An Institutional Crisis that Dissolved Like a Sugar Cube

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Thursday, 15 December, was a particularly hectic day in the Spanish Congress of Deputies because there were harsh accusations between the majority and the minority, blaming each other for attacks on democracy. At one point, it was even claimed that a *coup d'état* was underway and that the aim was to paralyse legislative action using a "Tejero with a lawyer's robe", a reference to the surname of the colonel who interrupted Congress on 23 February 1981[1]. The main opposition party, the Partido Popular, decided not to vote on the "Non-governmental Proposal Organic Law on the transposition of European directives and other provisions for the adaptation of criminal legislation to European Union law" and the second, Vox, left the chamber. What were they discussing that caused such harsh language?

The bitter dispute in Madrid's Carrera de San Jerónimo (the seat of Congress) on that sunny autumn day was not over the repeal of the crime of sedition nor over the reduction of the penalty for the crime of embezzlement of public funds, the two major controversial issues that had been occupying the focus of Spanish political attention in recent months and which were being voted on that December day. The dispute was over the introduction of two amendments to the non-governmental proposal, Amendments 61 and 62, the technical appearance of which gave a little foreshadowing of the confrontation: The first modified Organic Law 6/1985, of 1 July 1985, on the Judiciary [LOPJ] to change how the General Council of the Judiciary [CGPJ] votes to elect the two judges of the Constitutional Court. This is attributed to it by the Constitution when after three months from the date on which the CGPJ had to make the election, no agreement is reached through the standard procedure (in this, each of the 21 members of the CGPJ has two votes and to be elected a majority of 3/5 is necessary; in the subsidiary procedure, each member would only have one vote and the two most voted candidates would be selected, with no minimum quorum). Amendment 62 modified Organic Law 2/1979, of 3 October, on the Constitutional Court [LOTC] to expressly allow the two judges of the Constitutional Court to be elected by the Government every nine years to take office without waiting for the CGPJ to appoint its own two judges. It was not clear that this could be done without an express legal mandate, since the Constitution stipulates that the renewal shall be by thirds (Congress/Senate/Government+CGPJ), without specifying what happens if the CGPJ does not choose its own. Moreover, this amendment removed the Constitutional Court's ability to check that the proposed jurists met the requirements of the law, until then, a pure formality: the *approval* has always been granted to those elected, but the parliamentary majority feared that the Constitutional Court (controlled by conservatives) would not give it to the two appointed by the Government in November, as they had been part of it until recently.

The Popular's Party strategy

The great confrontation in Congress stemmed from the strategy adopted by the Popular Party to prevent the approval of these amendments: on 14 December, it filed an appeal for constitutional protection (amparo appeal) before the Constitutional Court against the Agreement of the Bureau of the Justice Committee of 12 December 2022, by which amendments 61 and 62 were admitted for processing. The appeal asked the Court to immediately suspend the processing of these amendments (a "precautionary measure" in Spanish judicial terminology).

[1] Diario de Sesiones del Congreso de los Diputados, no. 234, 15/12/2022. An interesting summary of this long debate can be read in EL PAÍS of 15 December.

Evidently, the authors of the amendments could have adopted another strategy that same day to achieve their goal of turning the two amendments into law: to present a new bill, which, because of the speed at which Congress was processing the reform of the Penal Code, would not take much more than a month to be approved. So much *noise* over so few *nuts*? To understand this, one has to briefly forget about this debate and first talk about the Constitutional Court and its role in the Spanish political system.

The composition of the Constitutional Court

Article 159 of the Spanish Constitution establishes that the Constitutional Court is composed of twelve members appointed by the King, four of whom are proposed by Congress by a three-fifths majority of its members; four by the Senate, with the same majority; two by the Government; and two by the CGPJ, which the LOPJ also requires to be by a three-fifths majority. While these reinforced majorities were designed to ensure that the jurists elected were chosen by consensus, which should lead to independent personalities with a high technical profile being appointed to the Court, the political practice has been to divide the posts between the major parties, which has meant that the majority of those elected have been jurists close to the parties, or even party activists. In recent years, this has led to judges being labelled as "conservatives" and "progressives" and judgments being analysed in this light. In general, the PSOE and the PP have divided the eight magistrates elected by the Cortes equally; in the same way, the two selected by the CGJP were divided, one for the conservatives and the other for the progressives. Thus, the big difference is made by the Government when it elects its own two. The last renewal of these two was in 2013, with a Popular Party government, which appointed two close jurists (a professor and a judge). Since then, a conservative majority has been established, first 7-5 and from August 2021, 6-5, when a conservative judge fell ill and resigned in July 2022.

The division between conservatives and progressives within the Constitutional Court has proved to be of great importance in the current decade as the Court has dealt with cases promoted by the PSOE-Unidas Podemos coalition government. Thus, for example, the Court decided by a majority of 6-5 that the two "states of alarm" proclaimed by the Government in 2020 and extended by Congress were unconstitutional (SSTC 148/2021, of 14 July and 183/2021, of 27 October). However, as more than fifty appeals filed by the opposition against laws and decree-laws (some of them highly ideological and politically and socially controversial) passed during this legislature with a left-wing majority, the Government was very interested in changing the composition of the Court as soon as the nine-year mandate of the two magistrates proposed in 2013 by the conservative Government expired. The deadline passed on 12 June, but the Government ran into an unforeseen obstacle: for many jurists (but not including myself), the constitutional mandate to renew the Constitutional Court "by third parties" (art. 159.3 CE) meant that the Government would have to wait for the CGPJ to appoint its own. For some months, the Government waited for the CGPJ to comply with its constitutional obligation, but the conservative members were in no hurry, not even after the parliamentary majority changed the LOPJ to oblige the CGPJ to propose the two judges "within a maximum period of three months from the day following the expiry of the previous mandate" (Organic Law 8/2022, of 27 July, modifying articles 570 bis and 599 of Organic Law 6/1985 on the Judiciary). For this reason, on 29 November, the Government proposed its two magistrates, a judge and a professor of Constitutional Law, who had one characteristic in common: both had been part of the same Government that appointed them, one as Minister of Justice (until July 2021) and the other as Director General (until April 2022), proposals that received little support and much criticism.

The President of the Constitutional Court decided not to immediately convene the Plenary of the Constitutional Court, which, according to the LOTC, must verify that the proposed jurists meet the requirements, but instead decided to wait a few days so that the CGPJ could appoint its own. Faced with this delay and considering that it was just a ploy to waste time, the PSOE and Unidas Podemos presented the famous

amendments 60 and 61 to the bill to modify the Penal Code to quickly obtain legal backing for their strategy of renewing the Constitutional Court. The PP reacted with the appeal for protection on 12 December, before which the President of the Constitutional Court urgently called a plenary session for 15 December to discuss whether or not the amendments would be admitted for processing and whether or not the provisional freezing of the amendments would be ordered. Faced with the concern that this suspension would be decided, the coalition political forces acted legally by submitting briefs to the Constitutional Court and politically with the aforementioned severe accusations of "attack on popular sovereignty", "hijacking of democratic institutions", "silencing of the Cortes", etc.

When this suspension was adopted on 19 December 2022, by six votes to five (Order of 19 December 2022), the official reaction of Congress, the Senate and the Government was one of compliance, but with harsh criticism. Strangely, neither the PSOE nor UNO Podemos immediately presented a bill containing the suspended amendments. The Senate did challenge the suspension, but it was quickly rejected by the Constitutional Court, once again by six votes to five (Order of 21 December 2022).

When the situation seemed to be heading towards a serious institutional crisis, on 27 December, the CGPJ unanimously elected its two corresponding jurists (a conservative Supreme Court judge and a progressive Supreme Court judge). On 29 December, the Constitutional Court, also unanimously, gave its approval to the four proposed jurists, who were sworn in or promised their posts before the King on 31 December and will take office on 9 January. The Constitutional Court will thus be made up of seven progressive and four conservative judges. All that remains is for the Senate to propose a replacement for the magistrate who resigned due to illness, which, given political practice, will probably have a conservative tendency. But for the composition of the Constitutional Court this will not be of much importance, given that the conservatives will foreseeably remain in the minority for the next nine years. The crisis has dissolved without a trace, like a sugar cube in tea. But in my opinion, it has left a very bitter aftertaste: the sad division within the Constitutional Court by blocs has become evident, even on very technical issues (such as whether or not to admit an *amparo* appeal or whether or not to consider the recusal of some judges), where it is not easy to see ideological differences but rather strategies of action to achieve a previously desired result.

Legal analysis of the amendments

The 12 December decision of the Bureau of the Justice Committee of the Congress admitting the two amendments to the draft organic law amending the Penal Code that sought to change two other laws had all the appearance of being an unconstitutional decision – as the Committee's legal advisor warned – because there is a clear precedent on a similar issue (only with the protagonists changed): in 2003 the draft Organic Law on Arbitration was amended in the Senate by the PP to add to the Penal Code the illegal calling of referendums; the Socialist senators filed an appeal for constitutional protection, which was upheld by the Constitutional Court and therefore annulled "the agreements of the Senate Bureau of 2 and 3 December 2003, by which amendments no. 3 and 4 presented by the Popular Party's Senate Group to the draft Organic Law complementary to the Law on Arbitration were admitted for processing" (STC 119/2011, 5 July).

We also know that this ruling, which recognised the violation of the socialist senators' right to political participation eight years later, had no practical effect as it did not affect the validity of the law, which could only have been annulled by the Constitutional Court using an appeal of unconstitutionality. Precisely for this reason, the PP's appeal for constitutional protection called for the suspension of the processing of the two controversial amendments as a precautionary measure. By acting in this way, it placed the Constitutional Court between Scylla and Charybdis: if it were suspended, it would interrupt the legislative activity of the Cortes, the representative of the Spanish people, for the first time in Spanish constitutional history. But if it did not do so, it could not effectively redress the apparent violation of the deputies' rights to political participation.

Therefore, the Order of 19 December 2022 only innovates on one point, the provisional suspension of the processing of the two fraudulent amendments, which is the one that has raised doctrinal criticism, even accusing it of creating a constitutional crisis comparable to the Tejero *coup d'état* in 1981 and the Catalan pro-independence *process* in 2017[2]. This would be an unjustifiable interference in legislative activity, protected by the classic theory of the internal *corporis acta*, which prevents control over decisions on the legislative procedure adopted by the Cortes Generales. I see it in a more optimistic light: the suspension was a decision to ensure that the amparo appeal would have some effect and that it would not happen as it did in 2011 when the Constitutional Court's ruling did not serve to repair the violation of the PSOE's right to political participation. For this reason, it seems to me to be a step forward in what Rudolf von Ihering called the never-ending "struggle for the law" to control the arbitrariness of political power[3]. Today the PSOE has been prevented from doing what would be, in classical terminology, an arbitrary decision. Tomorrow this precedent could be used against any government, including that of a hypothetical PP, which, given the amnesia of politicians, cannot be ruled out. After all, the legislative procedure is not only a way of transforming the political decisions of the majority into binding laws for all but also a way of guaranteeing the rights of the minority and, in general, of all citizens. In short, I believe that the famous telegram that Mark Twain sent in 1897 to the New York Journal when it published the news of his death can be applied to the controversial and – for many specialists – transcendental decision of the Constitutional Court: "The reports of the order are greatly exaggerated".

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[2] Vid. Javier GARCÍA FERNÁNDEZ, "La desestabilización constitucional de España", EL PAÍS of 19 December 2022. The Asociación de Constitucionalistas Españoles (Association of Spanish Constitutionalists) collects the interventions of its members in the media on its blog https://www.acoes.es/nuestros-socios-en-los-medios/.

[3] Rudolf von Ihering, *Der Kampf ums Recht*, 1872 [Jon J. Lalor tr: The Struggle for Law, 1915].