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THE RULE OF LAW AS A POLITICAL WEAPON

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I. Introduction*

Let us assume that politicians want to be in office and to maximise their autonomy in decision-making. On the other side, citizens want to avoid abuses by politicians. Citizens have two instruments to protect them: first, to throw the rulers out of office at election time; second, to enforce, through institutions, legal limits to the political discretion of incumbents between elections. The first protection is provided by democracy; the second, by the rule of law.[1] *Prima facie* they complement each other. Citizens are not just interested in electing politicians who, once in office, are controlled only by the prospect of future elections; they are not interested either in unelected, non-representative rulers, even if bounded by laws passed by an undemocratic assembly.

I shall use a minimalist definition of the rule of law. It consists of the enforcement of laws that (i) have been publicly promulgated and passed in a pre-established manner; (ii) are prospective (*nulla poena sine lege*), general (like cases are treated alike), stable, clear, and hierarchically ordered (the more particular norms conform to the more general ones); (iii) are applied to particular cases by courts independent from the political rulers and open to all, whose decisions respond to procedural requirements, and that establish guilt through the ordinary trial process. This definition makes no reference to fundamental rights, democracy, equality, or justice: it corresponds to what Dworkin (1985: 9-32) has termed the "rulebook" conception of the rule of law.[2]

My intention is to discuss how, under particular political and institutional conditions, politicians can turn democracy against the rule of law, and viceversa. Their strategic

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[1] Democracies operate under binding laws that guarantee the rules of the game. These laws not only limit the discretionary power of politicians; they also enable them. If, for instance, a law empowers parliament with the possibility of bringing down a government with a motion of no-confidence, it introduces control over the latter but enables the former. Yet, all enabling laws establish limits: the three conditions of the minimalist, "rulebook" conception of the rule of law that restrict politicians' decisions.

[2] This definition in no way assumes that the rule of law is better served when the legal limits to the incumbent's powers are more extensive. Its operation requires only that the law is systematically enforced according to the mentioned three conditions, not that politicians have their hands tied.

instruments are majoritarianism and judicial independence. I shall examine, more particularly, the strategic use of judicial decisions by politicians in order to subvert democracy and the rules and conditions of political competition. The focus will be on politicians and judges as the main actors in the scenario: on the strategies of the first, on the political independence and impartiality of the second. The media and economic actors will also play an important role. Citizens will be in the shadows, standing in the background of the stage, trying to figure out with incomplete information what politicians do in order to react with their votes at election time. The relation of forces, then, will mostly have to do with institutions (and the elites that inhabit them), rather than with the distribution of electoral support.

The conditions for democracy or the rule of law not to be an equilibrium have been discussed by models *à-la* Przeworski (1991) and Weingast (1997). We know much less about situations in which politicians judicialise politics in order to modify the results of democratic competition, while democracy and the rule of law are maintained. I shall use three arguments to interpret such situations. These arguments do not refer to conditions that are both necessary and sufficient: that is, politicians may or may not embark on the actions that I examine, but if they do the conditions should be present. In the first two arguments, the judicialization of politics is a strategy of the opposition; in the third, the government carries the initiative.

The first one goes as follows. Suppose an opposition that complies with democratic outcomes because it expects to have some chance of winning the elections in the future. Yet, when that expected future (i.e. the best imaginable conditions for electoral victory) arrives, the opposition loses again. This opposition may conclude that it cannot win under the present rules of competition. This may or may not be due to a lack of accountability of the government. Different circumstances can give a persistent advantage to the incumbent: elections may be strongly ideological and the median voter be with the government; the leader of the ruling party can be very popular. The opposition, however, does not turn to dictatorship: it introduces new dimensions of competition in which judicial activism becomes

instrumental.[3] In Riker's (1982: 209) terms, "this is the art of politics: to find some alternative that beats the current winner".

The second argument is that, if the accountability of politicians is limited, the probability that politics becomes judicialised increases. Incentives for the opposition to embark on such strategy will be great, unless it colludes with the government or fears reprisals. Institutions that provide insulation to strong executives or promote coalitions hardly removable by elections may restrict the accountability of incumbents. If elections are the only mechanism for enforcing political responsibility, if politicians turn electoral victories into exonerative devices, and if between elections they respond only to legal responsibilities, then parliament becomes irrelevant and political confrontation is transferred to a judicial terrain. If politicians collude, independent judges, supported by media and interest groups, will take the initiative; if they do not, the strategy will be launched by the opposition. The likelihood of collusion increases if the opposition expects an electoral victory: in such a case, it may be interested in preserving the conditions of limited accountability (an insulated executive, the control of public television, and so on).

In the third argument the strategy is carried out by the government. Under particular political and institutional conditions, with independent but not neutral judges, a government may manipulate judicial activism in order to consolidate its power and weaken the opposition. That is, it can try to modify in its favour the balance of power and influence, using the rule of law against political opponents. The target may be the parliamentary opposition, hostile interest groups, or critical media.

[3] This is related to Przeworski's (this volume) argument on the manipulation of rules. Party A will prefer democracy with new, more favourable, rules to the limit that party B is indifferent to democracy or dictatorship.

II. Beyond stereotypes

If politicians can undermine the rule of law with democratic instruments, subvert democracy, or alter the conditions of competition with strategies that use the independence of judges, then the combination of democracy and the rule of law will simply be a normative stereotype, not reflecting well the real world of politics. This rhetorical stereotype is, however, routinely reiterated in the constitutions of new democracies.[4]

For instance, the Spanish constitution of 1978 defines the new regime as a "social and democratic state of law"[5] (article 1, paragraph 1). And the Russian constitution of 1993 speaks of a "democratic federative rule-of-law state" (article 1). We also find this normative stereotype in many political analyses. Thus, O'Donnell (1999: 321, 318) writes that

> "Democracy is not only a (polyarchical) political regime but also a particular mode of relationship between state and citizens, and among citizens themselves, under a kind of rule of law that, in addition to political citizenship, upholds civil citizenship and a full network of accountability (...). All agents, public and private, including the highest placed officials of the regime, are subject to appropriate, legally established controls of the lawfulness of their acts".

We know the components of this normative ideal. Nobody will be above the law; citizens will be protected against discretionary abuses of politicians; the use of power will be predictable; the vertical accountability of democracy will be complemented by the horizontal accountability of divided powers, the checks and balances typical of political liberalism. Moreover, the rule of law will reinforce the control of citizens over their rulers' representativeness[6] in two ways. First, independent courts will correct the myopia of democratic governments, mitigating "the influences of the short term... (the) violent swings

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[4] Examples, among many, can be found in the 1991 constitution of Bulgaria (preamble); the 1991 constitution of Slovakia (chapter 1, article 1); the 1992 constitution of the Czech Republic (chapter 1, article 1); or the 1997 constitution of Poland (article 2).

[5] The expression used is that of *Estado de Derecho*, the translation of the German *Rechtsstaat*. I shall not make differences between this concept and that of the "rule of law".

[6] I consider a politician to be "representative" when his decisions are taken in the best interests of voters: i.e., voters would have made the same choice, if their information was symmetrical, and their preferences were not time inconsistent or myopic. See Manin, Przeworski and Stokes, (1999: 29-54).

and panic measures of legislatures concerned with re-election" (Raz, 1994: 260). Second, independent courts will facilitate the monitoring of rulers, providing citizens with information via the mutual vigilance of separate powers. In this ideal world, democracy and an independent judiciary do not just coexist in harmony: they support each other.

This appears to be the happy end of two institutional arrangements that were historically in conflict. Born in the common law tradition[7] when the British parliament imposed legal limits to the power of an already weakened crown in order to protect private rights (and, more in particular, private property), the rule of law became an instrument to protect individuals from the "tyranny" of majorities. That is, it became a counter-majoritarian, anti-democratic device. In Madison's famous statement, "democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property" (*Federalist Papers*, 1961: 81). Elected governments, in the name of the majority, could infringe individual rights, expropriate property, redistribute resources, intervene in the economy. The law was an instrument to prevent political intrusions in personal freedoms and private property. As Tocqueville (1969: 287) put it, "the courts correct the aberrations of democracy". The view of democracy as a threat, and of the rule of law as a guarantee against redistribution, was reiterated from Dicey's original definition in 1885 onwards. Remember Hayek (1994: 87-8): "any policy aiming directly at a substantive ideal of distributive justice must lead to the destruction of the Rule of Law (...). It cannot be denied that the Rule of Law produces economic inequality". Democracy and economic redistribution were the dangers to be avoided. This is why, over a long time, the left distrusted the rule of law (Shklar, 1987): any strategy of transforming capitalism had to challenge the rule of law as a bourgeois device. It was only after a long experience of dictatorships and violations of civil rights that the left defended the rule of law as the self-binding of rulers, compatible both with majority rule through elections (democracy) and with socioeconomic reforms (social democracy).

[7] In the civil law tradition of continental Europe, the law was an instrument that the state used to expand its power, rather than a restriction on public officials. The two major state builders, Napoleon and Bismarck, massively expanded the legal systems of France and Germany.

Democracy and the rule of law, however, can provide opportunities and incentives for politicians to subvert each other. Either majoritarianism or judicial independence will provide the instruments. That is, the original institutional conflict may be activated by politicians' strategies: the rule of law and democracy can undermine each other through politics. The central point of the paper will be the political manipulation of judicial independence.[8] To quote Madison again, "if men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary" (*Federalist Papers*, 1961: 322). But why would membership of the judiciary be restricted to angels? Judicial independence has generally been seen as protection from the government or the legislative majority: if rulers are to be controlled, the checks provided by the rule of law must be immune to their influence. But the protected checkers are unchecked. *Quis custodiet ipsos custodes* is the weak spot in the role attributed to the rule of law in liberal democratic theory. Examining judges in America in 1835, Tocqueville (1969: 206) wrote that

> "The arbitrary power of democratic magistrates is even greater than that of their counterparts in despotic states (...). Nowhere has the law left greater scope to arbitrary power than in democratic republics, because there they feel they have nothing to fear from it".

In the legal tradition of continental Europe, the limit to the power of judges was the law. Judges were to act just as *la bouche de la loi*; their power was to be "as null" (Montesquieu, 1951: 401). The Enlightment and Jacobinism, reacting against the despotism of the crown, also mistrusted the magistrates of the *Ancien Régime.* The inheritence transmitted from the French revolution was the supremacy of the legislature. And in order to avoid the excessive power of an unelected judiciary, the application of the law was to be a mechanical execution of the will of parliament.

[8] Judicial independence usually means that (i) judicial decisions cannot be overturned by retroactive legislation or by appeals to the parliament or the government; (ii) judges cannot be removed or promoted by decisions external to the judicial system; (iii) judicial procedure must be stable, not under constant revision by the legislature or the government; (iv) legislative and executive acts must be open to judicial review; (v) the "doctrine of precedent" and *stare decisis et not quieta movere* must be respected (previous decisions by superior courts are binding and contain a *ratio decidendi*: what has been settled must be applied to subsequent cases, and can only be reviewed by a higher court).

But this limit to judicial power is a very loose one. First, constitutional control of legislation increased such power. Exerted by the United States Supreme Court since the beginning of the 19th century, this control was introduced in many civil law countries when democracy was re-established: for instance, in the German Federal Republic and Italy after 1945; in Greece and Spain in the 1970's. Second, laws often do not have a clear, univocal meaning. If judges must interpret norms that carry a "penumbra of uncertainty" (Hart, 1958: 607), their interpretation may come close to legislation.

It is obvious that differences remain between judicial interpretation and legislation. For example, judicial decisions are framed in pre-existing and publicly-known laws (principle of legality); they must be justified by facts and norms (principle of impartiality); judicial activity follows an initiative undertaken by an external actor (*ne precedat judex ex officio*); sentences are preceded by hearings of the parties involved in the case (principle of contradiction). But the judiciary contributes to create law, in civil law countries as well; it is not just a brake on political power, but exercises political power. Hence the problem posed by unchecked checkers[9] in democracies.

The accountability of the judiciary has been examined from two additional, very different perspectives. One is normative: if we see the rule of law as inseparable from a political theory of rights, judges do not just enforce laws, but follow principles. That is, they use their discretion deciding on legal issues according to the best theory of justice; they are constrained by an ideal of law, based on "an accurate public conception of individual rights" (Dworkin, 1985: 11-2). Besides, because of their public visibility, judges may be the object of criticism by public opinion, which limits their discretion (Raz, 1994: 358-9). We know, in fact, that judicial decisions generally reflect public opinion: either judges are influenced by it, or they seek popular acquiescence with their decisions.[10] Judges must also stay "attuned to the

[9] To quote Radin (1989: 796), "If rules do not tie judges' hands with their logical or analytical application, the traditional view is that judges will have personal discretion in how to apply the law (...). It will also confer on judges a realm of 'arbitrary power' and undermine democracy (...). The government is a Leviathan to be restrained. Yet (...) judges are even more in need of restraint".

[10] On the first reason, see Rehnquist (1986:752, 768): "it would be very wrong to say that judges are not influenced by public opinion (...) judges go home at night and read the newspapers or watch the evening news on television; they talk to their family and friends about current events. Somewhere 'out there' -beyond the walls

support and expansion of the polyarchy" (O'Donnell, 1999: 317). There are no instruments, however, to ensure that these exhortations are followed; principles of justice alone would be seen as a weak protection if the suspects were politicians. And the control of judges by public opinion is not of great relevance in most of the strategies that I examine here. These strategies are not based on recurrent judicial decisions, but on exceptional ones, with effects intended to be lethal for the adversary.[11]

The other perspective is administrative: checks on the checkers are internal. These checks refer in particular to the divisions between, and the hierarchy of, courts; also to corporatist guarantees, such as the training, recruitment, and professional incompatibilities of judges; finally, to disciplinary action and legal liability that restrict prevarication. But these checks are always enforced by the checkers themselves: if the rule of law limits abuses by politicians, no democratic accountability exists for judges.

Judges, invulnerable to political pressures from other branches of the state, may have political interests of their own. Protected, unchecked, and unaccountable, we do not know why the judiciary would be politically impartial and neutral. Yet losers may still accept biased judicial decisions if they expect that the composition of the judiciary, and its partial activism, can be reversed in the future, and if they consider other alternatives (i.e. non-compliance) to be worse. Judges operate in scenarios where other actors play: politicians in government or in opposition, individuals who control mass media or vast economic

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of the courthouse- run currents and tides of public opinion which lap at the courthouse door". On the second, remember Justice Frankfurter's words: "The Court's authority -possessed of neither the purse nor the sword- ultimately rests on sustained public confidence in its moral sanction" (*Baker v. Carr*, 1962). Evidence on the U.S. Supreme Court shows that "the individual justices follow shifts in public mood" (Flemming and Wood, 1997: 493), the lag involved in that influence is debated, and the effect seems to be more noticeable in moderate judges that hold critical swing positions within the Supreme Court (Mishler and Sheehan, 1993 and 1996).

A different view, of course, is that judicial decisions influence public opinion: the public listens to courts and supports their decisions. See Dahl (1957), Franklin and Kosaki (1989), Hoekstra and Segal (1989). In this case, the judiciary would hardly be controlled by public opinion.

[11] That close to 60% of voters disapproved of Kenneth Starr's methods as Independent Counsel, and that less than one third supported the impeachment of Clinton, did not stop Starr. See Sonner and Wilcox (1999: 554-7).

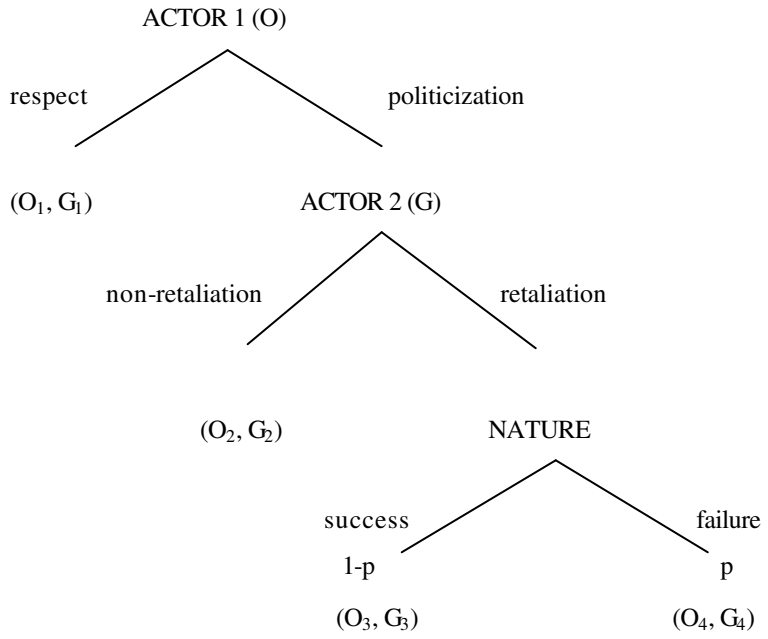
resources. Multiple interests criss-cross in this scenario. As Guarnieri and Pederzoli (1999: 57) put it,

> "The rupture of most institutional connections with the political system and the looser hierarchical links have indeed ensured particularly high levels of internal and external independence; they have not prevented, but rather facilitated, a network of connections, often hardly visible and with little transparence, that can undermine the autonomy of the magistrature".

Politicians, either in government or in opposition, will devise strategies and search for allies to achieve their political goals. Such strategies cannot ignore judges, these unchecked agents whose decisions are binding. I will not discuss in this paper why politicians comply or do not comply with the law, but why and how they will deploy to their advantage strategies of conflict between the rule of law (more particularly, an independent judiciary) and democracy (majoritarian political support). We know well two kinds of strategies: one in which politicians use democracy to subordinate the judiciary and to overcome the limits set by the rule of law; another in which politicians use existing norms and independent judges to undermine democracy as a regime. In both, either the rule of law or democracy are not an equilibrium: they are subverted by politics. We know much less well strategies in which, although democracy is preserved, the independence of judges is turned into a political instrument to get rid of an opponent if the rules of democratic competition are not enough. I will therefore concentrate more on the latter.

Politicians will politicise the independence of judges when the payoffs of this strategy appear to be higher than those of the alternative respect of the mutual autonomy of judges and politicians. The probability of success will be assessed, together with the risk of costs, particularly a future effective retaliation by the adversary. Probabilities and risks ultimately depend on the political balance of forces: votes when the target is the rule of law; sympathies and complicities that politicians may have within an independent but not neutral judiciary when the target is either democracy as a regime or the conditions of political competition. The strategies of two actors, an opposition and a government, can be analysed as a dynamic game with complete information: that is, as a sequential-move game in which the players' payoffs are known, and whose outcome can be established by backward induction. Strategies

and payoffs are represented in the following game tree in which, just as illustration, actor 1 is the opposition (O) and actor 2 is the government (G).



Because a strategy of retaliation, whatever its outcome, involves costs, the order of preferences of actor 1 is $O_4 > O_2 > O_3 > O_1$. The reverse order is that of actor 2. A subgame-perfect equilibrium constructed in the following manner captures the former arguments. To start with, payoffs are assigned in the third stage in case actor 2 retaliates. The probabilities (p) of success and failure of retaliation depend on the balance of forces, which is given by nature (i.e., it is unrelated to the strategies of the actors). For actor 2 (G), the payoff is $pG_4 + (1\text{-}p)\ G_3$. Hence, in the second stage, actor 2 (G) will not retaliate if $G_2 > pG_4 + (1\text{-}p)\ G_3$. Finally, in the first stage, given the assumed payoff structure so far, actor 1 prefers politicization to respect, as $O_2 > O_1$. Thus, by construction, a subgame-perfect Nash equilibrium is politicization (by actor 1) and non-retaliation (by actor 2).

III. Subverting the rule of law on the grounds of democracy

In democracy, if rulers confront independent courts, they will do so when they enjoy a broad mandate, the opposition is weak, and the credit of the legal system and the courts is low. The probability of success of their strategies will then be high, and the risk of retaliation limited. The institutions of the rule of law will be presented as opposed to democracy, to what Tocqueville (1969: 246) called "the absolute sovereignty of the will of the majority".

This is the liberal nightmare about democracy: when no boundaries of legality contain the whims of the majority. This is also a central mark of "delegative democracies": for governments, "other institutions -courts and legislatures, for instance -are nuisances (...). Accountability to such institutions appears as a mere impediment" (O'Donnell, 1994: 60). The usual suspect is the plebiscitarian populist politician, of which there are endless examples. A well-known one is President Juan Domingo Perón in Argentina, on whose behalf crowds shouted in the streets "even if a thief we want Perón" (*aunque sea un ladrón queremos a Perón*). Another one, also from Argentina, is President Carlos Menem: enjoying an overwhelming mandate he changed the composition of the Supreme Court. With two thirds of its members under his command, the Court was no longer independent, but an obedient instrument.[12] Menem incarnated for this Supreme Court the "sovereign will of the nation";[13] as one of its members put it, "my only two bosses are Perón and Menem (...). I cannot have an interpretation which is contrary to the government" (Larkins, 1998: 428-9). This subordination of the judiciary contradicted hopes that, with democracy, courts would become an independent and effective instrument to redress abuses and solve claims.[14] As a

[12] Menem also changed the Attorney General of the State and most members of the Tribunal of Public Accounts.

[13] Sentence of the Argentinian Supreme Court on decree 36/90 that introduced the Bonex Plan. According to this Plan, savings in private bank accounts exceeding one million australes ($610) had to be invested in state bonds, in order to finance the internal public debt.

[14] Such hopes led to a multiplication of claims presented to different courts, to the National Ombudsman Office (*Defensoría del Pueblo de la Nación*), and to the Municipal Ombudsman Office (*Controladuría General Comunal*). Judicial cases also became widely publicised by the media. On this discovery of courts by citizens and media see Smulovitz (forthcoming). The Argentinean judiciary resisted its political subordination with initiatives such as the investigation of three ministers of Menem for an illegal sale of arms to Ecuador and Croatia between 1991 and 1995; of the minister of Labour and the secretary of the

result, the prestige of courts collapsed: while in 1984 42% of citizens had little or no confidence in them, in 1991 the percentage had risen to 71%, and in 1996 it had reached 89% (Smulovitz, forthcoming: 19). A third example is President Hugo Chávez in Venezuela. Following his 1999 electoral landslide, Chávez and his parliamentary majority embarked on a purge of judges. A decree of Judicial Emergency allowed the new Assembly (*la Soberanísima*) to investigate magistrates of the Supreme Court and of the Judicial Council, as well as every judge in the country. The President of the Assembly, Luis Miquilena, warned against resistance:

> "Anybody who opposes the decisions will be eliminated. If the Supreme Court of Justice were to take any measure, and it is likely that it will do so, you may be certain that we shall not hesitate for a moment to suppress the Supreme Court of Justice" (*El País*, 21 August 1999: 8).

These politicians used mobilized majorities in democracies to suppress limits to their powers. Another type of politicians have similarly undermined the rule of law in new democracies: anti-communist politicians implementing lustration policies after 1989, in order to eliminate competitors in the political arena. Lustration means purification by sacrifice: that is, purges within institutions, screening individuals that had political responsibilities in the former communist regimes. Demands for punitive retroactive laws were made by conservative politicians, usually backed by the Catholic church, as communism crumbled. In the former Czechoslovakia a law was passed in 1990; Bulgaria, Germany, Hungary, Lithuania, Russia, followed. In Poland, lustration was introduced under the government of Hanna Suchocka in 1992. Parliamentary initiatives of AWS (Solidarity Electoral Action) and UW (Freedom Union) in the *Sejm* backed the purges, with the argument that the judiciary should "meet the needs of society".[15] In the former German Democratic Republic, lustration led to 70% of civil servants of the Justice Department of Brandenburg being replaced by West German imports.[16]

Intelligence service under the presidency of Fernando de la Rúa, for allegedly buying votes in the Senate to support a reform of the labour market.

[15] The demand for purges included the prohibition of the SLD (the Democratic Left Alliance). Leszek Kolakowski, Jacek Kurón, and most members of the KOR (Committee for Workers' Defence) would have been victims of lustration.

[16] This information is reported by Linz and Stepan (1996: 251, fn. 38).

Demands for lustration were made in the name of democracy. This contrasts with the argument that *garantismo* (Di Palma, 1990: 44-75) and pacts of coexistence make new democracies more stable (O'Donnell and Schmitter, 1986: 37-47; Karl and Schmitter, 1991: 280-2). The usual prescription for democratization has been "to forgive, but not to forget", as long as compromises do not make democratic competition or the agendas of governments irrelevant. It may be argued that this prescription is only valid for post-authoritarianism, not for post-communism: as Linz and Stepan (1996:24) put it,

> "in comparison to post-communist Europe, some of the long-standing authoritarian dictatorships we have considered in Franco's Spain, Salazar's Portugal, and Pinochet's Chile left more to build on in the way of a constitutional culture (...). In all three cases most of the principles of Western democratic law, while abused or put in abeyance in practice, were not fundamentally challenged".

According to this argument, because of the confusion between legality and politics and the overlapping between state and regime, democracy could only be sustained in post-communist countries with a new judiciary. An analogy is sometimes established between post-communist lustration and denazification after 1945 (Morawski, 1999). But this analogy is unconvincing. For one, the Nuremberg trial was part of an investigation of the whole German population following a world war, and it was grounded on legally-based charges of crimes against humanity by an international tribunal. For two, lustration served politicians to get rid of political competitors and policies which they simply disliked: for instance, because they opposed a market economy, defended abortion or public education (Kaniowski, 1999). Finally, politicians that defended lustration in the name of democracy, subverted two basic principles of the rule of law (Esquith, 1999): that no guilt can be established through association, and that no offence can exist without a pre-existing norm (*nullum crimen sine lege*).

The strategies of politicians in post-communism promoted tensions between democracy and the independence of courts. Thus, when communist politicians were confident that they would win the first elections, they cared little about the independence of the judiciary and defended the supremacy of the legislative. On the contrary, when they feared defeat, they tried to protect the existing judiciary from a future political majority, granting independence to the former. As for conservative and liberal politicians, they defended the

subordination of the existing judiciary to the newly-elected representatives, and were only ready to accept an independent judiciary after a political purge by a democratic majority had taken place (Magalhàes, 1999). Both anti-communists and plebiscitarian populists subordinated the rule of law to the "will of the majority".

IV. Subverting democracy with the rule of law

If politicians use independent judges as an instrument against democracy, they will do so when the political institutions are weak, society is divided in its support for the regime, and a judiciary beyond the control of parliament and government is hostile to democracy. In these circumstances, the probability of success of subversive strategies increases, while the threat of retaliation is hardly credible. If politicians create a divorce between democracy and the rule of law that opens up an opportunity for regime subversion, the conditions will be the opposite to those of the earlier case: the executive is fragile, powerful actors hostile to democracy have not been discredited, and judges are accomplices of the strategies rather than victims.

This scenario is likely in new democracies that inherit norms and independent, but partial, judges from the past. As Friedrich (1958: 139-40) put it, if "a large part of judges come from a precedent regime, and are maintained due to the principle of non-removability of judges, the loyalty of courts to the new government can become suspect". But established democracies may also be subverted through this type of strategy when the vital interests of potential veto groups are threatened, or when the country is in a deep political and economic crisis. A patriotic saviour has an opportunity to emerge and, in the name of the "national interest", find support to attack the regime.[17]

[17] Remember Schmitt's (1985: 27) argument that, if a dictatorship suspends the law, it is only to re-establish the conditions of its efficiency: "although it ignores the law, it is only to achieve it". This is a characteristic of the *Kommissarische Diktatur*, as opposed to "sovereign dictatorships".

Politicians may use the rule of law against democracy: the former only requires the observance and enforcement of any law, whatever its content. That is, it does not protect democratic political rights; it ensures only that, because laws are general, the consequences of actions can be predicted and individuals may enjoy greater security from arbitrary sanctions. But the rule of law can still be the rule of "bad" laws (i.e. norms that well-informed citizens would not have passed) as long as a government remains within the limits of a hierarchically ordered and logically consistent legal system. As we know, Kelsen's theory of the *Rechtstaat* simply required a principle of legality, that the actions of governments were limited by existing laws, that the legal system had a logical structure deduced from the *Grundnorm*, and that constitutional review should be a responsibility of courts.

> "We do not conceive the *Rechtstaat* as a state order with a specific content (...) but as a state whose acts are carried out in their totality on the basis of the legal order (...). Every state must constitute an order, a coercive order of human behaviour, and this coercive order, whatever the method of its creation may be -autocratic or democratic- and whatever its content, must be a legal order, that gradually becomes more concrete, from the hypothetical fundamental law to the individual legal acts, through the general norms. This is the concept of the *Rechtstaat*" (Kelsen, 1979: 120).

The nature of the political regime is indifferent;[18] democracy or dictatorship are irrelevant, as long as the laws are respected and enforced. As Raz has argued (1979: 211, 219, 225), if the rule of law has to have any meaning, it cannot overlap with a theory of justice or normative political philosophy:

> "A non-democratic legal system, based on the denial of human rights, an extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies (...). Conformity to the rule of law also enables the law to serve bad purposes".

Politicians may use the rule of law against democracy. If what matters is the respect and implementation of the law, political instability under democracy may be a reason to subvert it in the name of the rule of law. The regime can be subverted from within if it has

[18] Kelsen accepted that legal coercion under democracy does not assume that the majority has the truth, and keeps open the possibility that the minority becomes the majority (Kelsen, 1979: 472-3). But, as Heller (1972: 71, 216) pointed out, the "normative logicism" of Kelsen attributed "an authority to law deprived of any ethical or sociological content". The context of the debate between Kelsen and Heller was the dramatic collapse of the Weimar Republic.

inherited norms and courts from the authoritarian past, or if "bad" laws were passed under democracy that can be used to overthrow it. There are abundant historical experiences of such strategies of subversion. Two well-known cases are the Weimer Republic and Salvador Allende's Chile: the first was a new democracy with authoritarian legacies; the second, an apparently well-established democracy.

The German judiciary played a decisive role in the collapse of German democracy in the 1930's. Whereas the Second Reich had purged the judiciary of liberal members from 1878 onwards, no relevant changes were introduced after the First World War. The Weimar Republic inherited a very conservative judiciary, trained in the Historical School, more loyal to a German *Volkgeist* than to the regime and the 1919 constitution (Ehrmann, 1987). Its organization was bureaucratic, and its internal, vertical controls very strong; its political autonomy was very great, due to legal independence, unstable governments and a polarized parliament. But if the judiciary was autonomous from democratic political institutions, it was not neutral: it repressed the left and, on the contrary, tolerated an extreme right increasingly subversive and violent. While right-wing militants committed 308 murders between 1918 and 1922, and only 11 were convicted, the corresponding numbers for leftist militants were 21 and 37 (Ott and Buob, 1993: 94): that is, courts were 47 times more likely to convict a left-wing activist. In Müller's (1991:21) words, the judiciary "encouraged the radical right and undermined the confidence of the supporters of democracy". In the crisis of Weimar democracy was used by anti-democratic politicians to destroy it, and in this strategy the courts were crucial: they allowed the use of article 48 of the constitution to depossess the Prussian government, led by the social democrats, in July 1932 (Dyzenhaus, 1997); to pass the Emergency decree of 28 February 1933; to appoint, and later dismiss, Heinrich Brüning, Franz von Papen, and Kurt von Schleicher as successive Chancellors; and, eventually, to surrender power to Adolf Hitler. The nazi access to power used and manipulated democratic means; it also respected the rule of law. As Lepsius (1978: 56) has written, "pseudo-legality was transformed into a nominal legitimacy, which in turn was used to destroy constitutional legality and to establish an undemocratic rule". Politicians and courts subverted democracy by legal means.

The judiciary may facilitate anti-democratic strategies in established democracies as well. The typical situation is one where the interests of key actors appear to be threatened, a political or economic crisis exists, and the democratic parties are weak. The success of subversion becomes more likely, while the risk of retaliation is low. Chile under Allende was such a case. The country had a long tradition of judicial independence; but this did not guarantee the political neutrality of courts under a left-wing government. On the contrary, courts were very hostile towards the government of *Unidad Popular*:

The higher courts, and particularly the Supreme Court, had never been committed to democracy. They also had a tight control over judges in the lower échelons of a unified, hierarchical system. As Hilbink (no date: 7) puts it after studying judicial performance in Chile since 1964 in high-profile civil and political rights cases, "a judiciary, even one recognized as relatively independent, will not automatically serve the values and principles of a meaningful democratic system". In the confrontation between the government of *Unidad Popular* and the conservative opposition over legality and the rule of law, the judiciary was mostly an ally of the latter. This confrontation started when the government, with a legislative minority, used what were called *los resquicios legales* (the legal interstices), in order to implement its program. These were old norms that had survived in a chaotic and contradictory legal system.[19] Thus decree-law 520 of 1932 and the *Ley Orgánica de la Corporación de Fomento de la Producción* of 1939 (organic law of the Corporation to Promote Production) were used by the government as the legal bases for nationalizations. The right attacked this strategy from mid-1971 onwards, on the grounds that it violated the constitution and the rule of law. The *Consejo de Defensa del Estado* and the Constitutional Court remained neutral; the *Contraloría General de la República*,[20] the Supreme Court, and a large number of courts and judges did not. While hundreds of terrorist actions in 1972-73 were never investigated, the judiciary became a crucial actor in the campaign to undermine the government (Novoa Monreal, 1992: 61-71, 95-105).

[19] The term *resquicios legales* was used by the newspaper *El Mercurio* since August 1972, to disqualify this strategy of Allende.

[20] The *Contraloría General de la República* (General Controller of the Republic) had the preventive control of the legality of executive actions. The Controller General was Héctor Humares, who held a life-long appointment and responded to no institution.

Although no constitutional or legal grounds existed for a military intervention, the judiciary was eventually ready "to support the coup and defer to the armed forces on issues of personal liberties" (Valenzuela, 1989: 190). Following the 1973 military coup, on imposing the presidential band on general Pinochet, the president of the Supreme Court declared: "I put the judiciary in your hands".

General Augusto Pinochet did not need to interfere with the independence of this politicised judiciary. The first decree-law of the dictatorship, of 18 September 1973, manifested that the new regime, which had bombed the presidential palace, closed parliament, and purged the state bureaucracy, would respect judicial power. The exception was the Constitutional Court, under attack before the coup because its sentences often supported the legal initiatives of the Allende government: it was dismantled in November 1973 (Silva Cimma, 1977: 63-78, 209-16). This respect of the judiciary was very different to what had happened in Argentina and Brasil.[21] Although the military *Junta* controlled the judicial budget, and human rights cases were transferred to the jurisdiction of military courts, decree-law 527 of 1974 reaffirmed the independence of the courts. The judiciary never questioned the military legality,[22] nor tried to prevent violations of human rights. On the contrary, the Supreme Court complained against the protection of *habeas corpus*: of 5,400 writs presented by the *Vicariado de la Solidaridad* (the Church-sponsored Vicariate of Solidarity), it accepted only ten. In the inaugural speech of the 1975 judicial year, the president of the Supreme Court stated that

> "As to torture and other atrocities, I can say that we do not have executions or iron walls here, and that such information is due to political media committed to ideas that have not, and will not, prosper in our country" (Correa Sutil, 1993: 91).

When President Patricio Aylwin took office in March 1990, after nearly 17 years of military dictatorship, the new democracy inherited a legality framed by the 1980 constitution;

[21] In Argentina, the dictatorship purged 80% of judges. In Brasil, the Supreme Court was changed.

[22] This position was often justified on positivist grounds. Thus, in an interview in the conservative newspaper *El Mercurio* (20 January 1985), Hernán Cereceda Bravo, magistrate of the Supreme Court, declared: "You are using the words 'even if they are unjust laws'. I do not believe they are unjust, because if they are laws that have been duly enacted, they are there to be enforced".

a rule of law based on these independent, non-neutral courts. 14 out of the 17 magistrates of the Supreme Court had been appointed by Pinochet. The political interference of an independent judiciary was a threat to the new democratic government. The problem was not the absence of "horizontal" checks, the inexistence of a rule of law to contain governmental abuses. It was, on the contrary, a judicial system that accepted democracy as long as conservative political interests were not challenged; in order to protect them, it was ready to de-stabilize democracy. Eventually, the composition of the Supreme Court changed: 17 of the 20 magistrates were appointed under the presidencies of Aylwin and Eduardo Frei: when this court had to decide on whether to withdraw parliamentary immunity to Pinochet, 14 magistrates voted in favour, and six against. The situation had been reversed: rather than the judiciary subverting democracy, the rule of law was modified by democratic politicians.

V. The judicialization of politics in democracies

I have examined so far situations in which either democracy or the rule of law were not an equilibrium. Due to their resources in one or the other institutional areas, politicians chose not to comply either with the rule of law or democracy, and turned to subversion. I shall discuss now situations in which politicians respect both: democracy and the rule of law are an equilibrium, because neither the government or the opposition are better off with a different option given the anticipated strategies of the adversary. Yet, under particular political and institutional circumstances, politicians or judges may judicialise politics. Thus, while democracy is maintained, politicians can try to improve their position devising strategies in which an independent judiciary becomes an instrument of power.

I shall examine first institutional reforms that may transform judges into a potentially destructive political weapon. The legal control of politicians varied over a long time in the different traditions of the common and the civil law.[23] In the tradition of the common law,

[23] On the two judicial traditions, see Toharia, (1999).

judges are a crucial part of the system of checks and balances; they can prevent the majority of the day from passing laws that infringe the constitution; and they operate with adversarial procedures. They are also recruited through direct or indirect popular elections.[24] In the tradition of the civil law, on the contrary, judges were not to interfere with the popular will, represented in the elected bodies; they were simply expert civil servants, whose task was to apply a body of written laws, with inquisitive rules, and in order to solve conflicts. The judiciary was supposed to be anonymous, person-proof, powerless. As civil servants, judges were selected mostly through a competitive entrance examination, with or without a subsequent stage at a judicial school.[25]

Mostly following dictatorships and the experience of compliant courts, institutional reforms were introduced in several civil law countries. Reforms were a reaction to the political subordination of the judiciary, and were intended to increase controls over governments. Jurisprudence (i.e. the binding interpretation of norms by judges) achieved an unprecedented importance; constitutional courts and judicial review were established; the independence of judges was reinforced by their self-government via Judicial Councils (first in Italy, then in France, Spain, Portugal, and many Latin American countries); hierarchical controls were suppressed. These institutional reforms brought the civil and common law systems closer to each other, yet they did not introduce in the former the checks on the judiciary that exist in common law countries (Guarnieri and Pederzoli, 1999). These institutional reforms created the conditions for the judicialisation of politics by particularly unchecked checkers.

[24] In the United Kingdom judges are appointed by the Lord Chancellor, who is a member of Cabinet. In the United States, the election is direct or indirect depending on whether it is to a state or federal court. The election of judges in state courts was introduced in the second quarter of the 19th century; in 1994, 70.5% of all judges in the 50 states had been directly elected on partisan or non-partisan ballots. As for judges in federal courts, their election is indirect: it consists of a presidential nomination, a professional screening, and confirmation by the Senate Judiciary Committee.

[25] France, Spain, Portugal and Uruguay have competitive entrance examinations, followed by judicial school; Italy, Belgium, Peru or Brazil share the entrance examinations, but do not have judicial schools. Germany, Argentina, Chile and Ecuador select judges through practical training, without entrance examinations or judicial schools.

What can initiate this judicialization of politics is a restricted democratic accountability of governments. If electoral competition or parliamentary controls are unable to shed light on the actions of governments, the new powers of the judiciary may now be used to make politicians legally, if not democratically, accountable. The judicialization of politics often is the consequence of a limited political accountability of governments. The initiatives will correspond to judges[26] when the opposition fears retaliation or colludes with the government (for instance, on the illegal financing of parties). When politicians lead the strategies, they will first consider their electoral impact. Their incentive is to win office: by judicialising politics, they hope to discredit an adversary difficult to defeat at the polls. I shall consider these strategies led by the opposition later.

French and Italian politics have been examples of judicialised politics in which politicians played a passive role. A drastic change in the relationship between democracy and the rule of law in both countries was facilitated by institutional reforms and the limited political accountability of rulers. The reasons for the latter were different in the two cases. In France, the 1958 constitution attributed a large power to the executive -including vast competences of the president of the Republic and the minister of Justice over judicial matters.[27] The two-ballot electoral system manufactured solid majorities over many years. In Italy, restrictions to political accountability were due to multi-party coalitions, in which the *Democracia Cristiana* (DC) was the pivotal member: voters were hardly able to throw politicians out of power.

In both countries, politics became judicialised when the executive became weaker, but hardly more accountable due to inter-party collusion and/or the capacity of incumbents to survive in power through coalitional strategies. In France, this was the case in the last period

[26] Under a non-hierarchical, decentralized judiciary in which each and every judge embodies "judicial power", assumptions about a "unified" judiciary are not needed. A single judge may be instrumental for a political strategy. It is, however, reasonable to think that judges prefer to take binding legal decisions with autonomy and independence (whatever the content of such decisions, the conception of justice that they reflect, or their congruence with democracy). And also, that judges have political preferences: their willingness to participate in political strategies will depend on their aversion to risk, which will be the lower the greater their independence.

[27] To the president, regarding the appointment of judges; to the minister of Justice, over their promotion or their removal from politically delicate cases.

of Valéry Giscard d'Estaing as president,[28] and also in the first *cohabitation* (1986-88) between a president of the Republic (François Mitterrand) and a prime minister (Jacques Chirac) elected by opposite majorities. In Italy, *Mani pulite*, the investigation into the illegal financing of parties, was initiated by Milan judges before the 1992 elections, but was intensified when the DC and the *Partito Socialista Italiano* (PSI) lost ground, and after the murders of judges Giovanni Falcone and Paolo Borsellino by the Mafia were seen as evidence of an impotent executive. It has been convincingly argued (Burnett and Mantovani, 1998: 261-3) that, in the Italian case, *Mani pulite* was the contingent outcome of a tacit alliance between independent magistrates, powerful industrialists, and influential media controlled by the latter.[29] Judges, even independent ones, need support and resources to confront governments. Important Italian businessmen provided this, reacting against illegal financial demands from the parties that had grown exorbitantly since the mid-80s, and against increased taxation. Besides, politicians could no longer deliver their part of an implicit deal that had existed for decades: protection against outside competition in an European economy now integrated. And the public deficits and vast national debts of Italian governments threatened their economic future after the 1991 Maastricht treaty.

Political collusion between parties was also evident in both countries. In France, the scandals extended to left and right.[30] Over five years, two prime ministers and nearly twenty first-rank politicians were prosecuted. Eventually, parliament passed in January 1990 a retroactive law that granted amnesty for the prosecuted politicians: this cover-up by

[28] Giscard d'Estaing had been in a comparatively weak position from the beginning. His victory in May 1974 was by the narrowest of margins, 50.8% of the votes in the second ballot, against 49.2% for Mitterrand. He headed a very uneasy coalition of conservative parties: his confrontation with Jacques Chirac (leader of the strongest party in the coalition, and prime minister from 1974 to 1976) was publicly known. The first legal scandal in the 5th Republic, an alleged gift by the president of the Central African Republic, Jean Bedel Bokassa, to Giscard, appears to have been due to information provided by Chirac and his party, the RPR (*Rassemblement pour la République*).

[29] Thus, *L'Expresso*, that played a crucial role in the *Mani pulite* strategy, was owned by Carlo De Benedetti (Olivetti). The Agnelli family (Fiat), controlled *La Stampa*, the *Corriere della Sera*, and *Il Mondo*. Confindustria, the Italian confederation of industry, owned *Il Sole 24 Ore*.

[30] The first scandal of the *Parti Socialiste* (PS) was the illegal funding of the party with *Carrefour du Développement* and Urba. The minister of Justice removed judge Thierry Jean-Pierre from the Urba affair, exacerbating the politicization of justice. The first scandal in the 1980's affecting the conservatives was the case of Michel Noir, member of parliament and mayor of Lyon. See *Le Nouvel Observateur*, nos. 1759 (23-29 July 1998) and 1766 (10-16 September 1998).

politicians from left and right provoked widespread anger; it also stimulated increased judicial activism to make politicians legally accountable. In Italy, *Mani pulite* led to over four thousand arrests, 276 prison sentences, 120 judicial demands to parliament to withdraw immunity to politicians under investigation. The consequence was a political earthquake: the DC, the PSI, the Social Democrats, the Liberals, and the Republicans disappeared from the political scenario.

Judicial strategies had similarities in both countries. Judges brought the cases under criminal law, and used imprisonment without bail that could last several months to extract information. One of the Milan magistrates, Francesco Saverio Borrelli, defended this practice in the following terms: "the shock of preventive detention has produced positive results (…) are we then to be scandalized if it is said that detention before trial can have the effect of drawing us closer to the truth?" (interview in *La Repubblica*, 19 February 1995). Judges also sought support from mass media, providing them with secret information of the judicial proceedings. As one of the most active French judges, Eric de Montgolfier,[31] declared, "to bring the media inside justice is necessary, because justice will hardly be possible in darkness". In the case of Italy, Guarnieri and Pederzoli (1999: 147) have also argued that "the mass media are interested in the actions of courts because they offer a precious material, and they can amplify the impact of an action". Of course, media have interests of their own: greater political influence and increased sales, rather than justice. They are also connected to powerful economic empires, affected by governmental decisions.[32] An alliance between the judiciary and the press does constitute a formidable political weapon.

In the French and Italian experiences of the judicialization of politics, the role of politicians was largely passive: they were the victims or beneficiaries, but hardly devised

[31] Eric de Montgolfier was the *procureur* in the case of Bernard Tapie. See his defense of the use of prison without bail and filtrations to the press, on the grounds that the end justifies the means, in *Le Nouvel Observateur*, no. 1766 (10-16 September 1998).

[32] In France, one group controlled Aerospatiale, Matra, *Europe 1*,*Journal du Dimanche*, *Paris-Match*, *Elle*, Hachette, Fayard, Grasset, Stock, Calmann-Lévy, *Livre de Poche*; another group, Vivendi-Havas, *L'Express*, *L'Expansion*, Canal +; another one, Pinault (Printemps) Redoute, *Le Point*, TF-1, FNAC. In Spain, one group, whose centre was *Telefónica*, controlled *Antena 3 Televisión*, *Onda Cero*, *Vía Digital*, *El Mundo*, and *Expansión*; another group, Santillana de Ediciones, *El País*, the SER radio network, Canal +, *Canal Satélite Digital*.

active political strategies to use to their advantage. I shall now turn to Spain to examine how politicians can undertake this type of political initiative, that turns the independence of judges into an instrument for judicialising politics.

VI. Getting rid of adversaries through the rule of law

I shall first describe the scenario. The Spanish legal system, following the 1978 constitution, corresponded to the reformed civil law model. The transition from dictatorship to democracy had introduced profound changes in the norms and the judicial structure, although none in the personnel. No purges were carried out, but the special courts that had jurisdiction on political matters were suppressed.[33] The constitution attributed judicial review and the protection of fundamental rights to a Constitutional Court, and the self-government of judges to a Judicial Council (*Consejo General del Poder Judicial*). Judges became independent and unaccountable: only judges could recruit, organise, govern, or sanction judges. Judicial power was seen as an expression of the people's will; its decisions regarding legislation, as grounded on "the judicial conscience of the community" (Rubio Llorente, 1991: 32).

Opposition to the dictatorship had hardly existed in the judiciary. Only in the last years of the regime a group of judges set up an anti-Francoist organization, *Justicia Democrática*. Under the new regime judges were overwhelmingly conservative: of the 1369 that were affiliated to a professional organization in 1994, 54% belonged to the reactionary *Asociación Profesional de la Magistratura*, 18% to the right-of-centre *Asociación Francisco de Vitoria*, 24% to the progressive *Jueces para la Democracia*. The majoritarian association

[33] It has been argued that legal reforms under Francoism subordinated politicians to the rule of law. This is misleading: only bureaucrats were responsible *vis-à-vis* citizens, according to the 1956 *Ley de la Jurisdicción Contencioso-Administrativa* and the 1957 *Ley de Régimen Jurídico de la Administración del Estado*. Franco was responsible only "to God and History". The Code of Military Justice of July 1945 attributed judicial powers to the generals in command of the military regions, naval departments, and air zones. The Court of Public Order had jurisdiction on illegal political activities that did not affect the military, either directly or indirectly.

had opposed the creation of the Constitutional Court, defended that appointments to the Judicial Council had to be strictly corporatist, and demanded criminal sanctions against public criticisms of judicial decisions. A 1985 law of the socialist government, that gave to parliament the competence over appointments to the *Consejo General del Poder Judicial*, was seen by the conservative judiciary as undermining the rule of law.

Satisfaction with the judiciary was limited to less than two out of 10 citizens.[34] Scepticism over its independence was also widespread: in 1997, statements that "judicial decisions are independent from the interests and pressures of the government", "from the interests and pressures of economic and social groups", and "from the pressures and comments of the media" were rejected respectively by 57%, 58%, and 55% of citizens (Toharia, 1999: 18). The view that judges were independent from the government also declined with time: from 40% in 1986, under the socialist (PSOE) government, to 28% in 1998, under the conservative (PP) government.[35]

Let us now turn to politics. I have already argued that the judicialization of politics depends on the political accountability of governments and on the unlikelihood of an electoral victory of the opposition. If rulers limit their political responsibility to the verdict of elections, and if between elections are only ready to accept legal responsibilities for their actions, political confrontation will be transferred from parliament to courts. My second argument is that if politicians in opposition have been losing elections for a long time, value office highly, and believe that their chances of winning in the foreseable future are negligible under the routine rules of democratic competition, they will be likely to turn to strategies of judicialising politics in order to dislodge the incumbent. They will do so if the costs of such strategies are low: that is, if they have powerful allies, and the risk of retaliation of the adversary is small. I shall examine an illustration of such strategy, and then turn to strategies

[34] Eurobarometer survey, May 1997. In France, Portugal, and Belgium the percentage of satisfied people was similar. In Italy, it was below 10%. On the contrary, in Austria, Denmark, and Finland the percentages were above 50%. See Toharia (1999: 17).

[35] The data are from surveys by Demoscopia. See *El País*, 11 May 1998 (p. 20).

in which a government (rather than an opposition) uses judicial actions for its political advantage.

(i) *Dislodging the incumbent*. In June 1993, the Spanish Socialist Party, led by Felipe González, unexpectedly won its fourth consecutive elections. One year later, a judiciary investigation into a "dirty war" against the Basque terrorist group *Euzkadi Ta Azkatasuna* (ETA), carried out by secret *Grupos Armados de Liberación* (GAL), suggested that it was organised or protected by the Ministry of the Interior. This investigation overlapped from the very beginning with a political strategy of the opposition. We must, therefore, disentangle the judicial investigation of what had happened, on the one hand, and the political strategy devised to bring down the government, on the other. As Fish (1993: 738) has argued, "the difference between reaching political conclusions and beginning with political intentions is that if you are doing the second you are not really doing a job of legal work". Years later, one of the main organisers of the political strategy recalled it in the following terms:

> "It was naturally an operation of the opposition party (...). It included some financial institutions, some newspapers (...). An operation was carried out in depth to put an end to the 13 and a half years of González in power" (interview of Luis María Ansón in *Onda Cero*, 16 February 1998).

Some information is needed about the antecedents. The Basque terrorist organization ETA, set up in 1959, became much more active under democracy. In the three years that followed the first general elections in 1977, 287 people were murdered. Underground anti-ETA terrorism started in early 1975, organised by members of the Francoist secret service (the *Servicio Central de Documentación*), following a strategy called *Operación Diana*. Until the socialist electoral victory in October 1982, successive groups (*Batallón Vasco-Español*, *Tripe A*, *Anti-Terrorismo ETA*) murdered 40 ETA members or supporters, and wounded 128. Under the conservative governments of UCD, from 1977 to 1982, strong suspicions existed that the Ministry of the Interior might be involved in these anti-ETA actions.[36]

[36] For instance, three members of the *Batallón Vasco-Español*, who were arrested after murdering two people in a hotel in Hendaye, were later released following orders from Manuel Ballesteros, a high-ranking police officer in the Ministry of the Interior.

The "dirty war" against Basque terrorism persisted after the socialists won the elections. The same police officers continued in charge of anti-terrorist policies. The first underground action against ETA was in October 1983: in this first year of socialist rule, ETA murdered 44 people,[37] wounded 31, kidnapped five, committed 28 armed attacks. The underground anti-ETA terrorism was carried out by a group with a new name, GAL, but the continuities with past groups were clear.[38] From the first action until the end of the "dirty war" in 1986, the GAL murdered 28 ETA members or supporters. Judicial investigations started in 1988, under the socialist government, by judge Baltasar Garzón. As a result, two policemen were sentenced to 108 years in prison for organising the GAL. In the 1993 elections Garzón was elected to parliament in the socialist lists, but was careful to keep the case open. When he resigned from office one year later, he was able to resume the investigation of the GAL.

The results of the 1993 elections were a surprise. After trailing behind the conservative party (PP), what has been called "the González effect" (Barreiro and Sánchez-Cuenca, 1998: 191-211) was decisive in the new socialist victory. This result provoked a strong political reaction in the leaders of the PP. They were aware that the position of the median voter ensured the re-election of the socialists, unless ideological voting was neutralised by the introduction of new dimensions of competition and issues that would cut across ideological cleavages.[39] They also believed that the possibility of an electoral victory was remote unless extraordinary means were used to weaken González. They were not ready to wait patiently for the next election. They also had important resources, as well as strong allies who shared the same views and were similarly impatient: militant newspapers and a

[37] Of these, 18 were civilians; 12, Civil Guards; 11, policemen; three, military officers. One of the latter was general Víctor Lago, who commanded the Brunete Armoured Division in Madrid, and had played a crucial role in the defeat of the coup against democracy on February 23, 1981.

[38] For instance, Jean Pierre Chérid organized the "dirty war" against Basque terrorism from 1975 until 1984, when he was killed while setting a bomb. That is, he was first recruited in the Francoist secret service and ended up in the GAL. A dozen terrorists were successively members of the *Batallón Vasco Español*, *Triple A*, *Anti-Terrorismo ETA*, and GAL (Belloch, 1998: 113).

[39] I owe this argument to Belén Barreiro and Ignacio Sánchez-Cuenca.

network of radio stations with a large audience;[40] a very powerful banker, under judicial investigation after the Bank of Spain had discovered a fraud of $ 4 billion under his presidency of the *Banco Español de Crédito*, one of the largest Spanish banks. An alliance, then, of politics, media, and money. Although the contours of the strategy were known from a very early stage,[41] its intention was fully revealed several years later by one of its chief organisers:

> "There was no way to beat Felipe González with other weapons. This was the problem (...). González had won three elections with an absolute majority, and won again a fourth time when everything indicated that he was going to lose. We had to raise our criticisms to levels that, on occasions, destabilised the state (...). González was a man whose political strength was of such a caliber that it was necessary to go to the limit (...). We had to bring González to an end, that was the question (...). Not so much for the possible abuses that he had perpetrated, if they had existed at all, but because of the risk that alternance would not be viable" (interview of Luis María Ansón, *Tiempo*, 23 February 1998, 24-30).

This was the difference between the judicial investigation into what had happened, and the political strategy to dislodge the incumbent that judicialised politics as a political weapon. The goal of the latter was set from the beginning: to bring Felipe González to jail, to decisively weaken the PSOE, and to finish with the "democratic abnormality" of socialist rule, to use the words of Francisco Álvarez-Cascos, the deputy leader of the PP.[42] The "dirty war" was presented, and judged, as a creation of the socialist government: of the 11 years of

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[40] One of the newspapers, ABC, had a long anti-democratic tradition: it mixed reactionary Catholicism and monarchist loyalties. The latter had led to its acceptance of democracy. Its director was Luis María Ansón. Another newspaper, *El Mundo*, was different: it was created in 1989, with a populist orientation, particularly aggressive towards González. It was partly owned by the banker Mario Conde and its director was Pedro J. Ramírez. Both newspapers had, respectively, 321,573 and 307,618 readers. The main radio network was the COPE, owned by the Catholic Episcopate, and with an estimated audience of 3.4 million. The data are for 1995, and the sources are the official *Oficina de Justificación de la Difusión* (OJD) and *Estudio General de Medios* (EGM). See *El País*, 14 April 2000 (pp. 42-3).

[41] For instance, in an article published in *La Vanguardia* (the main Catalan newspaper) on August 22, 1994, José Luis de Vilallonga wrote that "the operation will be deployed in different stages. First, the government will be de-stabilized, with an all-out attack on Felipe González, who is at his lowest ebb (...). This will be in parallel with a strong campaign in favour of Aznar (the leader of the PP, JMM). It will be carried out by a well-known newspaper, with scarce ethical scruples, (and) a former banker who regularly finances the anti-government campaigns undertaken by this newspaper". Vilallonga was an aristocrat who wrote the authorized biography of King Juan Carlos.

[42] Speech of Francisco Álvarez-Cascos in the Senate, 25 February 1998. As a member of the Spanish Communist party (PCE) and the Workers' Commissions wrote, the politicians and their allies in the strategy were "fully disposed to use every non-violent means as far as they could reach their goal, to get rid of González" (Fernández Enguita, 1998: 10).

anti-ETA terrorism, only the last three were investigated; that anti-ETA terrorism had come to an end in 1986 under this government was ignored. No responsibility was attributed to the former conservative governments:[43] earlier actions were presented as sporadic, disconnected, disorganized -different from those of the socialist- inspired GAL.[44] In fact, responsibilities for such actions had prescribed when the GAL affair was investigated. The sequence of steps was also carefully timed.[45] Judges, as in the French and Italian cases, used prison without bail

[43] These governments included four different ministers of the Interior. The first was Manuel Fraga, from December 1975 to July 1976: that is, when anti-ETA terrorism started. Fraga was the founding father of the PP. The second was Rodolfo Martín-Villa, in the UCD government from July 1976 to April 1979. The third, Antonio Ibáñez Freire, also in the UCD government, from April 1979 to May 1980. The fourth was Juan José Rosón, in the UCD government from May 1980 until the socialist government. The death of Rosón, the main link with the past, was important: he could have provided information that was essential for the socialists.

[44] The opposite interpretation was, however, well supported. General Antonio Sáez de Santamaría, for instance, declared that "the dirty war that existed before the socialists came to power has been presented as consisting of isolated cases, and then the GAL as organized by politicians. This was not so. The groups were the same, there was no discontinuity (...). The dirty war was not organized: it was a reaction, an uncontrolled response to an unbearable situation due to the sheer number of murders, 89 in 1980. Not everybody has a cool head to carry the anti-terrorist struggle through its due course" (interview in *Cadena Ser*, 17 February 1998). This general was one of the army officers who defeated the coup against democracy in February 1981. He held political appointments both under the UCD and the PSOE governments: among others, that of chief representative of the government (*delegado del gobierno*) in the Basque Country, and that of Director of the Civil Guard.

[45] The sequence of events was as follows. (i) 5 May 1994: judge Baltasar Garzón resigned as member of Parliament, and resumed the investigation of the GAL. (ii) 4 December: the deputy leader of the PP, Francisco Álvarez-Cascos, promised a pardon by a future PP government to the two policemen sentenced to 108 years in jail for organising the GAL, on the condition that they accuse socialist politicians in the Ministry of the Interior (the meeting was organized by the director of *El Mundo* and the offer was made to the lawyer of the two policemen). (iii) Several days in December 1994: judge Garzón met the director of *El Mundo*. (iv) 16 December: the two policemen made a voluntary statement to judge Garzón, accusing the minister of the Interior (José Barrionuevo), the secretary of state for security (Rafael Vera), the *gobernador civil* of Biscay (Julián Sancristóbal -the top representative of the Ministry of the Interior in that Basque province), and the general secretary of the PSOE in Biscay (Ricardo García Damborenea). (v) 19 December: judge Garzón put Sancristóbal in prison without bail, and the two policemen in conditional freedom. (vi) 23 December: the banker Mario Conde was imprisoned due to the fraud in the *Banco Español de Crédito* (Banesto), and joined Sancristóbal in the prison of Alcalá-Meco. A brother of judge Javier Gómez de Liaño (who shared with judge Garzón the investigation of the GAL, and was later in charge of the Sogecable case) was also under judicial accusation, as an accomplice of Conde. (vii) 27 December: *El Mundo* started to publish the memoirs, and the accusations, of the two policemen. (viii) 18 April 1995: judge Garzón accused Sancristóbal and García Damborenea of organising the GAL: Sancristóbal remained in prison, and García Damborenea was left in conditional freedom. (ix) 12 June: *El Mundo* started to publish alleged documents of the *Centro Superior de Información de la Defensa* (CESID, the Spanish secret service), substracted by a high-ranking officer related to the banker Conde and to the PP. (x) 17 July: Sancristóbal made a voluntary statement to judge Garzón, accusing the minister and the secretary of state. (xi) 20 July: García Damborenea made a voluntary statement to judge Garzón, accusing the prime minister, Felipe González. (xii) 20 July: *El Mundo* published that "Aznar spoke with Damborenea before his first statement to judge Garzón" (the author of the article later became director of the cabinet of the secretary of state for Communication in the 1996 PP government). (xiii) 27 July: *El Mundo* published in its integrity the statement of García Damborenea to judge Garzón accusing Felipe González. (xiv) 27 September: García Damborenea reiterated to the Supreme Court the accusation against González.

in order to extract inculpations: those under accusation faced either jail, or conditional freedom if they transferred responsibilities upwards (in which case, they could also adduce the extenuating circumstance of "due obedience"). Judges also filtered to the sympathetic press secret information of the proceedings. The political strategy wanted to provoke a "popular judgement", rather than establish the judicial truth: thus, Álvarez-Cascos declared that

> "Public opinion has every day a clearer verdict on the GAL affair (...). If the sentence was not to correspond with the verdict of citizens, it will be to the loss of justice" (public statement to the press, 10 September 1995).

The verdict of citizens, however, distinguished between a judicial investigation of what had happened and a partisan strategy of judicialising politics. In 1995,[46] 47% of people believed that "after such a long time, to open again the GAL affair can only be due to political interests"; only 22% disagreed with such a statement. This majoritarian view existed among all voters, although its incidence was greater in the former socialist supporters (54%, against 43% among the non-socialist voters), who also disagreed less with the statement (13%, against 26%). A majority (46%) also thought that "some media are carrying out a parallel trial to discredit the government and end with Felipe González" (22% rejected this view). This majority was again larger among PSOE supporters: 58%, against 41% in the non-socialist electorate (only 11% of the latter, and 7% of the socialist voters, disagreed with this view on the conservative press). While citizens detected the political strategy, they also rejected the actions under judicial investigation. 59% of voters condemned the operations of the GAL (52% of the socialists, 62% of the non-socialists). 16% were comprehensive: they disapproved, but found excuses (the percentages were 17% and 15% for each of the two groups of voters). Finally, 10% supported the "dirty war", declaring that their priority was to finish with ETA (14% of the socialist voters, 9% of the non-socialists).

A few months later, in March 1996, the PP won the general elections. The socialists had been weakened by an economic crisis and growing unemployment in 1993 and 1994. The

[46] Survey from the *Centro de Investigaciones Sociológicas*, nº 2133, February 1995 (national sample of N = 2,500).

economic recovery that followed was not enough to renew their electoral support; besides, they were deeply hurt by economic scandals. With vote intention for the socialist government coded as a dichotomous dependent variable, the following logit regression estimates whether the probability of such support increased or decreased as a result of four independent variables. These were the vote in the former general elections, the assessment of the economy, the evaluation of political corruption, and the views on the GAL affair.[47] The four variables are statistically significant: the probability of voting for the government increased when voters had supported the socialists in former elections; and it decreased when their assessment of the economy was negative; when they thought that political corruption was a problem of great political importance; when they rejected the GAL more strongly. That is, the GAL affair influenced the vote intention, regardless of whether the individual had previously supported the government.

	Logit coefficients	Standard error
Constant	- 1.094 *	.653
Past vote	5.361 ***	.426
Assessment of the economy	- .676 ***	.121
Evaluation of corruption	- .274 **	.094
Views on the GAL affair	- .256 **	.105
Chi 2	782.353	
Pseudo R2	.43	
Number of cases	1053	
% of correct predictions	87.7	

* Significant at 10%.

** Significant at 5%.

*** Significant at 1%.

[47] The survey is that referred to in fn. 46. Vote intention was coded as 1 = support for the government, 0 = any other alternative (support for any other party, blank vote, and abstention). Vote in the former general elections had the same values. Assessment of the economy went from 1 (very good) to 5 (very bad). No reference to corruption as a serious political problem was coded as 0; reference as 1. Views on the GAL went from 1 (approval) to 4 (unqualified rejection). Interviewees who did not know or did not answer questions referring to their vote intention or any of the four independent variables were excluded. Ideology, which was initially included in the model as an independent variable, was eventually excluded due to its correlation with past vote (r: -.28, with a statistical significance at the 0.01 level), in order to avoid problems of multicollinearity.

An electoral victory was not the only goal that mattered for the conservative strategy: after all, the victory had been by a mere 1.3% of the vote. The question now was how to stay in power for as long as possible. Once the PP was in government, the two top politicians in charge of the Ministry of the Interior in the 1983-6 period were sent to prison on the grounds of their responsibility in the GAL affair. But the main target was González: if he were to be brought to jail, the PSOE would be disabled as a serious political contender for the foreseable future. On 29 September 1996, Álvarez-Cascos, now deputy prime minister, declared in a public speech in Mérida that "the GAL were orchestrated by Felipe González"; this was only one of a string of accusations against the former prime minister made by leaders of the PP. The general attorney, appointed by the government and following its instructions, tried to extract a prison sentence from the Supreme Court. However, González was exonerated in November 1996. But, in the course of a decade of investigation, the socialists never provided an articulate story of the "dirty war" against ETA.[48]

The strategy was successful in polarising attitudes towards González: he raised both profound hostility and passionate support in Spanish society, dividing it in two camps. Believing that this antagonism was politically explosive, González did not stand for re-election as leader of the party in the PSOE congress of June 1997. Why would a moderate politician produce such polarization was an intriguing question: the answer to this, and to other similar cases, is that political hostility does not depend so much on ideological distance as on the electoral appeal of the antagonist. Similarities were often pointed out between González and Clinton:

> "The most relevant parallelism between the ferocious oppositions to the centre-left governments of Clinton and González has been the use of the judiciary to achieve what was impossible through the ballot box. There are two key questions... One is that the right has found in courts an instrument to brutally harass left-wing governments. The other, that capable left-wing politicians can contribute to their defeat if they do not accept the political responsibility for scandals that took place under their mandate" (Jackson, 1998: 9-10).

[48] Felipe González only argued that the GAL, which operated in French territory, damaged the anti-terrorist co-operation of the French government, which started after a bilateral meeting between González and Mitterrand on 20 December 1983 (the first action of the French police against ETA was on 10 January 1984). The French government actively supported González. An additional argument favourable to González was that in 1994, before Garzón had resigned from his seat in parliament and the GAL investigation had advanced, he appointed a minister of the Interior (Juan Alberto Belloch) who was decisive in the clarification of the GAL.

The end of this story raises two counterfactual questions, which affect democracy as an equilibrium. The first is what would have been the reaction of an exasperated right if González had won again in 1996, as he nearly did, being later exonerated by the Supreme Court. That is, if neither the votes nor the extreme politicization of the rule of law had led to the demise of the adversary. The answer to this question lies in the political withdrawal of González: it would have taken place even if he had won. A surviving González, *a fortiori* if in government, could have led to a greater radicalization of the right and to regime instability.

The other question is what would have been the reaction of the PSOE if its leader had been put in prison. A strategy of judicialising politics, while preserving the rule of law as an equilibrium, has as its limit that the victim of such a strategy is indifferent to compliance or non-compliance: the Spanish socialists came close to such a limit. When the former minister of the Interior and the former secretary of state for Security were sentenced by the Supreme Court to ten years of prison in July 1998 for their responsibilities over the GAL affair, the official newspaper of the PSOE declared: "we believe in their innocence (...) We cannot ask the magistrates of the Supreme Court to be heroes, to judge and sentence according to what has been presented in the proceedings... A lot of courage is necessary to go against the current" (*El Socialista*, 618, August-September 1998). The position of the Executive Committee of the party was that, while the socialists acquiesced with the sentence, the court had been influenced by pressures from the government and some media. The leaders of the party organized in September 11, 1998 a large demonstration in front of the jail, to support the two politicians. Only gradually did the PSOE overcome this traumatic political experience and normalise its relationship with the judiciary.

This political reaction of the socialists damaged their electoral support. In July 1998, vote intentions for the PSOE and the PP were similar: 23.8% and 23.9%. In October, the PP had surpassed the socialists: 26.1% against 22.9%. In January 1999, the difference had increased: 26.7% for the PP, against 20.3% for the PSOE. That is, in six months marked by the resistance of the socialists to a politically damaging judicial sentence, the conservatives built a difference of 6.4 percentage points in vote intentions. The PSOE lost ground until in the general election of March 2000, with the socialists no longer led by Felipe González and

with a difficult leadership succession, under a prolonged economic expansion, the PP won a confortable majority of the votes (44.5% against 34.1% for the PSOE) and an absolute majority in parliament.[49]

Thus, punishment by voters at election time is one reason why politicians comply with judicial decisions. Besides, the PP knew well that the socialists lacked support in the judiciary to retaliate, and that past responsibilities for anti-ETA terrorism fell under the statute of limitation. Also, the socialists would not carry out a strategy that, in their view, could destabilize democracy -i.e. lead to a worse payoff. The PSOE had to accept the destructive effects of the conservative strategy: i.e. comply with the rule of law, whatever the damage. It could only hope for a better future under a democracy whose rules of competition had nevertheless been transformed. This was probably the calculation of the conservatives when they launched their strategy. Thus, the rule of law remained an equilibrium, even in a case of a politically non-impartial justice and a selective use of the law, because the losing actor was worse off under any other option (in terms of electoral support, judiciary battles, or regime stability). While acquiescing today, increased electoral support in the future might eventually change the balance of forces in the judiciary -i.e., lead to greater impartiality.

(ii) *Silencing opponents.* Politicians in government often try to modify to their advantage the balance of power that exists in society: that is, to fortify their position, and to erode the influence of their critics. When rulers devise strategies to this effect, they believe that the electoral risks are minimal, have powerful allies in society, and failure does not pose great political threats. Unsympathetic media are a usual target.

My illustration comes again from Spanish politics: it flows directly from the preceding one. Remember that the conservative party (PP), led by José María Aznar, had won the 1996 elections with a difference of 290,328 votes only. Expecting an absolute majority in parliament, the leaders of the PP attributed this resilience of the socialists not only to what

[49] The data are from surveys of the *Centro de Investigaciones Sociológicas*, nº2294, July 1998; nº 2307, October 1998; nº 2316, January 1999 (national samples of N = 2,486; 2,489; 2,493).

remained of the "González effect", but to the influence of a liberal-left media group, PRISA.[50] Thus, PRISA became, together with González, the major political target of the new government. The judiciary was again the instrument of a strategy later described by one of its main victims, the founding director of *El País*, as "a formidable aggression of the government against media that it did not see as obedient" (Cebrián, 1999).

The political strategy started in December 1996, a few months after the elections. PRISA was to launch a TV digital platform (*Canal Satélite Digital*), shared by two private channels (Canal + and *Antena 3 Televisión*) and the public television of Catalonia (TV-3). The government decided to veto this initiative and to create its own TV digital platform (*Vía Digital*), using a telecommunications giant[51] that was under its control (*Telefónica*). The transmission of soccer matches (particularly those of Real Madrid and Barcelona) was the most treasured resource for the two competing TV platforms: *Canal Satélite Digital* had already signed a contract with the clubs, and was from the beginning the most powerful of the two platforms.

The political strategy tried, first, to stop *Canal Satélite Digital* through executive and legislative initiatives; second, and more important, to bring to an end the influence of the PRISA media group by judiciary means. Thus, the government declared illegal, as a start, the decodifier for the new TV, passing a decree-law on the grounds of "exceptional urgency";[52] it then increased by ten percentage points the value added tax that this new TV was required to pay; and, finally, a law was passed that snatched soccer matches from this TV on the grounds of the "public interest". Simultaneously, PRISA was left without partners. *Antena 3 Televisión* was bought by *Telefónica*, and the nationalist party (CiU), that governed Catalonia and provided parliamentary support to the PP government in Madrid, forced TV-3 to abandon *Canal Satélite Digital*.

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[50] PRISA owned *El País*, the SER radio network, and the private TV channel Canal +.

[51] *Telefónica* had been a public monopoly. The new PP government appointed as president of the company a close friend of prime minister José María Aznar; it then privatised the company, ensuring that it would be controlled by friendly hands and that it would be protected from socialist governments in the future.

[52] The decree-law was finally suspended by the European Commission. No other kind of decodifier existed in the market, and the intrusion of the government was contrary to European Union rules.

The most serious political attack was launched at the beginning of 1997. The actors and their steps were the following. First, the government: it commissioned a legal and economic report in order to bring a criminal case against PRISA.[53] Politicians of the PP accused, in parliament and in the press, PRISA of being a group of "swindlers" and "counterfeiters". Second, the press: the report of the government was published by the magazine *Época*[54] on 24 February 1997; subsequently, the director of the magazine took the board members of PRISA to court. The conservative press mounted a massive campaign to undermine the economy of PRISA and to build up a "verdict of public opinion". Third, the judiciary: judge Javier Gómez de Liaño,[55] with the support of the general attorneys depending on the government, started criminal proceedings against PRISA. The judge withdrew the passports of the board members, and established an individual bail of 200 million pesetas for the chairman. The proceedings were declared secret; filtrations to the press[56] were, however, constant. As one of the general attorneys declared,

> "They (the board members of PRISA, JMM) will be forced to do the 'little promenade' (*el paseillo*), up and down the stairs of the Court. We shall carry out a judicial revolution from the Court (*la Audiencia Nacional*), in order to finish with this corrupt political system and with *Felipismo*".[57]

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[53] The report was written by two economists and a lawyer, closely associated with banker Conde.

[54] *Época* was an extreme right-wing magazine. Its director had been president of a Francoist trade union (the *Sindicato Vertical del Espectáculo*) and director of *Arriba* (the newspaper of *Falange*, the single party under the dictatorship). Banker Mario Conde financed the magazine.

[55] On judge Javier Gómez de Liaño see fn. 45 (vi). He had been a member of the Judicial Council (*Consejo General del Poder Judicial*) proposed by the PP. The state attorneys that were part of the concerted strategy were the *Fiscal General del Estado*, Jesús Cardenal, appointed by the government; the *Fiscal General* of the Supreme Court, José María Luzón (who played also an active role in the GAL affair); the *Fiscal Jefe de la Audiencia Nacional*, Eduardo Fungairiño; and two *Fiscales de la Audiencia Nacional*, Ignacio Gordillo and María Dolores Márquez de Prado, married to judge Javier Gómez de Liaño.

[56] The media were again *El Mundo* and ABC, the Catholic radio network COPE, the two public televisions, and the private TV network *Antena 3 Televisión*. See footnote 40.

[57] The declaration of the general attorney (*fiscal*), María Dolores Márquez de Prado, was made to judge Baltasar Garzón. The latter revealed it while declaring under oath to the High Court (*Audiencia Nacional*) on 16 September 1999. The "little promenade" (*paseillo*) referred to the humiliating arrival to the Court of the accused, photographed and recorded by TV. *Felipismo* was a pejorative reference to a network of power, that included PRISA, supposedly controlled by Felipe González. A former minister of the Economy under the conservative UCD government, Jaime García Añoveros, also testified to the High Court that the goal of "this process would be the end of the present political system".

The judicial investigation lasted a year. The director of PRISA avoided prison without bail thanks to Jordi Pujol, the president of the nationalist party that governed in Catalonia and supported the PP government in parliament. Eventually the High Court declared that the accusations were unwarranted. The director of PRISA retaliated, bringing judge Gómez de Liaño to court on charges of prevarication. The government and its party, as well as the conservative media, supported the judge; his lawyer was a PP politician; the general attorneys also defended him, following instructions from the government;[58] the same media carried out a campaign of intimidation of the Supreme Court magistrates. But this was the end of the "mafia-like operation of politicians, media, and judges" (Pradera, 1999: 4). Two years after the strategy was launched, in October 15, 1999, Gómez de Liaño was found guilty of prevarication and lost his job. The politicians who took part in the strategy were unaffected, either legally or politically. Voters viewed the conflict as a clash of powers and did not care much about it: the government suffered no electoral costs. Scarcely one year after the Supreme Court sentence, on December 1, 2000, the PP government pardoned Gómez de Liaño, who got back his job as a judge. The whole strategy was thus costless, not just for the incumbent politicians, but for the judge who served as their instrument.

The Supreme Court, however, used this case to establish limits to judicial independence within a reformed civil law system:

> "The judge cannot transform his will or conviction into law. This task can only correspond to parliament (...). Decisions based solely on the conviction of a judge, without a rational foundation in the law, are incompatible with a modern *Estado de Derecho*".

Only the hierarchical control by higher courts, whose composition was carefully attuned to democracy, prevented judges from becoming destructive political weapons. Judges as *bouches de la loi* seemed to better guarantee that the rule of law would respect the rules of democracy. Reforms that made judges not just independent, but also unaccountable and unchecked, did not introduce impartiality: they opened the possibility that judges could be transformed into instruments to destroy competitors, rather than to protect democracy.

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[58] The politician who acted as lawyer was Jorge Trías, a PP member of parliament. The general attorneys were those of footnote 55.

VII. Conclusions

I have questioned in this paper the thesis that democracy and an independent judiciary, a central component of the rule of law, are two institutional arrangements that reinforce one another. I have not discussed their institutional maladjustments, but politicians' strategies. My arguments have rested on the old question of an independence of the judiciary that does not guarantee its political impartiality or neutrality. Przeworski (1991: 35) has argued that "we tend to believe that an independent judiciary is an important arbitrating force in the face of conflict". Yet there are no serious reasons that guarantee such a position of the judiciary above politics. Judges are "nonelected quasi guardians", to use Dahl's term, that limit the democratic process: but, as he argues, these "nonmajoritarian democratic arrangements by themselves cannot prevent a minority from using its protected position to inflict harm on a majority" (Dahl, 1989: 156).

In this paper, however, strategies are led by politicians, not judges. The exception is when politicians collude, as was the case in France and Italy. Independent, but not neutral judges may be instrumental for initiatives by politicians, create opportunities for a conflict between courts and democracy. Two of these strategies are well-known. In one, politicians try to rule unfettered by judges, courts, and norms: they use votes against laws and robes. These strategies affect not just the plebiscitarian populist politician that we know well, but also post-communist politicians who want to get rid of the power of the judiciary also in the name of democracy. This last case poses the question of what kind of judges should be granted independence. That is, do checkers need to have a particular identity before they become autonomous and start checking politicians? The second strategy in which politicians exploited a conflict between the judiciary and democracy was the destabilization of regimes helped by instrumental judges. The problem in such case was not weak institutions of "horizontal accountability" against powerful executives; it was rather the reverse.

The rule of law also provides extraordinary resources to politicians when democracy is an equilibrium. This is particularly so when institutional reforms lead to a lack of responsibility of a decentralized and independent judiciary, and create conditions for

unrestricted judicial activism. Such reforms have been introduced in both common law[59] and civil law countries, but the paper focuses on the latter. Institutional reforms, in countries where the judiciary was hardly independent from past authoritarian regimes, have resulted in an unchecked judicial power. If rulers are scarcely accountable politically, and reduce their political responsibilities to legal liability, incentives for a judicialization of politics will be strong. If an opposition has been losing elections for a long time, and its prospects for the future are not hopeful, it will have incentives to introduce this new dimension of competition in order to undermine its adversary. A government that wants to reinforce its hold on power can also judicialise politics and use independent, partial judges to weaken opponents.

Politicians can transform a decentralised, independent judiciary into a political weapon against their adversaries if they have a strong urge for power now, have little fear of retaliation, partial judges are available, and their opponents will be substantially weakened as a result of the strategy. The latter will comply for the opposite reasons: if they value the long-term under democracy, even with rules of the game that are now unfavourable; if they cannot find similar resources in the judiciary, but hope to compensate this imbalance with the votes some time in the future; if voters punish resistance to judicial decisions. I have examined two strategies of this kind: in one, the judicialization of politics is used to dislodge the incumbent; in the other, to silence opponents. In both strategies, what ultimately limited the destructive capacity of the selective use of the law as a political weapon were the political credentials of the higher court on which the final verdict rested.

When the rule of law becomes a political weapon, some of its principles are eventually undermined. Thus, the end justifies the means; cases are selected for political reasons; "judicial populism" leads to violations of the presumption of innocence and legal guarantees; cases last several years, and become general inquisitions in search of causes; secret proceedings become public. A network of complicities develops between judges,

[59] An example is the introduction of the Independent Counsel in the U.S. system. First, Archibald Cox, followed by Leon Jaworski, with Watergate in the Richard Nixon presidency; Lawrence Walsh, with the Iran-Contra affair under Ronald Reagan; and finally, Robert Fiske, Kenneth Starr, and Robert Ray with Whitewater and the Monica Lewinsky cases, in the Bill Clinton presidency.

media, and politicians. The judicialization of politics does not just end with political conclusions; it starts with political intentions.

Scepticism towards the rule of law and "the assumption of its overriding importance" has been expressed by Raz in the following terms: "one should be wary of disqualifying the legal pursuit of major social goals in the name of the rule of law (...) Sacrificing too many social goals on the altar of the rule of law may make the law barren and empty" (Raz, 1979: 210, 339). The scepticism of this paper, however, does not stem from the prevalence of economic security against social reforms, but from the disconnection between judicial independence and political impartiality. That is, from the risk that such a formidable weapon can pose to democracy as a regime, or to the rules of democratic competition.

The answer to such risk does not lie in an impotent judiciary, abusive majorities, or unchecked politicians. What the paper defends is that the different limitations to judicial impunity of common law and civil law systems should not be carelessly eliminated. And also, that politicians must accept democratic accountability and political responsibility if they want to avoid the judicialization of politics.

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