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THE FUNCTIONING OF THE HIGH JUDICIAL COUNCILS IN ITALY AND IN SPAIN

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1. The Italian and the Spanish Judicial Councils: two heterozygote twins.

The Judicial councils regulated by the Spanish and by the Italian Constitutions share a series of common elements, both for their historical origin, for the constitutional purpose that is behind their institution and for their legal organization and functions.

At the same time these two Judicial councils, though clearly belonging to the same "family" of organs whose purpose is the guarantee of the independence of the Judicial branch of Government, are different in their structure and in their position in relation to the Judiciary and, moreover, have evolved along different lines of development, both in their relation to democratic politics and to the different ways of thought existing in the judicial bodies that they are supposed to "govern".

And also the failures and the inefficiencies of these two bodies have been different, and therefore also the proposals for their reform that are currently discussed in Spain and in Italy go in different directions.

2. The Italian Judicial Council: historical origin and comparative perspective

The solution adopted by the Italian Constitution of Dec. 27th, 1947 with the purpose of protecting the independence of the Judiciary power was extremely audacious for the times in which it was conceived. It was new for the radical perspective it adopted, but not for the instrument that it used: a Judicial Council.

Already the beginning of the XX century, in the most advanced phase of the evolution of the Italian liberal State under a monarchical Constitution, Law n.

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511/1907 had created a Judicial council ("Consiglio superiore della Magistratura"), recognizing to it the powers to elaborate proposals to be submitted to the minister of Justice on the appointments, promotions and transfers of judges. And that solution was not new in comparative perspective, given the fact that it was an imitation of a similar organ (bearing the same name) that had been created in 1883 in France[1], under the Third Republic. Yet the first Italian Judicial Council had been only an advisory body: the final administrative decisions that it had the task to prepare remained in the sphere of competence of the Minister for Justice, therefore in the field of the Executive power. Therefore, the first Italian Judicial council (that of 1907), more than a device to grant the independence of the Judiciary branch, had been a technique to recognize a sort of corporative autonomy to one of the most important "careers" of the State, in forms actually similar to those foreseen for Ambassadors and University Professors. Of course this organ also had the purpose of reducing the political discretion in the exercise of the functions of the Minister of Justice in the "government" (or in the administration) of the career of ordinary judges.

From this point of view, the "second" Italian judicial Council, regulated by the Constitution of 1947 – following the option adopted by the French Constitution of 1946, but later abandoned by the original text of the Constitution of 1958[2] – marked a radical change: the "second" Judicial Council was competent not to merely propose decisions, but to adopt administrative decisions on a wide series of topics, listed in art. 104 of the Constitution: selections, appointments, transfers and promotions of judges as well as their disciplinary responsibility. In this way, all decisions concerning the career of a judge were reserved to a deliberation of the Judicial Council, while the Ministry of Justice was left only with the competences regarding the "services relating to Justice" (like the career of administrative officers serving the

[1] Actually, the Judicial Council ("Conseil superieur de la Magistrature") created by the law of August 30th, 1883 was composed by all the judges of the different sections of the Cassation Court and its competence was to judge on disciplinary infractions committed by the judges.

[2] G. Mangin, Article 65, in F. Luchaire, G. Conac, X. Prétot (dir.), *La Constitution de la République française. Analyse et commentaires*, III ed., Economica, Paris, 2009, p. 1522 ss.

judicial power, the prisons, the practical aspects of Judicial organization like Court buildings, materials and so on).

The extension of the judicial apparatus submitted to the Judicial Council was defined on the base of the pre-existing judicial organization, that the Constitution of 1947 took in consideration, influencing it through its principles (specially establishing the general operation of the principle of judicial independence, and setting a trend toward the unity of the judicial function). Actually, the judicial organization existing in Italy at the moment of the fall of the fascist government and of the restoration of representative institutions was characterized by the division of the judicial function between various bodies of judges: besides the "ordinary judges", there were many "special" judges that had been created sometimes in the framework of a more general trend in European legal culture (Administrative Courts, Military Courts, Court of Advisors, Criminal Law Courts), and sometimes trying to find a solution for the special nature of the subject on which the courts were supposed to decide (Tax Courts, Criminal Law Courts for Minors of Age, etc.). These special Jurisdictions were not unified with the ordinary jurisdiction by the Constitution of 1947 and the Judicial Council regulated by art. 104 was endowed only with the competence for the career of "ordinary judges". It was left to the ordinary law to find forms to protect the independence of special jurisdictions.

At the same time – and this is another specific choice of the Italian Constitution – the Judicial Council was given the power to protect the independence and to administer the careers not only of ordinary judges, but also of public prosecutors[3]. Also this was a consequence of the Judicial organization existing at the moment in which the Constitution was adopted: at that time, ordinary judges and public prosecutors were selected with the same procedures, they belonged to the same career and they could actually exercise judicial or prosecutory functions in different phases of their careers (this rule is still existing today, although with some limitations). The result of this

[3] This solution was totally deprived of precedents in comparative constitutional history, because also the French Constitution of 1946, that anticipated the model of Judicial Council chosen by the Italian Charter of 1947 did limit the powers of the Council to the administration of the career of judges, not including prosecutors.

choice was to recognize a form of full independence not only for the judges but also for the public prosecutors and to entrust the task of guaranteeing that independence to the same organ: the "Superior Council of the Magistrates".

3. Composition and nature of the Italian Judicial Council

In the regulation of the composition of the Judicial council, the Constitutional Assembly tried to combine two different needs.

On one side, there was the need to protect the (external) independence of the judicial power, with the consequence that politics (the executive as well as the legislative power) should have been deprived of any influence on the Council. Furthermore, if independence meant also autonomy, till the point of a sort of a self-government of the judicial power, the consequence should have been a Judicial Council formed only of members of the judicial power, either through election or by lot or with another method of selection (for example seniority in the career).

But there was also a second type of need, in a certain sense opposite to the first one. The Constitutional Assembly clearly perceived the risk that a Judicial power ruled by a Council composed only by members of judicial origin could be tempted to insulate itself from the rest of the Constitutional system and from the society, bringing to the extreme a corporative trend that would have been in part an inevitable consequence of full autonomy and independence of the Judiciary. To foster this purpose, the Constitutional Assembly of 1947 believed that the composition of the Judicial Council should have included also "lay" members: it is to say persons not belonging to the Judicial career, but selected in other legal careers and selected not by the Judiciary power but by other authorities, either political in nature or expression of the corporations or of the authorities in which those non-judicial legal careers were organized.

The balance between these two basic needs produced a "mixed" Judicial Council, composed in majority of members of the Judicial Power elected by the same judges, but integrated also by non-judicial members elected by Parliament.

According to art. 104 of the Italian Constitution, the Judicial Council is composed by a number of councillors established by the ordinary law (and therefore variable without changing the Constitution), according with the following formula:

a) three *de jure* members: the President of the Republic, the First President of the Supreme Court (the "Cassation" Court) and the General Prosecutor of the Supreme Court.
b) Two thirds of the remaining (elective) members elected by the magistrates of the ordinary judicial power (both judges and prosecutors) of the various categories in which the judicial power is articulated, elected between the same judges.
c) One third of the elective members elected by Parliament with qualified majority between full professors of Law in the Universities and between practicing lawyers with at least 15 years of seniority.

Given the fact that the total number of the members of the Judicial Council has changed through time, according, respectively to laws nr. 185/1958 (24 members), nr. 695/1975 (33 members) and nr. 44/2002 (27 members), the actual number of the second and of the third of these quotas has changed. In the present moment, the Judicial Council is composed by 27 members, articulated in the following way:

a) three *de jure* members: the President of the Republic, the First President of the Supreme Court (cassation Court) and the General Prosecutor of the Supreme Court. This is the constitutionally fixed quota;
b) 16 judges and public prosecutors elected by all judges and prosecutors forming the ordinary Judicial Power: 2 of these members have to be elected between the judges of the Cassation Court, 10 among the Prosecutors and 4 among the Judges[4];
c) 8 "lay" members elected by Parliament between full professors of law in the universities or lawyers with 15 years of seniority.

[4] This is the division of quotas established by law n. 44/2002.

The need of an equilibrium between judicial autonomy and coordination with the general organization of the State has been pursued also in establishing the rules on the presidency of the Judicial Council. As said before, the President of the Judicial Council is the Head of the State, that in Italy has mainly representative functions, in the sense that he is not the Head of the Government and that he does not belong to the executive power. But as the President of the Republic has many and various functions and may not exercise the actual presidency of the Council (an organ that works on a day-by-day, or at least on a weekly base), the Constitution has put at his side a deputy president of the Council, who is elected by the Council itself (so by an organ composed of a majority of judges) but with the obligation of selecting him between the members of the Council elected by Parliament. In the practice, the President of the Republic delegates his functions to the Vice President, who is the actual Chairman of the Judicial Council, but when political controversies arise (like during the conflict between President Francesco Cossiga and deputy president Giovanni Galloni, at the beginning of the 1990s) the President may withdraw the delegation of powers and exercise directly the powers of the President of the Judicial Council (like establishing the agenda of the Council and presiding over the meetings).

While the President's powers as Chairman of the Council may be delegated to the deputy president, his powers as head of State may not: it is the case of the power of dissolution of the Council, foreseen not by the Constitution but by law n. 185/1958. Unless previously dissolved before its regular term, the Judicial Council is elected for 4 years. Its members are totally renewed at the expiration of the organ's four years term, while they have to be substituted as single members in case of resignation or death, through a by-election in the case of the members elected by Parliament and swearing in the first of the non elected candidates in the case of the members elected by the judges.

The members of the Judicial Council may not be immediately reelected but may seek a second term after an interval of a term.

The Judicial Council is considered by the constitutional doctrine as an organ of constitutional relevance, and as such it has somewhat a diminished status in

comparison with Constitutional organs, while its status is higher than ordinary administrative authorities. His functions are regarded as administrative in nature and therefore its acts may be appealed for violation of law before the administrative judges (in two degrees: the Regional Administrative Court for Lazio and the Council of State).

4. The Judicial Council's internal structure

The Judicial Council's internal structure is articulated in the Presidency, the Commissions and the Plenum.

All the functions conferred to the Judicial Council by the Constitution have to be exercised by the Plenum, with the consequence that both the Presidency and the Commissions have, in general, only preparatory and coordinating functions, every decision being reserved to the plenum.

The only exception to this general rule is the Disciplinary Section of the Council. This organ is not directly mentioned by the constitution, who confers the competence on the disciplinary responsibility of the magistrates (Judges and Prosecutors) to the Council. But the law that implemented the Constitution creating the Council (law nr. 195/1958), moving from the idea that such a "judicial" activity may be exercised more appropriately by a smaller organ, has established that the judgment on the disciplinary infractions of the judges is competence of the Disciplinary Section of the Council, that is composed of 6 members of the Judicial Council, in the same proportion of members of judicial (4) and parliamentary (2) origin foreseen for the composition of the Council and placed under the presidency of the Vice President of the Council (who is elected by Parliament).

The disciplinary jurisdiction may be activated either by the Minister for Justice or by the General prosecutor of the Supreme Court. Disciplinary infractions consist in infractions that may have been committed during the judicial function or outside of the judicial function. These disciplinary infractions have been codified by the Legislative decree nr. 150/2006, according to which the infractions during the judicial function are the violation of impartiality, the violation of the duty of due diligence

and of labouriousness – the most frequent case being serious and injustified delay[5] – and of the duty of fairness; the infractions committed outside the exercise of the judicial activity are the use of the judicial function to obtain injustified advantages; to obtain loans from persons under trial; to have relations with persons under criminal trial; to exercise activities incompatible with the judicial functions or not authorized by the Judicial Council; to be sentenced for a crime. A general clause adds that it is also a disciplinary infraction "every fact that may distort the image of the judge".

The judge or prosecutor who is found guilty of a disciplinary infraction is sanctioned through different kinds of measures: formal warning, censure, loss of seniority in the career, inability to be appointed to preside over a judicial office, suspension from the function of judge from three months to two years, dismissal from the judicial order. The maximum disciplinary sanction is the dismissal from the Judicial order.

The person affected by the decision may appeal it before the Supreme Court.

While the Disciplinary Section has a decision power and must follow all judicial form in its activity (that is regarded as jurisdictional in nature), the other Committees of the Judicial Council (nine in total) have a preparatory function, in the sense that they prepare the decision adopted by the Plenum, to which all decisions within its sphere of competence are reserved. All these Committees are composed by 6 members of the Council, of which 4 must be of judicial origin and 2 of parliamentary origin.

5. The Functions of the Italian Judicial Council

As it has already been said, the functions of the Judicial Council are:

a) the disciplinary jurisdiction (see above);
b) the selection of judges and prosecutors for their admission in the judicial order;
c) the appointment of judges and prosecutors to specific functions and offices;
d) the removal of judges from specific functions and offices, in the cases foreseen by the law;

[5] N. ZANON, F. BIONDI, *Il sistema costituzionale della magistratura*, IV ed., Zanichelli, Bologna, 2014, p. 287.

e) the transfer of a judge from one office or function to another within the judicial organization;
f) the appointment of a judge to a directive judicial or prosecutorial function (like that of President of a Court or of Chief Prosecutor in a district);
g) the power to appoint lawyers and university professors in law as Cassation judges for high merits.

The functions of the Council established by the Constitution may be enlarged by the law to which the Constitution recognizes the power to regulate the council. Between these further functions, the most important is the power to adopt its own internal regulation. In general it is not questioned that the ordinary law adopted by Parliament may confer further functions to the Judicial Council, provided that these functions are compatible with the role of the Council established by the Constitution. On the other side, it has been objet of debate the possibility for the Council to enlarge its functions by its own decision, without a legal base: this pretension has been justified with a doctrine of the "implied powers", according to which the Council is supposed to be enabled to adopt all the acts that may protect the independence of the Judicial power and that may give substance to the autonomy of the Judicial power. The main forms of these implied powers have been on one side the so called "normative" or "paranormative" powers of the Council, through which the Council has tried to regulate various aspects of the Judicial organization; on the other side, the power of the Council to discuss and deliberate in defense of judges or prosecutors who have been object of sharp criticism, specially when these criticism comes from politicians (the so called "pratiche a tutela"). Yet this theory of the "implied powers" of the Council is criticized in the constitutional doctrine on the base of the constitutional provision that reserves to the law of Parliament the regulation of the Judicial organization, with the consequence that without a specific legal base the Council should be regarded as deprived of the power to regulate that subject-matter. Furthermore, law n. 195/1958, in which the constitutional powers of the Council are concretized, includes the list of the powers of the Council and a general clause stating

that the Council has all the powers foreseen by the law, thus excluding the possibility of an enlargement of functions without a legal base.

It has to be underlined that, as it has already been said, the competences of the Judicial council deal only with ordinary judges and prosecutors. The protection of the independence of special judges is a constitutional imperative, but the forms of such a guarantee are left to the choice of the ordinary legislator. In the 1980s – so a quarter of century after the actual beginning of the activity of the Judicial Council – a series of laws has created four Judicial Councils respectively for the Administrative Judges[6], for the Tax Court Judges[7], for the judges of the Court of Advisors[8] and for the Military Judges[9], that are not part of the ordinary judicial systems.

In general, the structure and the functions of those "minor" Judicial councils replicate the structure[10] and functions of the Judicial Council for the ordinary judges. They are all composed by a majority of members elected by the respective judges (two thirds) and by a minority of members elected by Parliament (one third). The main variation in comparison with the (general) Judicial Council is the presidency, that is not conferred to the President of the Republic but to the President of the Council of State, to the President of the Court of Advisors and to the president of the Superior Military Tribunal, while in the Judicial Council for the Tax Courts the president is elected by same Council between the members elected by Parliament.

6. The Italian Judicial council in the practice

[6] Law n. 186 of 1982 and law n. 205/2000.

[7] See art. 17 of legislative decree n. 545/1992, according to which the Council is composed of 11 judges elected by all tax judges and by 4 members elected by Parliament (2 by the Chamber and 2 by the Senate, with absolute majority) between university professors in law or between persons who may practice in the tax commissions with at least 12 years of activity. This composition was introduced by art. 16-quarter of the decree-law n. 452 of 2001 (and by law n. 16 of 2002), while the original text of 1992 had foreseen a Council composed only by members elected by the tax courts.

[8] Law n. 117 of 1988 and Law n. 15/2009

[9] Law n. 561 of 1988 and later decree-law n. 78 of 2009, law n. 1999 of 2009 and law n. 66 of 2010.

[10] This may be said of the present structure of those Council. The structure defined by the first laws regulating them originally foresaw a composition only of special judges belonging to the category whose independence the Council is supposed to protect, without external members, while the more recent reforms have introduced non-judicial members elected by Parliament in forms similar to those established by the Constitution for the Judicial Council.

The first 15 years of the history of the Italian Judicial Council – from 1959 to the beginning of the 1970s – were marked by a gradual consolidation of the new organ. In this period the main line of division within the Judicial Council was related to differences of views between the older and higher ranking judges and the younger, with the first group of judges being more inclined toward a hierarchical view of the working of the judiciary and a more conservative attitude and the second group more open to underline the individual responsibility of the single judges and public prosecutors. It is important to remark that, notwithstanding the constitutional provisions in favour of full legal equality between men and women, it was only in 1965 that the Judicial power was opened to the women: and this may be regarded as sign of the weight of a conservative approach in the judicial career (and in the society in general).

After the foundation of a left-wing association of judges ("Magistratura Democratica"), close to the main opposition party of the post-war period, the Communist Party, a ideological line of division within the Judicial power began to emerge and to reflect itself in the composition of the Judicial Council. The ideological division was the prevalent phenomenon in the years between the beginning of the 1970s and the end of the 1980s. In the final part of this period a conflict arose between the President of the Republic, Francesco Cossiga and the Judicial Council and reached serious levels of confrontation.

After 1992 the key role played by the public prosecutors first in the demise of the political system of the so called "first" Italian Republic, whose main leaders were discredited through a series of scandals and of trials for political corruption ("Tangentopoli") and, after 1994 in a long series of trials in which the leader of the coalition of center-right and four times Prime Minister Silvio Berlusconi, put the question of the independence of the public prosecutor (and of the influence on them of opposition parties, mainly belonging to the left) at the center of the political debate. The Judicial Council became a theatre where many conflicts of that type were reflected.

The confrontation between the different Judicial associations has lost part of its ideological tone in the more recent years, but their role in the partition of the main judicial directive roles came to the light after 2018, specially for the role played by a former secretary of the National Association of Magistrates, Luca Palamara, who has been dismissed from the judicial power through disciplinary jurisdiction and is currently submitted to a criminal trial. The crisis of the Judicial Council that came up to the light in this case has generated many proposals for reform, some of which would need a constitutional amendment, while others would require only ordinary legislation. A special independent Committee to study the problem of the Reform of the judicial Council has been appointed by the present Minister of Justice and has worked under the presidency of one of the most respected Italian constitutional lawyers, prof. Massimo Luciani, submitting a report that outlines some solutions to reduce the influence of the judicial associations in the decision-making procedure of the Council, starting from a reform of the electoral system of its members of judicial origin, that, according to that Report, should be based on the Single transferable Voting System[11].

7. The Spanish Judicial council: historical origin

The institution of the *Consejo general del poder judicial* in the Spanish Constitution of 1978 has some elements in common with the Italian Judicial Council created three decades before, but it is characterized by some differences that, put together with a political system characterized by parties that are stronger than their Italian counterparts and with a legal culture in which legal positivism seems to be more deeply rooted, have produced an arrangement that, more than 40 years after its creation, protects the independence of the judicial power in forms that are remarkably different from the Italian model.

[11] See https://www.giustizia.it/giustizia/it/mg_1_36_0.page?facetNode_1=0_10&facetNode_2=0_10_18&contentId=COS334948&previsiousPage=mg_1_36#.

A common element that explains the option for the Judicial Council in Spain as well as in Italy is the heritage of the past, at least in two senses. Also Spain had inherited from its previous constitutional experience a liberal and an authoritarian view of the appropriate way to regulate and administer the Judicial power. While the liberal tradition stressed much more than the authoritarian tradition the value of the independence of the judge and of the judicial power as a consequence of the principles of the rule of law and of the separation of powers[12], they had in common the idea that the judicial career was a subject matter who was administrative in character and therefore belonged to the competence of the executive power, and in particular of the Minister of Justice.

In those context, the perspective of a self-government of the judicial power was regarded as incompatible with the structure of the State. And this was the normative solution that prevailed not only under the liberal Constitution of 1876 and under Franco's dictatorship (1939-1975), but also during the Second republic (1931-39): actually the radical-democratic Constitution of 1931 strengthened the guarantee of tenure of judges in its art. 98 and recognized to the President of the Supreme Court the power to propose to the minister of Justice promotions and transfers of judges[13] but did move in the direction chosen after the Second World War by the French and the Italian constitutions.

The decision of breaking with the model of government of the Judicial power prevailing in the past was therefore more dramatic in Spain than in Italy because, on one side, Spain lacked totally the precedent of a "lighter" form of Judicial council, like the one that had been created in 1907 in Italy following a French precedent, and, on the other side, because the search for solutions in Spain looked directly to the models offered by comparative law, and specially to the Italian model. At the same

[12] At the legislative level, see the Decree of 6.12.1868 and the Organic Law of the Judicial Power of 15.9.1870, establishing the stability of tenure of judges.

[13] Art. 97 – b) of the Spanish Constitution of 1931. See the comments of N. PÉREZ SERRANO, *La Constitución Española (9 diciembre 1931)*, Editorial Revista de derecho privado, Madrid, 1932, p. 295.

time, the Italian Judicial council was taken in consideration not only with the purpose of imitating it, but also for not imitating some aspects of it.

In this context, it has been said that the creation of the Judicial Council was the main innovation adopted by the Constitution of 1978 on the Judicial organization[14]. And there was a large consensus between the political parties in the Constitutional assembly concerning the creation of this organ. But this consensus did not continue after the entry into force of the Constitution and "few time later every kind of difference of opinions about this organ, his composition and functions"[15] became to affect the activity of the Council, with the consequence that the legal regulation of it has been subject to many amendments and not on marginal aspects of its regulation.

8. Composition and nature of the Spanish Judicial Council

The first difference between the Spanish Judicial Council and its Italian counterpart deals with the judicial body of which the Council must protect the independence: this "body" of magistrates is for an aspect larger and for an aspect smaller.

It is larger because the Spanish Judicial power is inspired to the principle of unity of the jurisdiction in a more radical way than the Italian Judiciary. We have seen that in Italy there are various bodies of magistrates, and that the administrative judges (as well as the military judges, the judges of the Court of advisors and the tax court judges) don't belong to the judicial power in a strict sense, i.e. to the judicial power that is placed under the administrative competence of the Judicial Council. In Spain all these judicial bodies are united in one single Judicial power, that is organized at different levels and in relation with the territorial organization of the State and is divided in Administrative, military, Civil-Criminal and Social sections, but all the sections are part of the unitary Judicial power. The "Consejo general del Poder Judicial" has the power to administer the careers of all these judges.

[14] E. ÁLVAREZ CONDE, R. TUR AUSINA, *Derecho constitucional*, VI ed., Tecnos, Madrid, 2016, p. 738.
[15] L. AGUIAR DE LUQUE, *Art. 122*, in M.E. CASAS BAAMONDE, M. RODRIGUEZ-PIÑERO, *Comentarios a la Constitución española*, Wolterz Kluwer España, Madrid, 2009, p. 122.

But, from another point of view – for some aspect of an even higher importance – the body of magistrates submitted to the competence of the Spanish Judicial Council is smaller than in Italy, because it does not include the Public Prosecutors ("Ministerio fiscal"), who are placed under the direction of the Executive power and are organized in a hierarchical form under the leadership of a National State Prosecutor ("Fiscal General del Estado"), who is appointed by the National Government. In other words: while the Italian Constitution grants to the public prosecutors the same kind of independence in what concerns their career that is recognized to the judges (and this even to the point that they belong to the same legal career) and recognizes to the Judicial Council the power of administer it, the Spanish Constitution treats the public prosecutors as another kind of public officials, for which no competence of the Judicial Council is foreseen. If we remember that in the practice of the Italian Judicial Council the independence of the public prosecutors has been one of the more "hot" questions, we may see already from this point of view that the role of the Spanish Council is remarkably different from that of the Italian Council.

The composition of the Spanish Judicial Council is at a first sight rather similar to that of the Italian Council, specially in the basic principle: the Judicial Council is an authority composed in majority of judges and in a substantial minority of members of other legal careers (practicing lawyers and jurists of recognized authority, with at least 15 years of seniority), elected with a three-fifth majority by the two Chambers of the National Parliament (half by the Congress and half by the Senate). The Spanish Constitution establishes directly the numbers: 12 members of the Council are elected between the judges, while 8 are elected by the two Chambers (four by the Congress of the representatives and four by the Senate). Yet, while the Spanish Constitution is more detailed than the Italian one in establishing the number of the members of the Council and the quotas of members, its art. 122.3 does not establish that the judicial members of the Council have to be elected by the judges, but only that 12 of the 20 members are to be elected between the judges. In other words: the Constitution is clear on the passive electorate but not on the active one, even though the comparative law reference to the Italian experience and the spirit of the constitutional provision

seems to lead in the direction that the 12 members of the Council that had to be selected between the judges should have been selected by the Judges themselves.

This latter solution was actually chosen by the first organic law adopted in Spain after the entry into force of the Constitution, the LO 1/1980 of January 10th, 1980, and therefore the first Judicial Council was composed of members elected by the judges (12) and by the two Chambers (8).

But, surprisingly, five years later the socialist majority in the Spanish parliament changed the Organic Law on the Judicial Council and choose the opposite solution, regarding it as constitutionally practicable: according to LO 6/1985, the competence to elect the members of the Judicial Council was given to the National Parliament (half to the Congress and half to the Senate), both in the case of the "lawyers and jurist of recognized authority" and in that of the judges of the various categories. Although the solution adopted by the Organic Law n. 6/1985 is not in contrast with the words of art. 122.2 of the Spanish constitution (and for this reason it was not declared unconstitutional by the dec. n. 108/1986 of the Spanish Constitutional Court), it goes clearly against the principle of equilibrating the political and the judicial elements of the Judicial Council not only in the quality of the persons of the two categories but also in their "derivation"[16].

Yet, this form of election of the members of the Council is still in force today, but first the LO 1/2001 and then the LO 4/2013 have recognized to the judges a role of proposal in the pre-selection of the candidates: all judges may submit their application, but at the condition of being supported by 25 members of the judicial career or by an association of judges (art. 574 LOPJ). Parliament is supposed to elect the members of the CGPJ choosing in a list that includes a number of candidates three times larger than the number of positions to be filled.

[16] The Spanish constitutional literature is divided on this problem following a ideological or political line: see for example L. AGUIAR DE LUQUE, *Art. 122*, cit., p.1887 y ss. and F. BALAGUER, *Manual de derecho constitucional*, Tecnos, Madrid, 2005, p. 485-486, who defend the solution adopted in 1985 and F. FERNANDEZ SEGADO, *El sistema constitucional español*, Dykinson, Madrid, 1992, p. 795 y ss., who criticizes it.

The 12 judges who are members of the Council are divided in three categories: a) three supreme Court judges; b) three judges with at least 25 year of seniority in the career; c) six judges without specific seniority requirements.

9. The internal structure of the Spanish Judicial Council

The Judicial Council is articulated in a presidency, in the plenum, in the internal Committees and in a support bureaucracy

According to the Spanish Constitution, the president of the Council is at the same time the President of the Supreme Court, the highest judicial body of the land (with the exception of the Constitutional Court) and it is elected with a 3/5 majority by the Judicial Council (between the judges with the rank of Supreme court Judges or between jurists of recognized authority with 25 years of activity in their category[17]) at the beginning of the Council's five-years term and for the whole term of the Council[18]. With his election the total number of the members of the Judicial Council is in total of 21. The President may be reelected for a second five-years term. According to LO n. 1/2013 a Vice president is also elected by the Council between the Supreme Court judges who are members of the Council[19].

According to both LO n. 1/1980 and LO n. 6/1985 some internal Committees had the function of preparing the decisions of the Plenum, but all the decisions were adopted by the Plenum of the Council.

This situation was drastically changed by LO 4/2013, which moved from the preference for a smaller Council, but faced the impracticability of a constitutional reform for the reduction of the number of its members[20] and tried to pursue this objective in an indirect (and maybe questionable) form. The LO 4/2013 devolved the

[17] Art. 586.1 and 3 LOPJ.

[18] The LO n. 4/2013 allowed the election with simple majority in the second vote, if the 3/5 majority had not been reached in the first round, but more recently LO 1/2018 reintroduced the rule of the 3/5 majority in all votes for the election of the President, without exceptions: see M.A. CABELLOS ESPIÉRREZ, *La reforma inacabada: El Consejo general del poder judicial ante su enésima reformulación*, in *Revista Española de derecho constitucional*, 118 (2020), p. 30-31.

[19] Art. 590 LOPJ.

[20] M.A. CABELLOS ESPIÉRREZ, *La reforma inacabada*, cit., p. 33.

main competences of the Council to a Permanent Committee composed of five of its members (increased to 7 plus the President, according to the reform adopted with the Organic Law n. 1/2015), elected by the Council for a one year term, providing that all the members of the Council will be members of the Permanent Committee for one year within the five-year-term of the Council. Among other things, only the members of the Permanent Committee exercised their activity on a full-time basis, while the others were reduced to the status of part-time judges or members of the other categories in which the councillors are chosen[21]. The activity of the Plenum was therefore reduced by LO 1/2013 to a meeting each month.

Yet this reform has been partially undone by the LO 1/2018, according to which all members of the Judicial Council are dedicated to it on a full-time basis and the Permanent Commission, although still playing a very important role, loses the "general competence" it had acquired in 2013 and has a specific list of powers, mentioned in art. 602 of the Organic Law on the Judicial power. The Plenum has therefore recovered its role of main deciding body of the Judicial Council[22].

Like in Italy, within the Council there is a Disciplinary Committee, exercising disciplinary jurisdiction. The Committee is composed of 7 members, elected by the Council. A Disciplinary Prosecutor has been created by LO 4/2013. The Disciplinary Committee decides on disciplinary infractions of greater or lesser importance and adopts sanctions, but the ultimate sanctions (dismissal from the judicial career) may be adopted only by the Plenum.

A further internal Committee is the one on Qualifications ("Calificación"), where the appointments to judicial offices that have to be adopted by the Plenum are examined.

The main support offices are the General Secretariat and the Technical Cabinet. The CJPJ is supported by a specific bureaucracy depending from it, but permanent in its status ("letrados").

[21] Art. 579 and 601.2 LOPJ.

[22] M.A. CABELLOS ESPIÉRREZ, *La reforma inacabada: El Consejo general del poder judicial ante su enésima reformulación*, in *Revista Española de derecho constitucional*, 118 (2020), p. 31.

10 The functions of the Spanish Judicial Council

Art. 122 of the Spanish Constitutions lists the main functions of the Judicial Council, whose "basic core of competences is centered around the legal condition and the disciplinary system of judges"[23]:

a) appointments of judges[24];

b) promotions of judges;

c) disciplinary jurisdiction on judges and

d) control ("inspección") on judicial offices.

Among other things, it may be said that there is a certain degree of parallelism between the functions of the Spanish Judicial Council and those of the Italian Judicial Council, with the exception of the fourth function (control), that in Italy has been left to the Minister of Justice. The abovementioned functions are only the minimum of competences that the organic law regulating the Council is constitutionally obliged to recognize to the Council, but art. 122.2 enables the law to recognize to the Council also other functions. Currently the organic laws have recognized to the Council the following "integrative" functions:

a) the selection, training and specialization of the judges and the appointment of the Director of the Judicial School;

b) the decisions on administrative cases concerning the judges[25];

c) the adoption of advisory reports on bills on matters related to the judiciary power;

d) the draft of the budget of the Judicial power (not binding neither for the Government nor for Parliament);

e) the power to adopt executive regulations concerning its own organization and activity, developing art. 560.1 –XVI LOPJ;

f) various acts concerning the internal organization of the Judicial Council, like the appointment of its own Secretary General and of the members of its own Cabinet.

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[23] M.V. GARCÍA-ATANCE GARCÍA DE ROMA, *El gobierno del poder judicial: su garantía de independencia ante el tercer milenio*, in *Revista de derecho político*, 47 (2000), p. 150.

[24] A special form of appointment is the election of the President of the President of the Supreme Court (who is also president of the Judicial Council), as well as the election of two members of the Constitutional Court.

[25] Art. 348-377 LOPJ.

All the acts of the Judicial Council may be appealed before the III Section of the Supreme Court (art. 68.1 LOPG, implementing the principle of legality control of administrative activity fixed by art. 106.1 Sp. Const.).

As is may be seen from the variety and the importance of its functions, the Spanish Judicial Council plays an extremely important role in the protection of the independence of Spanish judges. Notwithstanding this fact, it has recently been said that "of all the Constitutional organs, the Judicial Council has been the less lucky and the one whose internal working has been more dysfunctional"[26].

11. Comparative conclusions.

The Judicial Councils in Italy and in Spain are the product of the option made by the Constitutions of these two countries to strengthen the independence of the Judicial power from political interferences and in particular from a subordination of their career to the executive power. This option was made in both countries bearing in mind the experience of the authoritarian governments to which Italy and Spain had been submitted before their Constitutions adopted, respectively, in 1947 and in 1978.

Various decades later it may be said that these purposes have been reached and that the type of Judicial Council foreseen by the two Constitutions has been successful not only in the two Countries but also abroad, where this model has been widely imitated.

For this reason, in neither of the two countries there have been serious proposals of abandoning radically the Judicial Council model as a device to protect judicial independence.

At the same time, the two Judicial Council have been involved in various kinds of conflicts with political powers and between the different lines of thought and groups of interests existing within the Judicial power, although in forms that have been very different in the two countries, also as a consequence of the structural differences between the two Councils. And the Councils have been object of controversy between the political parties, concerning – among other things – the degree of autonomy of the

[26] M.A. CABELLOS ESPIÉRREZ, *La reforma inacabada: El Consejo general del poder judicial ante su enésima reformulación*, in *Revista Española de derecho constitucional*, 118 (2020), p. 15.

Judicial Power, the representative nature of the Councils, its dignity of constitutional organ: these controversies have led to reforms and proposals of reform and to a situation in which, if the Judicial Council is not discussed as a model, it is criticized for various specific aspects of its practical working, specially for the criterias followed in judicial appointments. Among other things, both in Italy and in Spain, a sort of "judicial politics" has emerged, that may be compared to similar phenomena in free society – like "university politics" – where ideological and practical lines of division appear inside a body of public officers, sometimes creating negative effects, very similar to the political influences that organs like the Judicial Councils are supposed to avoid.

If conflicts are unavoidable in pluralistic democracies, they may also be symptoms of a certain degree of malaise that require reform: may be not radical reforms – like the change of a model, abandoning the Judicial Council solution – but moderate reforms, correcting the forms of election of the Councils and regulating with attention the role of judicial associations.