professional occupation,

⁹ For more details on these competencies, see article 602 LOPJ.