The (free) appointment of Spanish judges to international courts

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The mandate of Luis López Guerra as one of the Judges of the European Court of Human Rights expired on 31 January 2017. His successor has not been appointed yet but the process has been subject to a new internal regulation in Spain (the Agreement of the Council of Ministers of 20 January 2017), a court challenge (which led to the suspension of this agreement by the Supreme Court) and extensive controversy over new criteria that has even been reflected by some media as regards the age of the candidates and, more particularly, the possible appointment by the Government of the outgoing President of the Constitutional Court.

Appointing a former Judge of the Constitutional Court, especially its President, to such a relevant position and immediately after the expiry of his mandate is not, in my opinion, coherent with the independence safeguards expressly laid down by the Constitution in terms of prohibition of renewal of appointments. And it certainly does not contribute to recovering the Constitutional Court's independence or to reinforcing that of the ECHR. The current situation, however, deserves a much broader discussion about the whole appointment process of Spanish judges to international courts, more specifically to the ECHR and the European Court of Justice.

In both cases it is basically on the Government to decide: it issues a proposal which is later adopted by the corresponding international institution through a formal appointment. The European Council appoints the new members to the ECJ after proposal by each Government. Since the entry into force of the Treaty of Lisbon the potential members' profiles are assessed by a committee of experts acting secretly and operating as a screening for minimum conditions. Concerning the ECHR, a shortlist of three candidates is proposed by the Government, assessed by a committee of the Parliamentary Assembly of the Council of Europe and voted by the said Assembly. The external intervention is consequently much more intense than in the former case. In both cases the intervention of the corresponding European authorities as well as the assessment process have been intensified in the last few years. They have even been specifically regulated by Resolution 2002 (2014) of the Parliamentary Assembly of the Council of Europe and Article 255 of the Treaty on the Functioning of the European Union. The Information document prepared by the Council of Europe's Secretariat on the procedure for electing judges to the ECHR (version April 2017) proves the particular intensity of the process. The legal framework and the interesting Activity Report of the Panel provided for in Article 255 are available here. In any case, these documents are only the first screening to the decision made by the corresponding State.

This increasingly strict process of appointment to international institutions, particularly as far as the ECHR is concerned, has only recently entailed new measures at national stage. Until now, the appointment by the Government was absolutely and unconditionally free in both cases. Coherently, appointments to date have been very opaque and subject only to the different, sometimes even partisan, stances within a Government, with special consideration of the Ministers of External Affairs, Justice and Presidency, and with clearly uneven results. But, of course, these appointments have lacked a thorough and public process of discussion and assessment of the candidates' abilities, which looks quite necessary for such relevant positions (equally if not more relevant than the positions at the Constitutional Court). In any case, the appointment procedure of the Constitutional Court judges is also in urgent need of reforming.

The Agreement of the Council of Ministers mentioned above alters the situation. For the first time, it defines a formal internal procedure according to the requirements of the Council of Europe. At least a minimum publicity requirement has been introduced: the selection process needs to be published in the Spanish Official Gazette and is open for applications. However, the Agreement does not have any other positive aspects. It sets the age limit for applying at 61 (which has already been challenged before the Supreme Court), and the procedure basically aims at protecting "the exercise of the [Government's] discretionary power to propose candidates to the highest international judicial positions", as mentioned in the explanatory statements. The "committee in charge of assessing the applications" is exclusively composed of (particularly) senior members of the Government and, of course, a state's attorney acting as the Secretary. Apparently, it has not been considered appropriate to include highly regarded persons or institutions such as former judges, experts, human rights organizations etc., or even to demand a motivated report on the selection of the three final candidates brought to the Council of Ministers. The new Council of Europe's regulation at least includes the minimum curriculum requirements, but that is far from requiring that the candidates express their view on the task they are going to fulfil.

There is no place for quotas in the appointment of a judge (although there is in case of a shortlist of three candidates). Regardless of this fact, the procedure could (or even should) be subject to discussion at political and parliamentary level and to a public explanation of the candidates' merits and, more specifically, of their conception of the judicial task. Many deplorable decisions have already been the consequence of the opacity and dubious responsibility of the Government in this procedure with parliamentary intervention. In any case, however, it works better than the procedure designed to appoint the judges to the Constitutional Court.

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