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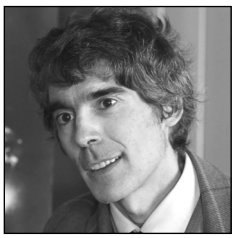

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The Independence of the Judiciary: Meaning and Threats

1. The traditional concept of judicial independence

Defining 'judicial independence' is not an easy task. At the level of theory, formal obstacles exist that arise from the ideological preconception we choose to proceed from; on the practical level, we are confronted with polymorphous materials from the numerous legal experiences accumulated for each domestic law. Likewise, we are not dealing with a monolithic idea, since it is reasonable – and almost mandatory – to delve into multiple layers of semantics that mesh together in unexpected complexity. Whatever obstacles may exist, there is no way to circumvent these dilemmas either, given that judicial independence has been categorised as a key component of democracy and rule of law.

This conceptual background seems to point to a reasonable starting point, however, rooted in its wide and general scope. That is the 'Basic Principles on the Independence of the Judiciary' framework adopted in 1985 by the United Nations.[*1] It specifies the following underpinnings:

> The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

As simple as this may appear, it enshrines *in nuce* the issues elaborated upon as the nucleus for the reasoning developed below, especially the opposition between 'facts' and 'law', alongside the contrast that sets 'proper' and 'improper' in mutual opposition. Taking into account that the UN approach shapes 'impartiality' into a precondition for 'independence', we need a further explanation: Independence applies to the judicial body, to the court of justice itself, whereas impartiality is connected with the person – *id est*, the individual judge entitled to settle the dispute between parties, who is supposed to decide without favouritism. An additional distinction involves 'neutrality', which has to do with the interests affecting a singular legal case[*2]. As we can already see, it is essential to clarify the meaning of the proper/improper binary, since

1 United Nations Human Rights Office, High Commissioner. 'Basic principles on the independence of the judiciary' (1985), adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan from 26 August to 6 September 1985 and endorsed via General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Available at https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx (most recently accessed on 1.3.2022).

2 Nicoló Zanon & Francesca Biondi. *Il Sistema Costituzionale della Magistratura*. Bologna, Italy: Zanichelli 2014, pp. 89–92.

the judicature is not isolated from society but confronted with a myriad of influences, interests, and interactions that, for some opinions, are to be not erased but metabolised in the pursuit of justice.

Traditional jurisprudence finds the foundation of independence in the parties' right to a fair trial[*3], as the Recommendation document issued by the Committee of Ministers of the Council of Europe on 17 November 2010 (CM/Rec (2010) 12) articulates:

> The purpose of independence, as laid down in Article 6 of the Convention, is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence.

Accordingly, it is not a judge's privilege but a citizen's right. Let us keep this remark in mind as, further on, we examine the issue of some aspects of judicial independence having sometimes been linked to corporatism – that is, to the professional interest of the judicature as a lobby or a self-contained group disconnected from society.

Once this principle is established, the following step leads us to specify the prerequisites for judicial independence: the conditions enabling its free implementation. The above-mentioned UN document offers a series of items related to the structure of the judicature: 'freedom of expression and association', 'qualification, selection and training', 'conditions of service and tenure', and 'professional secrecy and immunity'. The list is not closed (*numerus clausus*) or portrayed as exhaustive; it is open (*numerus apertus*) to other elements, such as 'judicial self-governance'[*4], which, in turn, may be subdivided into several dimensions: 'personal', 'administrative', 'financial', 'educational', 'ethical', 'information', 'digital', and 'regulatory'. As we deepen the concept, we find it growing increasingly complex, to the point that it is not completely clear whether we are speaking about its components or, rather, about the circumstances pertaining to the social milieu where it is supposed to flourish. Moreover, the same notion of 'self-governance' is at the centre of intense theoretical or even philosophical debate involving disagreement on the need for 'Councils of the Judiciary', as autonomous bodies entitled to its preservation. Hence, we must be very careful to avoid a circular approach, while simultaneously taking care to detect the underlying political biases constraining the various particular perspectives to be adopted.

In view of the above considerations, we work with a broad concept of judicial independence here, one that may even be deemed 'fuzzy', notwithstanding the further details to be added to the picture in aims of tackling the practical problems it poses.

2. An alternative view of judicial independence

The above-mentioned recommendation from the Committee of Ministers states that judicial independence is a 'fundamental aspect of the rule of law'. One might expect, accordingly, that both concepts are inextricably intertwined to weave the fabric of a free society. Things are not so easy, however.

Take Sweden as an example. Its government appoints judges, and there is nothing reminiscent of an autonomous Council of the Judiciary, since the judicial administration rests in the hands of the *Domstolsverket*, an organ whose members have equally governmental roots. In the international ranking produced from the Worldwide Governance Indicators dataset, Sweden lags well behind in judicial independence when compared to such countries as Italy and Spain[*5]. Even so, the overall score of the Economist's Democracy Index 2020 accords this kingdom an excellent position, putting it in third place, surpassed by only Norway and Iceland[*6]. Moreover, the perceived independence of courts and judges among Sweden's general public, according to the 2020 EU Justice Scoreboard, reaches an enviable fourth place out of 28 states[*7].

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3 ECHR case 4907/18, *Xero Flor v. Poland*, §121.

4 David Kosař. 'Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe'. *German Law Journal* 2018-19)/7, p 1567–1612, on p.1597. – DOI: https://doi.org/10.1017/s2071832200023178.

5 Carlo Guarnieri & Dianiela Piana. 'Judicial independence and the rule of laws: Exploring the European experience' (2009) a paper prepared for presentation of the Interim Meeting of the IPSA Research Committee on Comparative Judicial Politics (held in Bologna, Italy, on 21–23 June 2010), p 14.

6 Economist Intelligence Unit. *Democracy Index 2020: In Sickness and in Health* (2020) .

7 European Commission 'The 2020 EU Justice Scoreboard' (2020), a communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, and the Committee

The United States too is worth mentioning. The American judiciary has reached nearly archetypal status. It has been said that it would provoke 'blushing' and 'hilarity' to cast doubts over its judicial independence[*8]. Still, federal judges are nominated by the President through a process wherein political parties 'play a significant role', per scholarly assessment, and only about three per cent of US judges enjoy lifetime tenure[*9].

These two cases are not isolated tokens. Astoundingly, comparison reveals that 'countries with a weak Rule of Law seem more likely to exhibit a higher level of court's [*sic*] institutional independence'[*10]. Should we conclude that independence is harmful for a free society?

Such scholars as Helmke and Rosenbluth defend the thesis that 'it is not obvious why a judiciary cordoned off from political accountability would protect rights and if it did, which minorities and which rights the judiciary would protect'[*11].

Politics and the judiciary, according to some theoretical reasoning, should be 'cordoned on' so as to prevent corporatism from the judges. That was the official reason cited in support of the 1985 legal reform in Spain through which judicial self-government was limited in favour of Parliament[*12]. It was at that time when Spanish judges were deprived of the right to vote for the nomination of the Council of the Judiciary (*Consejo General del Poder Judicial*, 'CGPJ'). Before the passage of the bill in question, 12 of its 20 members were chosen by the judges themselves; from that moment on, in contrast, the entire composition of the council would depend on legislative chambers.

Perhaps the most compelling rationale for connecting judges to politicians is the very nature of the adjudication mechanism. Continental legal history has concocted an ideal image: judges decide exclusively by referring to the law, without any kind of extra-legal contamination. They exist as a symbol of pureness incarnate, in which politics, religion, or ideology in general has nothing to say. It goes without saying that such old-fashioned theory has long been forgotten.

Legal philosopher Alexy explains that the 'application of norms' (*Anwendung der Gesetzregeln*) is not merely a question of 'logical adjudication' (*logische Subsumtion*), because sometimes inconsistencies obtain, such as the legal language suffering from vagueness (or *Vagheit*); conflicts arising between legal standards (*Normenkonflikten*); legal rules often manifesting loopholes; and, more importantly of all, it being possible in some cases to issue a decision that contradicts the wording of the normative text ('die Möglichkeit, in besonderen Fällen auch gegen den Worlaut einer Norm zu entscheiden')[*13].

'Open texture' is the well-known term coined by Herbert Hart to capture such intricacies of norms. He goes so far as to say that 'in any hard case' judges are bound to act as a **conscientious legislator** selecting from among competing principles[*14].

The final twist of the screw may well be Dworkin's remark that, on some occasions, 'it might be the judge's duty to lie and falsely to report what the law is, and that description supposes that the way may not be what it should be'[*15].

Is society to entrust the most cherished rights to gowned liars?

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of the Regions, COM (2020) 306, Luxembourg: Publications Office of the European Union 41. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0306&from=EN, most recently accessed on 1.3-2002.

8 Jorge Pérez Alonso. 'La independencia del Poder Judicial en la historia constitucional española'. *Revista electrónica de Historia Constitucional – Electronic Journal of Constitutional History* 2018/19, pp. 47–87, on p. 5. – DOI: https://doi.org/10.17811/hc.v0i19.534.

9 Ben Firschein. 'Judicial independence in the United States'. *Sistemas Judiciales* 2010(2)/4, on pp. 41, 43. Available at https://sistemasjudiciales.org/wp-content/uploads/2018/08/temacentral_bfirschein.pdf, most recently accessed on 1.3.2022.

10 Carlo Guarnieri & Dianiela Piana. 'Judicial independence and the rule of laws: Exploring the European experience' (2009), a paper prepared for presentation of the Interim Meeting of the IPSA Research Committee on Comparative Judicial Politics (held in Bologna on 21–23 June 2010), p 14.

11 Gretchen Helmke, Frances Rosenbluth 'Regimes and the rule of law: Judicial independence in comparative perspective', *Annual Review of Political Science* 2009(12), pp. 345–366. – DOI: https://doi.org/10.1146/annurev.polisci.12.040907.121521.

12 Rosario Serra Cristobal. 'La elección de los miembros del Consejo General del Poder Judicial. Una propuesta de Consejo más integrador e independiente'. *Teoría y Realidad Constitucional*, 2013/31, pp. 299–321, on p. 316. – DOI: https://doi.org/10.5944/trc.31.2013.10310.

13 Robert Alexy. *Theorie der juristichen Argumentation. Die Theorie des rationale Diskurses als theorie des juristichen Begrundung*. Frankfurt am Main: Suhrkamp Verlag 1983 (first published in 1978), p. 18.

14 Herbert Hart. *The Concept of Law*. Oxford University Press 1991 (first published in 1967), pp. 272–275.

15 Ronald Dworkin. *Taking Rights Seriously*. Cambridge, MA: Howard University Press 1978, p. 341.

Let us not take things so far, though. On the contrary, we are simply going to examine an alternative conception of judicial independence: the distinction between political and judicial powers here would be depicted not as a sharp break but as along a continuum where there is no choice but to build bridges between the two social fields. In other words, rather than a Continental system for the judiciary, comprising strong 'separation of powers', one could posit that a more democratically realistic approach resides in a Common Law model, in which the 'checks and balances' formula allows permeable boundaries between socio-political institutions. This is the hypothesis we shall test.

With the first section of this paper, we began with the Continental thesis, inspired by a European *Weltanschaung*; conversely, the discussion in Section II has exposed its antithesis, an approach angled more toward Anglo-Saxon culture. But there is no easy answer. Let us contrast this set of possibilities against real-world experiences.

3. Poland and Spain as cases for testing judicial independence

Judicial independence, *qua* a principle to aspire to, has gained the status of a worldwide tenet. The difficulties arise when one attempts to determine the meaning of such a fuzzy concept. One of the thorniest problems is the 'political accountability' of the judiciary. That is to say, if we admit the political nature of the jurisdiction, it is essential to ascertain what kinds of bonds should link the judicial power to the legislative and the executive, the latter being legitimate branches of democratic government. International texts on sound jurisprudence proscribe 'improper influences' on the judiciary, to preserve judicial independence. So are we allowed to qualify as 'improper' the influence emanating from the representatives of the will of the people? Let us try to clarify this subject by examining some examples.

Poland is a paradigmatic case. In recent years, the conservative majority in its government has deployed an array of legislative instruments to increase the influence of political powers over the judiciary. The Group of States against Corruption in the Council of Europe (GRECO) has pointed out some areas wherein the impact of such implements is especially deep: the National Council of the Judiciary (NCJJ), whose judge-members are directly appointed by Parliament; the disciplinary procedures, open to potential interference by the executive power; and the legal mechanisms by which the presidents and vice-presidents of ordinary courts are elected, also under the shadow of governmental pressure. These are only a few token examples, since the whole process exhibits endemic, far-reaching complexity[*16].

The philosophy offered to justify these 'reforms' flies the flag of 'democratisation' as a means of eradicating the remnants of Communist dictatorship. However, international observers, far from greeting the changes as representing evolution toward a more open society, are appalled by what they consider a weakening of judicial independence[*17] or even the 'fall and capture of the judicial self-government'[*18]. In fact, the ideology behind such approaches has been denounced as the very opposite – reactionary – in the wake of the Visegrád Group's development[*19].

Things have gone so far that in 2017 the European Commission activated the procedure foreseen under Article 7 (1) of the Treaty on European Union (TEU), which could lead to drastic and unprecedented sanctions on Poland as a member state of that union – so much so that it has been characterised as the 'nuclear option'[*20].

16 GRECO. *Fourth Evaluation Round: Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors*, second Interim Compliance Report, Poland.GrecoRC4 (2019)23, adopted by GRECO at its 84th plenary meeting (held in Strasbourg, France, on 2–6 December 2019), on pp. 9–12. Available at https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a3efa8, most recently accessed on 1.3.2022.

17 See p. 1 of the chapter on the rule-of-law situation in Poland presented in the European Commission's *2020 Rule of Law Report* (2020), a communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions (Commission staff working document.

18 Anna Śledzińska Simon. 'The fall and rise of judicial self-government in Poland: On judicial reform reversing democratic transition'. *German Law Journal* 2020(19) / 7 (special issue 'Judicial Self-Government in Europe', published on 1.12.2018), pp. 1839–1870, on pp. 1851, 1853. – DOI: https://doi.org/10.1017/s2071832200023257.

19 Juan Fernando López Aguilar. 'De nuevo (y todavía) Polonia: Rule of Law y Art.7 TUE en el Parlamento Europeo y el Tribunal de Justicia'. *Teoría y Realidad Constitucional* 2019/44, p. on 143–144. – DOI: https://doi.org/10.5944/trc.44.2019.25999.

20 Juan Fernando López Aguilar. 'De nuevo (y todavía) Polonia: Rule of Law y Art.7 TUE en el Parlamento Europeo y el Tribunal de Justicia'. *Teoría y Realidad Constitucional* 2019/44, on p. 156. – DOI: https://doi.org/10.5944/trc.44.2019.25999.

We glimpse a similar gloomy picture in Spain. In contrast, however, the ideological forces pushing for control of the judiciary in that country are not moved by right-wing inspiration but share leftist roots, engaged as they are in freeing the CGPJ from 'conservative domination'*[21]. Accordingly, as we have noted above, the council is appointed entirely from legislative chambers, thanks to a proposal by the Socialist Party, incumbent at the time of the 'reform'.

Spain's Council of the Judiciary is, as a Constitutional body, entitled to fill key judicial positions, but its performance in that area has been implemented in such a flawed manner that GRECO has detected signs of 'horse-trading'*[22]. Spanish public opinion incorporated outrage in 2018 when leaking of a mobile-phone text message sent by a Senate member uncovering of a plot to control the Supreme Court 'through the back door' (in what is known as the Cosidó affair)*[23]. Note that the politician was a member of the conservative party: the temptation to subjugate the judiciary exists irrespective of ideological constraints. The situation has deteriorated so greatly since that judicial governance in Spain has been downgraded to, in essence, quota-based apportionment among the major political parties. Moreover, when it comes to designation of the council's president, the latter role has been reduced to mere rubber-stamping of a decision concocted in advance by the main political leaders, who gladly filter to the press the name of the winning candidate as soon as the pact has been concluded*[24]. At present, the CGPJ is in a state of stagnation, unable to renew its membership and just exercising its functions *ad interim*. It is in an impasse referred to as an 'institutional anomaly'*[25].

So far, this section of the paper has only exposed what appears to be empirical evidence of how dangerous an excessively close relationship between the justice system and politics may end up. In this case, democracy seems to be weakened, not strengthened. But are we offering objective realities or mere subjective impressions?

As noted above, the US judiciary is famous for its independence*[26]. And even in this markedly different nation we find phenomena surprisingly reminiscent of those in Spain and Poland. Let us examine why.

Some scholars have identified as key elements of judicial independence lifetime tenure and financial compensation. Remember the statistic mentioned above, however – life service is bestowed on only three per cent of US judges. The rest serve for terms ranging from four to 15 years, and the majority must pass some sort of popular election or political intervention to retain the post. They may be removed through a system of parliamentary impeachment or via recall elections. Obtaining funds for financing the associated election campaign is sometimes necessary for reaching the level of popular support that is necessary for victory in these. On the other side of the balance, disciplinary proceedings and economic conditions usually are in the hands of parliamentary commissions*[27].

Here we have a paradigmatic structure of robust connections between political and judicial powers. The political control is heavier-handed than in Poland or Spain, but the legal architecture of the system

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21 Aida Torres Pérez. 'Judicial self-government and judicial independence: The political capture of the General Council of the Judiciary in Spain'. *German Law Journal* 2018(19) / 7 (special issue 'Judicial Self-Government in Europe', published on 1.12.2018), pp. 1839–1870, on p. 1777. – DOI: https://doi.org/10.1017/s2071832200023233.

22 GRECO. *Fourth Evaluation Round: Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors*, second Interim Compliance Report, Spain.GrecoRC4 (2019)12, adopted by GRECO at its 83rd plenary meeting (held in Strasbourg on 17–21 June 2019), p. 13. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020SC0320&from=EN, most recently accessed on 1.3.2022.

23 See the 2021 report published by the Civic Platform for Judicial Independence in response to the European Commission's 2021 rule-of-law consultation, available at https://plataformaindependenciajudicial.es/2021/03/08/rule-of-law-report-2021/, most recently accessed on 1.3.2022.

24 Rosario Serra Cristobal. 'La elección de los miembros del Consejo General del Poder Judicial. Una propuesta de Consejo más integrador e independiente'. *Teoría y Realidad Constitucional*, 2013/31, pp. 299–321, on pp. 302–304. – DOI: https://doi.org/10.5944/trc.31.2013.10310.

25 See the European Commission's *2020 Rule of Law Report*, specifically p. 2 of the chapter on the national rule-of-law situation of Spain (a Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, a Commission staff working document available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020SC0308&from=EN, most recently accessed on 1.3.2022).

26 Gretchen Helmke & Frances Rosenbluth. 'Regimes and the rule of law: Judicial independence in comparative perspective'. *Annual Review of Political Science* 2009(12), pp. 345–366, on p. 351. – DOI: https://doi.org/10.1146/annurev.polisci.12.040907.121521.

27 Mira Gur-Arie et al. *Guidance for Promoting Judicial Independence and Impartiality* (2002). Washington, DC: Office of Democracy and Governance (part of the Bureau for Democracy, Conflict, and Humanitarian Assistance, U.S. Agency for International Development), pp. 133–147. Available at https://pdf.usaid.gov/pdf_docs/Pnacm003.pdf, most recently accessed on 1.3.2022.

finds praise rather than vilification. And this is true irrespective of the fact that complaints about 'political pressure' are recurrently voiced. For instance, the American Judicature Society, an association promoting judicial independence, has reported interference in such sensitive matters as religion in schools, affirmative action, the statute of limitations on crimes, and the death penalty[*28].

At this point, how is one to distinguish between 'proper' and 'improper' influences? In this regard, the difference in theoretical treatment between Continental and Common Law models is thought-provoking. We have spoken of accusations of 'horse-trading' in appointments for key judicial posts in Spain. In the United Kingdom, on the other hand, while bestowing high ranks on judges through corrupt practices such as 'taps on the shoulder' and 'secret soundings' are commonplace[*29], alarm bells are not so audible. The yardstick is not the same, and that is why we should do our best to seek stable ground on which to stand.

4. Perversion of the judicial adjudication process

So far, our analysis has yielded seemingly bizarre conclusions. Judicial independence is believed to be a mandatory precondition for the rule of law. Empirical data, very much to the contrary, appear to draw a different picture, for some countries, where the judiciary is extensively open to political influence, enjoy enviable levels of democratic health while some other countries, equipped with an impressive array of guarantees against political interference, perform much worse in the field of civil liberties.

One tentative explanation consists in distinguishing between *de iure* and *de facto* judicial independence[*30]. The former involves legal architecture, the latter to the facts of real practices in a real society, as opposed to a mere abstraction. Common Law countries benefit from a venerable history of civic education, so they do not really need to set the legal bar so high. After all, everything could boil down to a problem of democratic culture. If we dare take this view, it is understandable why the same legal structures exhibit such disparate results between the United States and some European nations. Presidential powers to select federal judges might be regarded as a manifestation of the will of the people, an advisable way to increase the democratic legitimacy of the judiciary in one setting. In contrast, the channels between Spanish or Polish politicians and 'their' judges lead only to corruption.

If one examines such a stance with a critical eye, though, it appears to be quite naïve. As we have remarked *supra*, 'improper' influences on the judiciary are widespread in American and British lands. Funnily enough, they are not considered a reason to disqualify the system as a whole. Perhaps the reason is purely ideological: Common Law holds a different understanding of what 'proper' and 'improper' may be, since its legal institutions subscribe more to a 'checks and balances' model than to 'separation of powers'. In continental Europe, pressures on judges to bend in favour of the electorate's opinion on matters such as abortion or the death penalty would cause the population to scream to the skies. Poland serves as a good example: those subjects are, in theory, reserved to the legislative power, in such a way that the courts are supposed to stick to the legal norms that Parliament will ultimately enact. Of course, in practice, things are not so easy, but what we are stressing now is the underling ideology of each legal tradition.

Alongside philosophical reflections, there is another reason we should not overlook, a technical factor. Empirical studies of the relations among judicial independence, the rule of law, and democracy follow co-variation methodology; that is, they outline correspondences between numerical variables. Such research is useful for descriptive purposes but lacks causally oriented explanatory power[*31]. It we forget this obvious mathematical caution, we end up misdirected to arbitrary inferences. In other words, one draws a risky conclusion if believing that the quality of Sweden's rule of law is due to the country's governmental interference on its judicial system.

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28 Ben Firschein. 'Judicial independence in the United States' *Sistemas Judiciales* 2010 4, on p.44. Available at https://biblio.dpp.cl/datafiles/14128.pdf, most recently accessed on 1.3.2022.

29 Rosa María Fernández Riveira. 'El modelo británico de nombramientos judiciales: Judicial Independence in Law'. *Teoría y Realidad Constitucional* 2019 44, pp 137–176. – DOI: https://doi.org/10.5944/trc.44.2019.26014.

30 Lars Feld and Stefan Voigt. 'Making Judges Independent: Some Proposals regarding the judiciary' (2004). Cesifo Working Paper 1260 Category 2: Public Choice) p 2. – DOI: https://doi.org/10.2139/ssrn.597721.

31 José Wilmar Pino Montoya. 'Metodología de investigación en la ciencia política: la mirada empírico-analítica' *Revista Fundación Universitaria Luis Amigó (histórico),* 2015, on p. 191. – DOI: https://doi.org/10.21501/23823410.1671.

Another distinction that facilitates tackling the problem is the one between 'formal' and 'material' judicial independence[*32]. Formal independence is connected with the legal functions of the judiciary; material independence, on the other hand, has to do with the actual circumstances surrounding the judicial job.

If judges are afraid of being reprimanded for ideological or political reasons, the judicial adjudication process is endangered. Diffuse but tangible co-action would permeate a system wherein the courts must keep an eye on political financing for re-election or on parliamentary commissions' capability of removing individuals through ideology-laden proceedings, as in the United States. A connection between the judiciary and politics brings the risk of conditioning the judicial decision with extra-legal factors. Remember that the United Nations links judicial independence to an impartial decision 'on the basis of facts and in accordance with the law'. Facts would be distorted were judges to fear for their professional future. And here we have the remedy to dissolve many misunderstandings: judicial independence is not a judge's privilege but a citizen's right. After all, the contending parties in a trial demand justice, not ideology. And justice calls for facts to be taken as they are, in an objective and neutral manner. That is why 'neutrality', with its caution against professional, political, or ideological interests of judges, has been deemed an ingredient to a fair trial[*33].

Hart's 'open texture' must not be mobilised as an alibi for manipulation. And politicisation is a way to manipulation like any other. Popular representativeness is no antidote to improper control of justice. Perhaps ideological influence could be accepted to a certain extent for guiding judges in some contexts who must decide between conflicting legal norms, but it is extremely dangerous in settling of facts, since it leads to institutionalised deception and judicial fabrication, no matter how fond of it Dworkin might be. Also, according to such scholars as Samuel Walker, it poses a risk of harm to minorities, since judges are exposed to biases associated with pressure from public opinion – that is to say, the prejudices of the majority. One may regard this as the paradox of popular justice[*34].

Thus far, we have warned extensively about the dangers of 'politicisation', but the issue of 'corporatism', no less vexing a deviation, should not be discounted either. If judges are isolated from democratic control, how can society be sure they would not put their vast powers in service of their professional, ideological, or personal self-interest? Neutrality is a double-edged sword. The solution is 'accountability' – but 'legal' rather than 'political' accountability. Judges must be held responsible for their misbehaviour, not for resisting ideological pressures from politicians or public opinion. Judges are human, not gods, so they are vulnerable to the same vices as all other mortals. Some of them are greedy for media prominence, an attribute harmful to public perceptions of judicial independence[*35], while others are 'gowned politicians', in that they yearn to use the courts as a springboard for political promotion, hence the importance of fair and balanced disciplinary proceedings[*36].

In this regard, we have another useful classification of judicial independence: external *versus* internal. The latter has its origin in the pressures emanating from the judiciary itself. Again, the Spanish CGPJ provides an example. This body has been labelled a 'conveyor belt' for passing from politics into the judiciary[*37]. Likewise, some Spanish judicial associations have received opprobrium for being unrepresentative tools of political control discriminating against non-affiliated judges[*38]. In sum, we can identify the likelihood of

32 Arenas García et al, 'Informe sobre la Independencia Judicial en España' (2021), on p. 4. Available via https://www.tolerancia.org/sociedad-bilingue-instituciones-bilingues-en-los-medios-del-16-al-30-de-junio/sociedad-bilingue-instituciones-bilingues-en-los-medios-del-1-al-15-de-junio/sociedad-bilingue-instituciones-bilingues-el-foro-de-profesores-analiza-el-estado-de-la-independencia-judicial-en-espaa/25914/, most recently accessed on 1.3.2022.

33 Arenas García et al. 'Informe sobre la Independencia Judicial en España' (2021), on p 5. Available via https://www.tolerancia.org/sociedad-bilingue-instituciones-bilingues-en-los-medios-del-16-al-30-de-junio/sociedad-bilingue-instituciones-bilingues-en-los-medios-del-1-al-15-de-junio/sociedad-bilingue-instituciones-bilingues-el-foro-de-profesores-analiza-el-estado-de-la-independencia-judicial-en-espaa/25914/, most recently accessed on 1.3.2022.

34 Samuel Walker. *Popular Justice: A History of American Criminal Justice*. Oxford University Press 1998, p. 6.

35 Victoria Rodríguez-Blanco; 'Justicia y política; una relación compleja' *Revista de Sociales y Jurídicas* 2014/10 (supp.) (ISSN-e 1886-6611, 'Ejemplar dedicado a: Realidades sociales desde miradas jurídico-políticas'), on p. 62. Available at https://revistasocialesyjuridicas.files.wordpress.com/2014/07/10-tm-03.pdf, most recently accessed on 1.3.2022.

36 Jesús Manuel Villegas Fernández (co-ord.). *Libro Blanco para la despolitización de la Justicia Española. Propuesta de la Plataforma Cívica por la Independencia Judicial*. Dykinson Editorial 2019, on p 5358 See https://www.dykinson.com/libros/libro-blanco-para-la-despolitizacion-de-la-justicia-espanola/9788413241708/, most recently accessed on 1.3.2022.

37 Jorge Pérez Alonso. 'La independencia del Poder Judicial en la historia constitucional española' *Historia Constitucional,* 2018/19, pp. 47–87 on p. 84. – DOI: https://doi.org/10.17811/hc.v0i19.534.

38 Rosario Serra Cristobal. 'La elección de los miembros del Consejo General del Poder Judicial. Una propuesta de Consejo más integrador e independiente', *Teoría y Realidad Constitucional* 2013/31, pp. 299–321, on p. 302. – DOI: https://doi.org/10.5944/trc.31.2013.10310.

Trojan horses planted to undermine judicial independence from within. Transparency and judicial democracy have been proposed as salves against such legal malaise*[39].

5. Conclusions

What are the corollaries of all these reflections?

First of all, we should take methodological precautions when dealing with judicial independence. Empirical approaches based on correlations of numerical data offer no answer as to the real causes behind the systemic malfunctioning of the judiciary and sometimes even give birth to absurd results. The real question, in contrast, is conceptual. When judicial independence is constructed as too fuzzy a notion, one depending on subjective conceptions such as 'proper' or 'improper', ideology is going to get the last word in its characterisation. In the end, there will be as many definitions as political stances: 'liberal independence', 'conservative independence', and any other wording whatsoever.

'*De iure* judicial independence' is an indispensable prerequisite for 'material judicial independence', since it creates the legal architecture for the latter's factual development. If a strong legal framework is lacking, the judiciary remains at the mercy of social contingencies, adrift on the seas of political, economic, or popular interests. However, again, judicial independence is a citizen's right. Consequently, it must be vigorous enough to resist pressures affecting the adjudication process, especially with regard to the objectivity of facts, which must be preserved from manipulation. And the sources of distortion stem not only from external powers but also from the judiciary itself, chiefly from corporatism. Transparency, internal judicial democracy, and legal accountability are remedies.

Finally, encouraging the influence of popular will on judicial decisions leads to disastrous consequences. As we have seen, it threatens to pervert the logic of judicial adjudication, to the detriment of vulnerable social groups and the whole society.

[39] Jesús Manuel Villegas Fernández (co-ord.). *Libro Blanco para la despolitización de la Justicia Española. Propuesta de la Plataforma Cívica por la Independencia Judicial*. Dykinson Editorial 2019, on p 59–61. Seehttps://www.dykinson.com/libros/libro-blanco-para-la-despolitizacion-de-la-justicia-espanola/9788413241708/ most recently accessed on 1.3.2022.