



## Governing the justice system: Spain's judicial council

*Following the European model, many developing and transition economies have established councils independent of other government branches to govern their judiciaries. Spain's experience illustrates the issues raised by the creation and operation of these entities.*

Like any public organization, the judiciary must be well-managed if it is to deliver its product swiftly and efficiently. But the product of the judiciary is the just resolution of disputes, which demands that it operate free of pressure from other branches of government. To prevent judicial management from becoming a means for compromising judicial independence, many countries have created judicial councils—bodies separate from other government branches and entrusted with selecting and promoting judges and otherwise managing the court system.

Although these councils differ by country, their success depends on how well policymakers address questions about their composition, the selection of their members, their responsibilities, and their accountability. Spain's experience with its Consejo General del Poder Judicial shows how one nation has dealt with these issues and reveals the factors that must be taken into account when addressing them.

### Composition and selection of members

Spain's Constitution states that the council is to consist of the president of the Supreme Court, who presides over it, plus 20 individuals, each of whom serves for five years. In some countries all council members are sitting judges, while in others sitting judges are in the minority—and in some instances

judicial membership is merely symbolic. The Spanish solution represents a compromise. Of the 20 members, the Constitution specifies that 12 are to be judges. The other 8 are attorneys or other jurists. This setup ensures that the concerns of the judiciary are heard, but not to the exclusion of those outside the corps of judges.

The Constitution requires that the 8 members from outside the judiciary be appointed by a three-fifths majority of Parliament. But it is silent on how the 12 representatives of the judiciary are to be selected. At first these 12 were elected by judges, but in 1985 Parliament assumed responsibility for selecting the entire council. Since then, 10 members have been chosen by the Congress of Deputies and 10 by the Senate. A three-fifths majority is required in each case.

The change from election by judges to selection by Parliament was adopted only after intense debate. The socialist majority supported the arrangement, while the conservative opposition voted against it. Since 1985 the issue has been a major point of contention between Spain's diverse political camps, and various arguments have been advanced for and against the different methods for choosing the members from the judiciary.

Opponents of election by judges cite two drawbacks. First, an electoral process in which both judges and their associations

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play key roles can spark ideological confrontations within the judiciary—as happened in the 1980 elections. Although Spanish judges may not belong to political parties, they can join judicial associations. Such associations are legally independent of the parties, but they do reflect ideological leanings. Those who oppose electing the judicial members argue that elections inject partisan tensions into the judiciary, to the detriment of both the cohesion of the judiciary and the judiciary’s public image.

A second criticism of judicial elections is that, if council members are chosen by other judges, they will tend to emphasize the interests of those who elected them. This fear of corporatist behavior is not limited to Spain. It was behind a recent proposal in France that only a minority of that nation’s council be drawn from members of the judiciary.

But serious objections have also been lodged against the current practice of having the Spanish Parliament elect the entire council. The main criticism is that this method enables political parties to divide the council seats among them. The fear is that the ideological composition of the council might simply reflect the prevailing pattern of party representation in Parliament. If that were to happen, critics assert, not only would it undermine the council’s image as a nonpartisan body, it would also enable parties to influence the judiciary. Council decisions—which affect the selection, promotion, and monitoring of judges—would then reflect the party leanings of council members, seriously undermining the independence of the judiciary.

While the experience in Spain and elsewhere suggests that there is no single right answer to the question of how to select council members, it does point to several considerations that any solution should reflect. First, if, as in Spain, the Constitution allows lawmakers a broad latitude when deciding how members are to be elected, the method adopted—whether Parliamentary selection, election by judges, or some other option—should be determined by agreement between the majority and the opposition. In Spain whenever an effort has been made

to amend the law governing the council before an interparty consensus has emerged, the result has been public controversy—undermining the council’s authority and legitimacy.

A second conclusion is that if the preferred option is to have Parliament select the judicial members of the council, partisan considerations must be reduced to a minimum. Accordingly, it is essential that the election process not reflect any jockeying for power on the part of majority and minority parties. Rather, the various Parliamentary groups must reach consensus on candidates of recognized standing. This can be accomplished not only by requiring larger majorities when it comes time to vote, but also by having an interparty commission propose candidates (as happened in Spain in 1996) or by allowing associations of judges or other legal professionals to play a role during the proposal phase. In that regard, in May, 2001, the Spanish government and the principal opposition parties reached a compromise agreement whereby the twelve judicial members of the Council will be elected by Parliament from a list of 36 candidates nominated by the judges’ associations or by groups of judges.

One practical question that must be addressed is the amount of time council members should spend on council business. Spanish policymakers decided that council members should devote themselves solely to council activities, to the exclusion of other professional endeavors. This approach has been criticized on the grounds that the volume of work does not justify having 20 full-time members and a president. Because the number of members is set by the Constitution, one suggestion under consideration is that only some members (acting as a standing committee) be full-time. The remaining members would then balance their council responsibilities with their professional activities.

### Functions of the council

In Spain, as in other European countries, the task of managing the administrative aspects of the judicial system was historically

entrusted to the executive branch of government, most often the Ministry of Justice. The executive would select judges, determine their administrative status, and discipline them. When Spain established its judicial council, it had to divide responsibility for these organizational matters between the council and the executive.

Because the Constitution specifies only the core functions of the council—appointment, promotion, inspection, and discipline of judges—it has been up to Parliament to legislate on the subject. Over the years various measures have extended the council's duties to cover nearly all organizational matters pertaining to the judiciary. The council organizes the selection process for judges by holding public examinations, manages the Judicial School, makes decisions on promotions and transfers, grants licenses, and establishes judges' workloads. The council also provides judicial inspection services and imposes disciplinary sanctions, either in plenary session or through its Disciplinary Committee.

Many tasks nevertheless remain the responsibility of the executive branch, particularly those pertaining to court administrative personnel and management of buildings and office resources. For efficiency reasons, the executive branch even continues to handle some matters directly affecting judges, such as salary and pension administration.

Experience suggests that it is better to entrust to the executive branch functions that a large collegiate governing body such as the council would find it difficult to discharge efficiently. Experience has also revealed problems arising when different government agencies have overlapping responsibilities. Two approaches have been followed. On the one hand, over time nearly all matters pertaining to judges have been given to the council, gradually eliminating executive branch involvement. The Judicial School and the selection process for judges were both transferred to the council in 1994. The council recently proposed that it be given authority over the Judicial Benefit Society as well. On the other hand, the need

to coordinate the work of the council and the executive branch led in 1996 to the establishment of joint council-government commissions at both the national and regional levels.

The council has no legislative power, although it can develop rules to implement provisions relating to the governance of the judiciary. It must also cooperate with Parliament. The council must report its views, which are nonbinding, on legislation the government intends to send to Parliament on issues affecting the judiciary and the protection of fundamental rights. The council's report must accompany whatever legislation on these issues the government transmits to Parliament. Parliament may also ask the council to provide reports or opinions on any matter it wishes. Although the council has no formal power to initiate legislation, it can send policymakers proposals and suggestions, something it does fairly regularly. In 1997 it prepared a white paper on justice that contained proposals for reforming and streamlining the judiciary, and in 2000 it issued proposals for judicial reform.

### **Oversight and responsibility**

The council is not a court. Its tasks are managerial and administrative. In accordance with the law, it develops and implements policies relating specifically to the organization of the judiciary. Thus it is responsible for providing guidance and direction, a situation that can eventually yield erroneous policies or policies that appear to run counter to the orderly functioning of the justice system. What is more, because the council is responsible for implementing legislation governing the judiciary, it is possible that its actions could contravene such legislation. Accordingly, the question of the council's responsibility arises: political responsibility for mistaken guidance it may provide and legal responsibility for violations of law.

With regard to political responsibility, the Constitution and the law rule out removal from office in the event of legislative censure, an otherwise typical tool parliamentary sys-

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tems apply in such cases. This was done because of the desire to guarantee the independence of the council members, who can be removed from office only if they have committed a specific act prohibited by law. Even so, the council is subject to parliamentary control. It is obliged by law to submit to Parliament an annual report on its work, along with recommended measures and requirements. The usual procedure is for the president of the council to appear before the Justice Committee of the two houses of Parliament. Either house can also ask council members to appear before them or their committees. And as noted, Parliament can require the council to report on its activities. Accordingly, although the council does not, strictly speaking, bear political responsibility, it is accountable to the public for its actions.

The council's administrative actions can be reviewed by the administrative chamber of the Supreme Court. This is in accordance with Spanish law, which provides that every public administrative body is subject to judicial control. But this situation is not without critics, who argue that as a result a court can review the actions of the body responsible for governing judges.

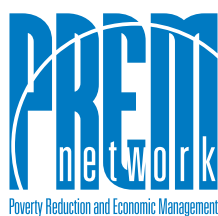
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