



JUSTICE

The Judiciary: By Far, the Weakest ‘Check in the Balance’

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“...the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks...though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the Legislature and the Executive.”

Alexander Hamilton, *The Federalist*, No. 78¹



¹ Hamilton, Alexander. *The Federalist no. 78*, ‘The Judiciary Department’, Tuesday, March 18, 1788, The Library of Congress. <https://guides.loc.gov/federalist-papers/text-71-80>



In a liberal democracy, just plain common sense dictates that the judiciary should remain as independent and autonomous as possible from the other two branches of government, the Legislature and Executive. The individual citizen's view of the level of independence of the judiciary is linked to trust in its function within the institutional rule of law.² If the courts are not trusted, the law is mute, and individuals will see no rhyme or reason in bringing disputes before courts that do not successfully interpret the law. First and foremost, judges are there to aid in the protection of individual rights and freedoms. All of this is quite straightforward. What is not as forthright is the extent of inevitable political influence on the judiciary, even as the judiciary's unmistakable vulnerability regarding the other two branches remains quite clear. As such, the role of the judiciary within the democratic system of checks and balances shines yet another light upon a rather delicate democratic balancing act. Ultimately, this liberal democratic equilibrium is intertwined with an innate necessity for all three branches to be held mutually accountable and legitimate amongst themselves—not to mention in the public's eye—and not just in constitutional terms, but also regarding the evolution of society's norms.

On the one hand, judicial systems need to be perceived as independent so as to gain the public's trust in their impartiality as a whole, and on the other hand, the judiciary cannot be completely disconnected from the society that it serves. Recently, many a populist movement has not viewed checks and balances as all that necessary at all. Populist leaders commonly see themselves as the only check necessary since within their mindset they represent the 'true people' anyway.³ A perceived disconnect from society, combined with a preexisting perception of an elite ruling class, can be easily used as a polarizing tool to then erode or dismantle a liberal democracy's democratic institutions. Simply due to the influential nature of the post, the position of judge can be easily categorized as 'elite' within a political framework, democratic or otherwise. After all, the knowledge and authority necessary to actually do the job inevitably tends towards an 'ivory tower'.

At the same time, the judiciary acts as defender of the average citizen (against one another as well as against the other two branches of government) all the while that internal checks and balances of said government take center stage. A central question embedded into all discussions relative to a judiciary's efficacy is the public's perception of the courts. That perception is very much tied to the relative view

² Van Dijk, Frans. *Perceptions of the Independence of Judges in Europe: Congruence of Society and Judiciary*, Palgrave Macmillan: Cham, Switzerland, 2021, p 4.

³ Mueller, Jan-Werner. "Eastern Europe Goes South: Disappearing Democracy in the EU's Newest Members". *Foreign Affairs* 93, no. 2 (2014): 14-19. Accessed May 13, 2021. <http://www.jstor.org/stable/24483579>, p 16.



of the judicial system's independence, or lack of politicization, as well as other factors. Politics will always find a way to enter into the equation in one form or the other.⁴ Therefore, it is imperative to focus upon to what extent a democracy is willing to allow political influence to intervene, how to minimize it, how transparent that intervention will ultimately be, and most importantly what constraints on institutional reforms will be put in place. Also, said reforms should preferably be bi/multi-partisan in nature if they are even allowed to take place. Institutional stability is always key so that politicians do not simply change the rules of the game midstream in order to temporarily push their political agendas.

Judges are human, and as such they can lean towards either progressive or conservative interpretations of the law. Politicians will tend to insist upon instating those judges that follow their own interpretations of how democratic norms should move forward. This may very well be in direct contrast to the day-to-day impartial interpretation of the law in simple terms. In practice, impartiality may be consistently high in many a democratic society. Even so, judges, lawyers, politicians, and even individual citizens should be very much concerned by how the judicial system is institutionally constructed. A broad sense of autonomous democratic functionality should be insisted upon, although some are most keen to such insistence on independence only when it does not have a detrimental effect on their own prospects. Ultimately, institutional intervention is what should be looked out for and never taken lightly.

Regarding the other two branches of government, the popular vote is what primarily lends them their legitimacy. When dealing with the judiciary branch, legitimacy and accountability are not as democratically straightforward. Consolidated democracies generally call for the increased independence of the courts, in theory if not always in practice. If trust in the judiciary is lower, then all the easier it will be eroded or dismantled. If the legislative or executive branches garner enough support to push through their agendas by infringing upon a democratic institution, they may choose to do so. What is termed as 'court curbing' (engaged in by political forces in retaliation to the court when 'out of step' with political coalitions,⁵ and defined as "actual changes to the Court's institutional power—through jurisdiction stripping, court packing or other legislative means"),⁶ is an example of this.

⁴ Handelsman Shugerman, Jed. *The People's Courts*, Harvard University Press: Cambridge, Massachusetts, 2012, p 273.

⁵ Chilton, Adam S., and Mila Versteeg. "Courts' Limited Ability to Protect Constitutional Rights". *The University of Chicago Law Review* 85, no. 2 (2018): 293-336. Accessed May 13, 2021. <https://www.jstor.org/stable/26455909>, p 314.

⁶ Clark, Tom S. "The Separation of Powers, Court Curbing, and Judicial Legitimacy". *American Journal of Political Science* 53, no. 4 (2009): 971-89. Accessed May 13, 2021. <http://www.jstor.org/stable/20647961>, p 972.



► **Judges are there to aid in the protection of individual rights and freedoms. All of this is quite straightforward. What is not as forthright is the extent of inevitable political influence on the judiciary**

Politicization of the judiciary can hinder its democratic function as an entity dedicated to protecting an individual's constitutional rights against onslaughts from the Executive or Legislative branches. However, the legislative branch is in particular closer to the public that it represents, and as such can more properly gauge a society's evolution. Attacks on the judiciary can even be a sign of how the public perceives a lack of judicial legitimacy in the first place.⁷ The public's trust can be very much linked to judicial outcomes as well, and as such can fluctuate regardless. Particularly within polarized societies, the innate logic of independent courts may be lost in the shuffle.

Contradictorily, it is the very initial lack of legitimacy and trust in the public's eye that may lead to further attacks on the judiciary. The eventual institutional erosion that can stem from such attacks can in turn result in even more legitimacy issues, further decreasing the public's trust even more. Some constituencies within the public sphere may very well insist upon independence while simultaneously supporting the actual dismantling of that same autonomy. Unfortunately, this can result in a sort of vicious cycle, one in which legitimacy, trust and independence turn about the reel in such an exacerbating way that the public, and its politicians, can lose sight as to what caused it in the first place. Add populism into the mix, and the polarization that inevitably comes along with it, and it may spin out of control. On the other side of the coin, if there is a sufficient amount of trust in the first place, backlash against the judiciary will more than likely not be supported by the public, even as politicians may endeavor to do so in order to further their agendas. (FDR'S proposal for court-packing is perhaps an example of this).⁸

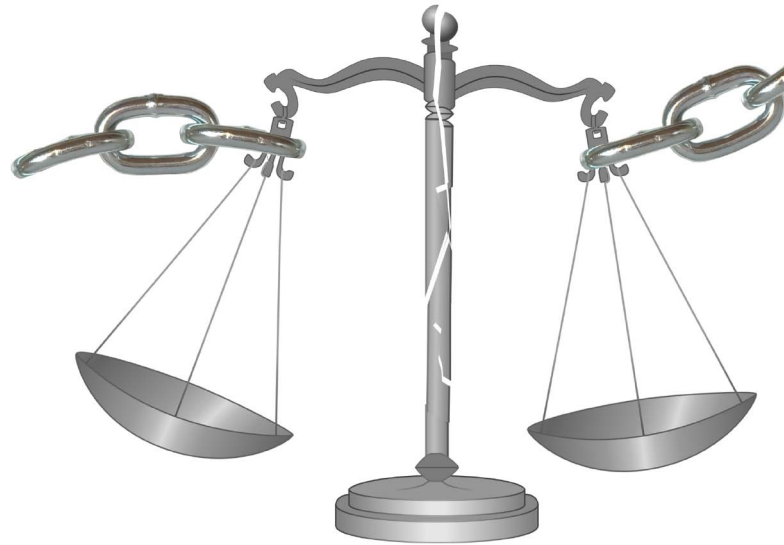
Once more, the conundrum is that not only do the courts have to be seen as independent, but also as genuine defenders of their citizens' individual rights. They have to be insulated, but still legitimate to, and simultaneously connected with, society. Sometimes, it is imperative that democratic societies not kid themselves by focusing upon an unrealistic goal: that of an isolating bubble-wrap of inde-

⁷ Clark, Tom S. "The Separation of Powers, Court Curbing, and Judicial Legitimacy". *American Journal of Political Science* 53, no. 4 (2009): 971-89. Accessed May 13, 2021. <http://www.jstor.org/stable/20647961>, p 973.

⁸ Handelsman Shugerman, Jed. *The People's Courts*, Harvard University Press: Cambridge, Massachusetts, 2012, p 196.



pendence tucked carefully around the legitimacy and accountability of the courts, and then tidily stored in a box of judicial impartiality. This does not mean that a society should not strive towards the ideal of an independent judiciary to the fullest extent possible *per se*, but a healthy dose of pragmatic realism paired with that idealism is also in order. In other words, judicial independence cannot be created in a vacuum. Regardless, if a democratic society simply rules out political influence on the judiciary entirely, then it will be incapable of properly identifying it and dealing with it when it crops up—and politics will make its entrance either on center stage for all to see, or behind closed doors. Such is the nature of the system.



Within a democratic society, dominant constituencies will commonly demand the courts' recognition of their political views. Sometimes they will cite the courts' lack of impartiality as the culprit. This can be simply because their views are the dominant ones and not because they are constitutionally sound. Sometimes these demands will lead to support for the infringement of that very independence that said constituency was originally so concerned with. Consequently, oppositional minorities will lose out. Sometimes majority leaders will look ahead and realize that when the tables are turned, institutional judiciary meddling may not work to their favor, but sometimes they will not (especially when they plan on not leaving office).

The thing is, *complete and total* isolation is not the preferable remedy to judicial politicization because a complete disconnect may only eventually lead to judicial encroachment. Also, it could result in a lack of the transparency of political influence (the politics just simply goes behind closed doors). Totally independent detachment is also an impossibility greatly due to both individual nature and the nature of the democratic game. It is a puzzling balance of factors, particularly when it is the judicial system that is clearly the weaker of the three branches and as such many a time unable to defend itself against a legislative or executive onslaught.

On Both Sides of the Atlantic

The approach towards maintaining an independent judiciary differs quite a bit on either side of the Atlantic, but one thing remains the same: all the while that the public may view the judiciary as lacking in independence, or being overly politicized,



► **Judicial systems need to be perceived as independent so as to gain the public's trust in their impartiality as a whole even though the judiciary cannot be completely disconnected from the society that it serves**

trust in individual judges to be impartial can still be there. Maybe it is as Hamilton said and the individual has less to fear from an encroachment of individual rights by the judiciary as opposed to the other two branches of government. Possibly citizens are innately aware of this. Also possible is the fact that there is a clear difference between a politicized and fluctuating trust in the judiciary as opposed to a lack of trust that translates into public support for court-curbing. There is a difference between an actual institutional encroachment upon the judiciary as opposed to simple threats by politicians that view the judiciary as a temporary impediment to their agendas. Of course, judicial reform must not be ruled out, but when it is undertaken unilaterally so as to simply push a specific agenda—instead of as a bi/multi-partisan endeavor primarily meant to improve the judiciary's independent efficacy—then a red flag should be thrown.

In the U.S., the Democratic Party has been pushing for reform of the Supreme Court, especially the notion of court-packing (increasing the numbers of the judges in order to combat conservative turn the last few years due to Trump's appointments). Recently in Spain, President Pedro Sanchez tried to push through legislation so as to change the rules regarding appointing judges to the National Judiciary Council (so that 12 did not require a three-fifths vote, but instead a simple majority) in order to break the stalemate over the renewal that has been over two years running between the two main parties, PSOE and PP. This may have been a simple move to push negotiations through, but it got so far as to be passed in the lower chamber of Congress, triggering the intervention of the EU. Both recent moves are clear examples of court-curbing, one in defiance of a populist leader, and the other from a minority government propped up by a populist party. Both are also cause for concern.

Not only did Trump appoint three Supreme Court Justices during his one-term presidency (which had not happened since Nixon in his first four years of presidency), he also appointed 54 of 165 judges on the national regional appeal courts.⁹ The number of appointments, while relatively high for a one-term presi-

⁹ Gramlich, John. "How Trump compares with other recent presidents in appointing federal judges", *Pew Research Center*, January 13, 2021. <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/>
<https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/>



► **Reforms should preferably be bi/multi-partisan in nature. It is important that politicians do not simply change the rules of the game midstream**

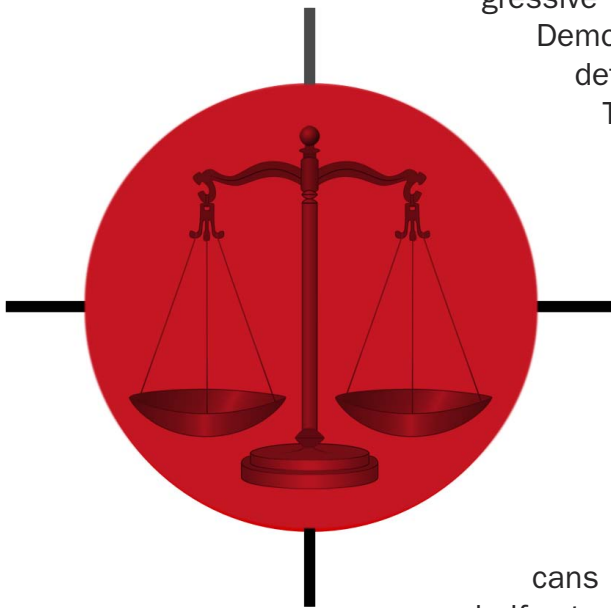
dency, is not so much the problem. It is the polarized nature of the appointees' dissent as opposed to their progressive colleagues which is worrisome. This is even more so acutely troubling when one considers the still very much polarized political culture in the United States. Trump's conservative judges disagree with their Democrat-leaning counterparts (i.e., on subjects such as immigration, gun control, abortion, policing) twice as much as those appointed by Ronald Reagan, George H.W. Bush, and George W. Bush. The light at the end of the tunnel is that Trump-appointed judges did rule against him regarding supposed election fraud both at the Supreme Court and appeals levels.¹⁰

Even so, the progressive Democrat's insistence on packing the Supreme Court (increasing its number of judges beyond the current nine), a move that Biden, as an institutionalist, has not outright supported, is problematic. Meanwhile, a bipartisan Commission has been formed in order to study the possibility of Supreme Court reform. The Commission has 180 days from its first meeting to go over "the genesis of the reform debate; the Court's role in the Constitutional system; the length of service and turnover of justices on the Court; the membership and size of the Court; and the Court's case selection, rules, and practices."¹¹ It seems that Biden's constituents are asking for a review even as favorable ratings for the Supreme Court were at a record high in August of 2020. Just before the liberal Ginsburg was replaced by the conservative Barrett, 70% of Americans had a favorable view of the Supreme Court. At the time, Republicans were more likely to express that favorable view more so than Democrats. Fortunately, the Commission is a bipartisan effort.

As recent as 2015, after rulings over the Affordable Care Act and same-sex marriage, only 48% of the public saw the Supreme Court favorably. Since then, many conservative Republicans have changed their view of the Court from being too pro-

¹⁰ Ruiz. Rebecca & Gebeloff, Robert. "As Trump Leaves the White House, His Imprint on the Judiciary Deepens", *The New York Times*, December 17, 2021. <https://www.nytimes.com/2020/12/17/us/politics/trump-judges-appeals-courts.html>

¹¹ White House Statement, "President Biden to Sign Executive Order Creating the Presidential Commission on the Supreme Court of the United States", April 09, 2021, *Statements and Releases*. <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/09/president-biden-to-sign-executive-order-creating-the-presidential-commission-on-the-supreme-court-of-the-united-states/>



gressive to instead more balanced, just as progressive Democrats have changed their tune as well. After the definite swing toward the conservative because of Trump's last appointment, views have more than likely changed yet again, especially for the progressives). Particularly in the United States, peoples' opinions of the Court fluctuate regarding its rulings. This is not so surprising since the U.S. Judicial System is incredibly politicized in nature when compared to its European counterparts where independent Councils or Commissions generally take part in the nomination and appointment of judges.

It is also important to note that while Americans may currently believe in the courts, more than half actually think it is too involved in politics (according to one poll in 2019).¹² Of course to an extent, in a country where 90% of state judges are elected and Supreme Courts justices appointed by the Executive, logic tends towards this politicization. So, in the U.S., trust in the courts may not necessarily be as attached to independence in the same way as it is in Europe, but confidence is still high in both Spain and the United States regarding individual impartiality (that is to say specific rulings on specific cases, or more broadly termed as the courts ability to look out for an individual's best interests). Contradictorily, individuals may feel that they trust the courts to work in their best interests while at the same time not believing that those same courts are all that independent politically.

As is common practice in European countries, Spanish judges gain access to entry-level posts through a particularly rigorous merit-based system even as the Judicial Council is in charge of promotion and the legislative framework allows for quite a bit of discretion as to the appointment of high courts and administrative positions.¹³ As such, it could be assumed that the courts must be by no means as

¹² Annenberg Public Policy Center of the University of Pennsylvania, "Most Americans Trust the Supreme Court, But Think It Is 'Too Mixed Up in Politics'", October 16, 2019. <https://www.annenbergpublicpolicycenter.org/most-americans-trust-the-supreme-court-but-think-it-is-too-mixed-up-in-politics/>

¹³ Torres Pérez, Aida. "Judicial Self-Government and Judicial Independence: The Political Capture of the General Council of the Judiciary in Spain", *German Law Journal*, 19(7), 2018, p 1777. <https://www.cambridge.org/core/journals/german-law-journal/article/judicial-selfgovernment-and-judicial-independence-the-political-capture-of-the-general-council-of-the-judiciary-in-spain/64998AB70B95B796EEA200893D68E8F0>



► **Not only do the courts have to be seen as independent, but also as genuine defenders of their citizens' individual rights**

politicized in the public's eye to the same extent as in the United States, as would logically apply. Even so, the numbers tell another story. In Spain, trust in the national judiciary (and its independence) is at roughly 40%,¹⁴ even as confidence in the judiciary as protector of individual rights is situated at 68%.¹⁵

The European Union has insisted that it is not individual judge's application of the law that is the main concern within the Spanish system, but instead how the Judicial Council members are appointed, insisting that it is this politicization of the courts which is problematic. The loosely agreed upon practice by Spain's political parties to divide the appointments amongst themselves is what is viewed as over-politicized, and as such detrimental to the public's perception of judicial independence.¹⁶ Especially in light of the Spanish public's low confidence in judicial independence, the EU does have cause for concern, as they must be fully aware that negative perceptions may be a precursor to institutional judicial interference. Still, Spain is not Poland or Hungary where both the Polish Law and Justice party and Hungarian Fidesz party "have enacted legal and institutional changes that simultaneously squeezed out electoral competition, undermined liberal rights of democratic participation, and emasculated legal stability and predictability."¹⁷

Even so, infringement of democratic institutions has been an issue throughout many a consolidated democratic society as can be best exemplified by Trump's attack on the American electoral system. Even today, Republican attacks on the electoral system continue in Trump's name, playing out at the state level in the form of ballot audits. While Arizona is the first to conduct a recounting audit in Maricopa county, propelled by a Republican state legislature, Georgia is set to follow suit in

¹⁴ Van Dijk, Frans. *Perceptions of the Independence of Judges in Europe: Congruence of Society and Judiciary*, Palgrave Macmillan: Cham, Switzerland, 2021, p 90.

¹⁵ Rincón, Reyes. "La opinión de los españoles sobre la justicia: inasequible a la corrupción aunque lenta y sometida a presiones políticas y económicas", *El País*, 14 de mayo de 2021. <https://elpais.com/espana/2021-05-14/la-opinion-de-los-espanoles-sobre-la-justicia-inasequible-a-la-corrupcion-aunque-lenta-y-sometida-a-presiones-politicas-y-economicas.html>

¹⁶ Council of Europe. *Fourth Evaluation Round Corruption prevention in respect of members of parliament, judges, and prosecutors EVALUATION REPORT SPAIN*, Adopted by GRECO at its 62nd Plenary Meeting (Strasbourg, 2-6 December 2013). <https://rm.coe.int/16806ca048>

¹⁷ Ginsburg, Tom, Aziz Z. Huq, and Mila Versteeg. "The Coming Demise of Liberal Constitutionalism?" *The University of Chicago Law Review* 85, no. 2 (2018): 239-56. <https://www.jstor.org/stable/26455907>, p 244.



► **Society should strive towards the ideal of an independent judiciary to the fullest extent possible perse, but a healthy dose of pragmatic realism paired with that idealism is also in order**

Fulton County.¹⁸ In the case of Spain, there is cause for concern, yes, but immediate danger, maybe not so much. Overall, it is a good sign that Sanchez was unable to follow through with his court-curbing plans (with a bit of encouragement towards said outcome by the EU).¹⁹

Unfortunately, the breaking down of the appointment-sharing process in Spain was very likely detrimental to the public's faith in the whole process, domestically as well as internationally. Obviously, Spain cannot be considered to be what is now termed as supposed 'illiberal democracies' like that of Hungary and Poland. Even so, Sanchez's confrontation with the EU regarding proposed institutional encroachments on the judicial system has brought some to make unfortunate, while unfounded, comparisons. As of now, very little progress has been made. PP is insisting on returning to the 1985 rules regarding appointment to the Council so that less of them are actually appointed by the Legislature in the first place (8 as opposed to 20).²⁰ In 1985, the PSOE government under Felipe Gonzalez was able to change the rules, as within the Constitution it is not specified as to how those 12 judges should be appointed, in order to counteract what was considered an overly conservative Council. PSOE has recently contended that politicization could be countered, and independence reinforced, by returning to the 2001 Pact reducing candidates from 51 to 36.²¹

Among other things, the European Union recommends that at least half of the judges be elected by the judges themselves. Returning to the 1985 rules seems reasonable and would follow EU guidelines. Even so, it must be kept in mind that

¹⁸ Gardner, Amy. "In echo of Arizona, Georgia state judge orders Fulton County to allow local voters to inspect mailed ballots cast last fall", *The Washington Post*, May 22, 2021. https://www.washingtonpost.com/politics/georgia-ballot-inspection/2021/05/21/1e8ad1cc-ba61-11eb-a6b1-81296da0339b_story.html

¹⁹ Rincón, Reyes. "El Gobierno opta por retirar la ley que rebajaba la mayoría para renovar al Poder Judicial", *El País*, 20 de abril de 2021. <https://elpais.com/espana/2021-04-20/el-gobierno-opta-por-retirar-la-ley-que-rebajaba-la-mayoria-para-renovar-al-poder-judicial.html>

²⁰ Marcos, José. "El PSOE acusa al PP de "boicotear" la renovación del Poder Judicial", *El País*, 17 de mayo de 2021. <https://elpais.com/espana/2021-05-17/el-psoe-acusa-al-pp-de-boicotear-la-renovacion-del-poder-judicial.html>

²¹ Romero, José Manuel. "Justicia ofrece al PP dar más margen a los jueces para elegir al nuevo Consejo del Poder Judicial", *El País*, 3 de mayo de 2021. <https://elpais.com/espana/2021-05-03/justicia-ofrece-al-pp-dar-mas-margen-a-los-jueces-para-elegir-al-nuevo-cgpj.html>



► **The judicial system is clearly the weaker of the three branches and as such many a time unable to defend itself against a legislative or executive onslaught**

a weak majority in Parliament could continue to bring the process to a standstill in the future (the same stalemate could theoretically occur over eight members of the Council just as easily as twenty). On the other hand, a strong majority would dominate the procedure, so splitting up the appointments between the judges and the Parliament makes sense. The Spanish political system is no longer a two-party system, and that inevitably complicates things as well. Regardless, the move could generate a public boost in judicial confidence, at least in the short-term. Completely turning over Council appointments to the judges is another option as well, but that may only create a widening gap between society and the Judicial Branch in the long-term. Even more importantly, it may designate political influence to alternate arenas behind closed doors. Nevertheless, any reforms, or at least as the Council of Europe suggests, “an evaluation of the legislative framework”, should be multi-partisan in nature.²²

As demonstrated in the United States (yes the very system that is many a time dismissed as being an exception to the rule) politicization is clearly not the only culprit regarding lack of confidence in the judicial system. Instead, confidence, legitimacy and accountability are intertwined within a conglomeration of factors. To different degrees, this can be considered in the European context as well. While histories are not the same, particularly regarding the ousting of European authoritarian governments, democracies on both sides of the Atlantic can learn both by example and error. What is clear is that many a democratic institution is a fragile target and even more so threatened by populist leaders and polarization. Still, it should be noted that democratic institutions are not only endangered by the political extremes of solely populist influence either.

While further judiciary politicization is clearly out of the question in both Spain and the United States, it cannot be ignored that the courts will always be somewhat influenced by politics. Also, various factors simultaneously affect the overall dynamic. Some of those aspects, just to name a few, could include the following: first, fluctuating political views that many a time are due to populism and polarization; second, a society’s evolution of norms as a whole and the political reaction of constituents to broad-based judicial rulings; and finally an individual’s

²² Council of Europe. *Fourth Evaluation Round Corruption prevention in respect of members of parliament, judges, and prosecutors EVALUATION REPORT SPAIN*, Adopted by GRECO at its 62nd Plenary Meeting (Strasbourg, 2-6 December 2013). <https://rm.coe.int/16806ca048>, p 24.



► **The European Union has insisted that it is not individual judge's application of the law that is the main concern within the Spanish system, but instead how the Judicial Council members are appointed**

experience with the efficacy of the judicial system (confidence also tends to decline with direct interaction possibly because of individuals' perceived loss of control or simply because a ruling does not turn in their favor). The politicization of the judiciary, while a primary area of concern, is clearly not the only offender to its institutional stability. Yes, without judicial independence, the whole democratic system falls into a decrepit state, void of the rule of law, but that is not the only issue to consider. Hence, each democratic society should make it a priority to comprehend each individual circumstance so that political limits and allowances are suitably established. Most importantly, this structure should be such so that it not be institutionally encroached at whim.

Conclusions

Again, a totally isolated, and thus detached, judiciary can have two separate, and contradictory effects: first, the courts' independence can translate into a greater trust towards the institution as a whole; and second, a sort of societal 'disconnect' with the public may actually at times work against the public's view on the effectiveness of the courts. The first may increase the public's faith in the judiciary, but the latter may eventually translate into the political encroachment of a judiciary's institutions, or court-curbing. Regardless, the issue here is not just how the judicial system interreacts with society in and of itself, but how the other two branches interact with the judicial branch. Political rhetoric inevitably permeates society's perception of the courts. That is to be expected, but what is truly problematic is the judiciary's ability to fight back. What one must constantly keep in mind when pondering judicial reform is that it is the democratic institutional framework that is ultimately at stake. So again, it follows that reformation of a judicial system within a democratic society should not be taken lightly. In the U.S., the turn to popular judicial elections was actually a move made in order to make political maneuvers behind closed doors transparent, so that the judicial would be less politicized, not more.²³ Of course, this move also opened the system up to a variety of complications. As such, the American judicial system is leaning towards greater and greater

²³ Handelsman Shugerman, Jed. *The People's Courts*, Harvard University Press: Cambridge, Massachusetts, 2012, p 112.





dependency upon a merit-based system as time goes by but it still has very long way to go.²⁴

Overall, there should be some middle-ground: societies want their judges to be impartial, and even as the day-to-day may not be so much in doubt, their overall trust towards the judicial system can be. Judges may only rule on cases brought before them, so yes trust (most tangibly demonstrated by an individual coming before a judge in the first place and both sides agreeing to hand over the control of a dispute to the assigned judge) can be a relative foundation for the institutional rule of law. Laws are introduced, argued upon, and put into place by the legislative branch and then in a broad sense enforced by the executive branch.

Supposedly, it is the judiciary that has the final say as to the interpretations of those laws and their congruency regarding the Constitution. Whether or not the executive and legislative branches choose to accept this is key to the democratic check-and-balance equilibrium. At the same time, complete insulation from politics is not only impossible, but not necessarily desirable in the long-term. Instead, something in the in-between range may be in order where independent impartiality is respected, and expected, on all sides, while the tendencies of human nature and society are not naively ignored. Then maybe the push and pull of democratic legitimacy, along with its institutions, would be ultimately upheld. In the long run, it is the longevity of the very liberal democracies that is the concern. These democracies, through the check-and-balance system, struggle to uphold institutions that are constantly in danger of tumbling down due to a democracy's lesser inclinations.

So yes, the judiciary has to be separate—as separate as can be—but as democratic systems are innately politicized, the judicial branch will sometimes be a political target, and a weaker one at that with less means of defense against the onslaught. As Hamilton insisted, the Executive holds the “sword of the community” and the Legislative the “purse” while the Judiciary “has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.”²⁵ Still, there is a difference between political influence and erosion/outright attack on the institutional structure of the judiciary. This all depends upon the extent a system allows political in-

²⁴ Handelsman Shugerman, Jed. *The People's Courts*, Harvard University Press: Cambridge, Massachusetts, 2012, p 3.

²⁵ Hamilton, Alexander. *The Federalist no. 78*, 'The Judiciary Department', Tuesday, March 18, 1788, The Library of Congress. <https://guides.loc.gov/federalist-papers/text-71-80>.



► **The U.S. Judicial System is incredibly politicized in nature when compared to its European counterparts where independent Councils or Commissions generally take part in the nomination and appointment of judges**

fluence to engage with the judiciary, how transparent such engagement is and how said engagement upholds diverse democratic norms. Most importantly of all, democratic societies must at all times be aware that judicial independence, once encroached, is something that can be dismantled quite quickly. This is particularly true regarding its legitimacy in the eyes of the people, a legitimacy that while 'usually acquired slowly' can be 'easily diminished'.²⁶

In the end, so that while some degree of politicization is inevitable, maintaining strict institutional limits to the involvement of both the Executive and Legislative branches is at the same time critical. In other words, drawing the line between simple politicization and the tangible, unilateral tampering of judicial function is the primary concern. While public opinion is fickle, and may constantly fluctuate, the courts should not. At the same time, the courts cannot be consistently detached from public opinion either. At the end of the day, particularly in the age of misinformation, public perception of democratic function is even more important as increasingly polarized populations are more and more susceptible to extreme swings of political, as well as populist, leanings. As such, the independence of the judiciary may on one day be seen as an advantage, only to be seen the next as a simple roadblock to be steamrolled over.

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