COUNTRY REPORT

SPAIN

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Theoretical approach: deliberative processes in Spain[1]

When thinking on deliberation applied to the Constitution, it is good to distinguish the evolution of its meaning and theorization. In a first stage, the systemic view of deliberation (Habermas, 1996; Parkinson & Mansbridge, 2013), very influenced by Habermas's work, stressed the need to focus on the quality of public discourse, highlighting its key role on the formulation of the basic principles of society. But what was envisioned as a theory of legitimacy for contemporary democracies has now focused on "democratic innovations" on governance that try to develop some "deliberative procedures" to achieve real deliberation between individual participants. That´s why a different picture comes out if we apply one vision or other to assess the deliberative character of the Spanish political system.

In *Between Facts and Norms* (1996) Habermas tried to articulate his political vision, adapting his discourse theory to this arena. He did so notwithstanding that although his conception of rational discourse clearly fulfilled a central role in a theory of truth or in moral theory, it couldn´t be directly applied to politics. In the political domain, its major function was to solve the problems of legitimacy present in pluralistic societies -not to provide a standard to judge every political interaction or decision:

> *the normative infrastructure of the constitutional state is mirrored in terms of channels, filters and transformers of various communication flows. These flows circulate between the informal networks of the political public sphere on one side, legislatures, courts and administrative bodies on the other side. And each of these state powers operates again according to patterns of deliberation of its own* (Habermas 2005: 388).

From this systemic point of view, the quality of our democracies will depend on the way power circulates between the institutionalized forms of decision making and the informal flows of communication (Bohman, 1998: 415). A crisis of legitimacy would take place when citizens perceive either that there is a closure between the informal claims and institutional decisions or that the political system is colonized by any of the subsystems (administrative power, economy). To counteract that, Habermas put in place a strong civil society, composed by a network of associations and movements capable of being sensitive to social problems arising from private life spheres and making them audible at the public sphere, as well as independent mass media receptive to the citizen needs and claims.

From this view, the 78 Spanish Constitution was presented as a good example of deliberation (Oñate, 1998), as it was the outcome -during an unstable transition period- of the consensus of the main political forces in a highly polarized context. And although the Spanish Parliament was the locus of debates, starting on a core group of MPs responsible of elaborating the draft, it also generated a deliberative process (a

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public debate) involving civic society and media. As Habermas pointed out, "from a systemic point of view, the communicative power stored by majority parties, shares with the more fluid impact of parliamentary debates on shifting votes of MPs the same roots of political deliberation" (Habermas 2005: 390).

The '78 Constitution fulfilled two important functions through an original successful consensus, extended to relevant laws developing the constitutional provisions, that configured a specific conception of the political community, articulating various nationalist claims in a complex equilibrium (with the menace of ETA terrorist attacks, claiming self-determination for the Basque Country), and was the result of agreements reached in a moment of strong ideological polarization which urged for a consensus in a pre-constitutional context

This explains why some of the basic traits of the political system, as the degree of autonomy of the Autonomous Communities, was not detailed in the Constitution, but was left to their specific norms, the Statutes of Autonomy -very questioned by some sectors. It also conferred an important role to the national Parliament (named Las Cortes Generales; bicameral: Senate and Congress of Deputies) and helped to reflect that plurality through a proportional electoral system (provinces as constituencies and the D´Hondt formula to distribute seats reinforcing main parties, guaranteeing the presence of nationalist parties). And this model was reproduced at the regional and local levels, with slight changes in its main traits. At the national level, the parliamentarian model was the best option possible as:

- it gave Parliament the main responsibility for the wide and deep legislative changes necessary for the development of the new democratic regime
- it was based on strong parties' differences -from communism to post-franquism-, which reflected the plurality of ideological positions and territorial identities that characterized the construction of the political community through its representation
- it guaranteed a fair play between these plural ideological positions and identities, and established political debate through the pros/cons model as the best way to achieve political decisions (Palonen, 2008) (but having in mind the original consensus on the Constitution)

This is the model that was developed at the regional and local political level, based on the weight of national mainstream parties (with a presence -and majorities- in all these levels) except on the more nationalistic Autonomous Communities that have other party systems (Catalonia, Basque Country).

Assuming a deliberative position, the success of the transition and the deliberative character of the 1978 Constitution was acknowledged, although was considered "elitist" (Elster, 95). And this "elitist" character of deliberation is precisely what has been criticized in the last decades in theoretical developments that emphasize the importance of the subject of deliberation- the ordinary citizen-,and the embedment of deliberation in real decisions. That is why many authors appeal to a hybridity of "models" (deliberative/participatory) to describe the normative foundations of these proposals.

This is a “theoretical turn” that insist on a different type of deliberation, focused on the direct involvement of citizens in some fora to adopt decisions. This has had a wide impact on what has been called the development of “democratic innovations” (Smith, 2009) at the local or regional level, and now is envisioned at the national level to reform the Constitutions (Reuchamps & Suiter, 2016)). But this is also open to debate at the normative level in this Cost Action, and the position adopted will be key to assess the deliberative character on any political system.

From this perspective, in Spain there have been many experiences at the local level from the beginning of this Century (participatory budgets, deliberative pools, participatory planning…), but not at the national level. It can be stated without doubts that the territorial question (and terrorism until recently) have conditioned the development of the democratic system. The configuration of the political community has been permanently challenged and accommodated through legal development and consensual policies, within a context of ETA terrorism, with two major political defies attempting to change the Constitution: by Basque nationalists, using the reform procedure of the Constitution (i.e. Plan Ibarretxe, 2003), and, later on, during the Catalonian “process” through the approval on the Catalonian Parliament of some laws intended to a secession of the Autonomous Community territory (2017). In both circumstances, Parliaments (national and of the respective Autonomous Communities), have had a predominant role on public debate -that was widespread and intense, involving all society. And withing the conflict, the relative majority obtained by the different parties those parliaments (in some case a plebiscitary understanding of elections) was used as a prove of their representativeness of citizens.

That´s why it seems to be complex to articulate alternative descriptions of citizens represented through citizen forums for certain issues, as a reform of the Constitution. Nevertheless, the last crises (the economic and the COVID) and deep structural changes in contemporary democracies press to include demands of new mechanisms of citizen participation, and there are already announcements of the creation of citizens forums to debate some policies as sustainability, as well as to continue the debate on the future of Europe.

The 1978 Constitution and its reform procedure

After Franco's death in 1975, a period known as "the Transition" to a full democracy began in Spain. Thus, in June 1977 the first democratic elections were held, with all political parties legalized – including the Communist party - and it was up to the Parliament born of them to approve the 1978 Constitution. The preliminary draft Constitution was drawn up by a commission, composed of 7 members of different parties (Partido Comunista (1), Minoría Catalana (1), Unión de Centro Democrático (3), Socialist Party (1) and Alianza Popular (1)), subsequently debated and approved in Congress and the Senate. Finally, it was ratified in a referendum by the Spanish people on December 6, 1978, with a 67.11% share of the census, and 91.81% in favour of 8.19% against. The Constitution is recognized as the supreme norm of Spanish legal order and it states that "Spain is hereby established as a social and democratic State,

subject to the rule of law, which advocates as the highest values of its legal order, liberty, justice, equality and political pluralism" (art. 1.1 EC).

As something typical of a normative constitution, the Spanish one of 1978 responds to the model of rigid constitutions. That rigidity is a guarantee of supremacy and, at the same time, it is supposed to give greater stability to the Constitution. Likewise, it also preserves the Constitution from being reformed by circumstantial or short-term political majorities. In particular, Title X of the 1978 Constitution provides for two reform procedures:

A first procedure (art. 167) that allows to modify those aspects of the Constitution that are not considered essential. While rigid, it is not particularly burdenful: it only requires parliamentary approval by qualified majority (3/5 Congress and Senate, and, in case of discrepancy between the two chambers, 2/3 of Congress and an absolute majority of the Senate); and the popular referendum in this case is discretionary, so it must be requested by a tenth of the members of any of the chambers.

The second procedure (art.168) is intended to reform essential aspects, for the revision of the fundamental political decisions of the Constitution (Preliminary Title, Fundamental Rights and the Crown), but also for cases where a "full revision" of the Constitution is to be carried out. The latter is a particularity of the Spanish Constitution that expressly provides for the possibility of undertaking a comprehensive reform of the Constitution to give rise to a new order. There is no express limit to the power of reform, which leads to the power of constitutional reform being confused from this perspective with constituent power, acting in any case as a constituent power constituted, that is, procedurally limited in accordance with art. 168, but not materially. So, a “revolutionary” reform of the 1978 to seek to lift a completely new order is possible.

For example, the Spanish Constitutional Court has recognized that secessionist claims to introduce a right of self-determination, even if they affect the unity of the Nation affirmed by the Constitution (art. 2 EC), can be channeled through the constitutional review procedure (SSTC 103/2008 of 11 September; 31/2015, 25 February; 902017, 5 July; and 114/2017, 17 October,among others). It is true, however, that the procedure of art. 168 is especially burdenful and requires: 1) Approval by 2/3 of Congress and Senate of the proposal to start the reform; 2) Dissolution of the Parliament and holding elections; 3) Ratification by the new Parliament of the will to reform the Constitution; 4) Final approval by 2/3 of Congress and Senate; 5) Popular referendum, in this case necessary. In this sense, the reform procedure designs a mechanism that guarantees wide public deliberation and a participatory process through elections, parliamentary debates and appearances of social agents and experts, and referendums. The constitutional rigidity is not an insurmountable obstacle, but a guarantee of democratic quality.

With regard to the constitutional reform initiative, it is attributed to the Government, Congress and the Senate and the regional parliaments, who may request the Government to adopt a draft or forward to the national Parliament a proposal for constitutional reform (art. 166 EC). However, the popular legislative initiative to push

for constitutional reform is excluded. The only limit to the possibilities of reforming the Constitution is circumstantial, and it cannot be initiated in time of war or when the state of alarm, exception or siege is declared (art. 169 EC).

Constitution-making process: The flexibility of the Constitutional order

Until now the Spanish Constitution has been amended only on 2 occasions. The first was in 1992 to introduce passive suffrage for European citizens for requirements of the Maastricht Treaty; the second, in 2011, a very controversial express reform (with very little public debate) incorporating the principle of budgetary stability in art. 135, according also here to European requirements. In both cases, the procedure followed was that of art. 167 EC. However, the fact that the 1978 Constitution has undergone only two specific amendments in its more than forty years of life does not mean that the Spanish constitutional order is hyper-rigid. On the contrary, over the course of these decades it has demonstrated great flexibility and capacity for evolution within the framework of the Constitution.

In relation to constitutional institutions and bodies, the 1978 Constitution sets out basic balances, with certain rules, but the regulation of its specific functioning is specified in the parliamentary regulations and organic laws that discipline their organization and functioning, which have been undergoing changes. Among others, we can mention the Organic Law of the Constitutional Court, the Organic Law of the Judicial Governing Council, the Organic Law of the Electoral Sistem...

In the field of fundamental rights, important changes to adapt them to the new realities were allowed by constitutional jurisprudence and organic laws. It can be noted, for example, the sentence of the Constitutional Court (STC 198/2012, of 6 November) stating the idea that the Constitution is a "living tree" to legitimize gay marriage introduced by Parliament in 2005.

Regarding the European Union, the Constitution does not expressly mention it. Here too the Constitutional Court has made a broad interpretation of art. 93 EC to facilitate European integration and the principles derived from it, such as that of the primacy of European law (Declaration 1/2004 of 13 December).

Finally, one of the areas in which constitutional design was more open ("deconstitutionalized" in a way) was the territorial organization. The 1978 Constitution recognized the power for certain territories to become "Autonomous Communities" (equivalent to federal states) establishing a procedure through the adoption of the corresponding "Statute of Autonomy". The Constitution also establishes a minimum regulatory framework (state-exclusive competences, basic institutional scheme for some autonomous communities...). All this "peculiarities" grounded on three essential pillars: unity of the nation; recognition of autonomy to nationalities and territories; and duty of solidarity (art. 2 EC). From there, the consolidation of the current autonomous state, with the 17 autonomys and 2 autonomous cities, has taken place through important public debates, relevant political agreements (the two main ones were held in 1981 and 1992), the development of the Statutes of Autonomy (the first Statutes were approved between 1979-1983, and

subsequently they have been reformed intensively in different waves – especially, 1996-2001; and 2004-2011), other sectoral legislation and the constitutional jurisprudence itself.

The latest statutory reforms (Valencia and Catalonia -2006-, Balearic Islands, Andalusia, Aragon, Castile and León -2007-; and Navarra -2010-) brought to their limits the possibilities offered by the constitutional framework for regional development. So much so that the Constitutional Court declared some of the provisions of the new Statutes unconstitutional and, in particular, it overruled extremely sensitive precepts of the Catalan Statute -which had been approved in 2006 and submitted to a referendum in Catalonia (STC 31/2010, of 28 June)- such as the reference to the Catalan "nation" or the "people of Catalonia", which was alledged to contradict the recognition of the Spanish people as sovereign in accordance with art. 1.2 EC. This has generated a wide political and juridical conflict about the limits of the Constitution. The Constitutional Court has expressly recognized the possibility of reforming the Constitution to introduce any political demand, including the pro-independence ones.

Constitutional regulation of participation in the Spanish democratic system

The preamble to the 1978 Constitution proclaims the will for it to serve to "ensure democratic coexistence", to ensure "the rule of law as an expression of the popular will" and to "establish an advanced democratic society". Something that is reflected, it has been said, in art. 1.1 of the Constitution that recognizes Spain as a democratic state. A first manifestation of this democratic principle is projected on the very foundation of power as (art. 1.2. EC) "National sovereignty resides in the Spanish people, from which the powers of the State emanate". It requires the democratic legitimacy for the exercise of any public power, whether direct or indirectly, as well for the organization and functioning of the institutions. Even further, another dimension of the democratic principle leads to the postulate of the participation in public affairs directly or through their elected representatives in art. 23.1 EC.

From this perspective, the Constitutional Court has particularly emphasized that the constitutional system is built -as a general rule- as a representative democracy with a parliamentary government (Monarquía parlamentaria). And it includes mechanisms of direct participation: popular legislative initiative (art. 87 EC) and various referendum modalities (referendum for constitutional reform –arts. 167 and 168 EC-, referendum for the approval and reform of certain Statutes of autonomy –arts. 147.3 and 151 EC-, and consultative referendum, in accordance with the modalities provided for by organic law –art. 92-). Nevertheless, these instruments can never be used as "an undervaluation or substitution but as a strengthening of that representative democracy" (STC 103/2008 of 11September).

The competence to call and regulate referendums rests in the State (arts. 149.1.32, 92 and 81 EC), but the Autonomous Communities can have some form of implementation intervention or can supplement the regulation thereof. According to settled constitutional jurisprudence, if the issues to be consulted affect the constitutional order, then the only legitimate procedure is the "constitutional review referendum"(STC 103/2008 of 11 September). This logic is intended to prevent

plebiscite drifts that could condition the development of the constitutional reform process.

Outside the scope of art. 23.1 EC, are possible "other forms of participation in which particular or collective wills are articulated, but not general, that is, not attributable to the electoral body" (STC 103/2008 of 11 September). So, the door is open for other participatory instruments to be contemplated. Particularly, mechanisms for citizen participation of different types have been developed at the regional and local level.

Citizen participation in the subnational sphere

In the level of Autonomous Communities, we cannot speak in Spain of a single model because each autonomy has -or not- developed the regulation of mechanisms for citizen participation with some depth. However, we can indeed identify some common features or characteristics such as the creation of sectoral councils in areas of their competence. For example, the youth councils stand out, although even these have not always been present in all the Autonomous communities and their level of participation is very unequal.

The approval of the so-called Law on Transparency (Ley 19/2013, de 9 de diciembre, de transparencia, acceso a la información pública y buen gobierno) has led to greater access to citizen participation at all levels, with particular emphasis on the regional level, increasing citizen participation with requests for information which in some cases have subsequently led to other types of initiatives, linked to a discourse of "good governance". Thus, the processes of transparency, good governance and citizen participation have been linked to the increase in spaces for deliberative democracy with greater direct or indirect citizen involvement in public affairs. In this sense, and in the purest aspect of participation, the legislative approvals of the Canary Islands with the Law for the Promotion of Citizen Participation (2010), the Balearic Islands with the Law for Good Administration and Good Government (2011), and Extremadura with the Law for Open Government (2013) stand out, Aragon with the Law of Transparency of Public Activity and Citizen Participation (2015), Andalusia with the Law of Citizen Participation (2017) and Madrid with the Law of Transparency and Participation (2019) while in the Autonomous Community of the Basque Country the Law of Transparency, Citizen Participation and Good Governance of the Public Sector is still in draft form. These laws regulate aspects such: mechanisms for promoting and fostering citizen participation and collaboration; the right to participate; guarantees for citizen participation and collaboration, as well as matter excluded; specific instruments for participation; files and databases; and specific rights of participation and collaboration, among others. Furthermore, the right to political participation has been included in the amended Statutes of Autonomy of Andalucía (art. 30), Balearic Islands (art. 15), Aragon (art. 15), Canary Islands (art.) Catalonia (art. 29) and Extremadura (art. 6).

In the local scenario, some common instruments of participation have been established in many Spanish municipalities following the principle of local autonomy. However, we cannot speak of a single model if we approach it through the lenses of deliberative democracy. There is a specific regulatory framework, such as Law 7/1985

of April 2, Ley de Bases de Régimen Local (LRBRL), which settle the bases of the local system, stressing on its first article the importance of local administration for citizen participation. Therefore, we can highlight that in our political model, participation is understood to have a special weight in this area of government. The LRBRL also articulates the rights and duties of the inhabitants of the municipality, such as the rights to popular initiative; to request information; to a hearing; to consultation or to collaboration with their local administration, the same for all Spanish citizens regardless of the municipality to which they are attached (registered).

But the ideology of the party in power at the municipal government has influenced the model adopted and its success, and what we could consider its deliberative character. And this has been detrimental to the existence of a more coordinated model as mentioned above. It is also important to highlight the asymmetry of the Local Government model in Spain, because there is a great difference when we have town councils of hundreds of thousands of people or even with three million people as in the case of Madrid, and many very small town councils with barely hundreds or less inhabitants. It is in the larger municipalities, where the last two decades these participatory mechanisms have been implemented over the last two decades. In larger town councils, forums or spaces for participation are generally required to be held in person (so online meetings are not in the regulations or in the experience where they are sufficiently developed). Nevertheless, in the smaller municipalities these mechanisms have not existed and there are some experiences of direct democracy such as the local consultation referendum.

Although in the development of these participatory practices some mechanisms have been considered prone to generate deliberation (i.e. participatory budgets), the real experiences have been assessed differently (Font, Sintomer & Della Porta, 2014). While, for example, the Participatory Budget of the city of Córdoba had been presented as a success following these patterns, other are considered instruments of the municipality to obtain some legitimacy for their policies. But, again, this is based on the pattern that is used to evaluate deliberation.

Another mechanism which has survived the different changes of political colour in different town councils in Spain has been that of the Local Security Board and the Local Security Council, which is developed in the town councils with an agreement with the Ministry of the Interior (in the case of Madrid City Council since 1997). In general, in the town councils where the Local Security Board has been set up, representatives of national, regional and local administrations meet to coordinate security policy, and the Local Security Council also includes citizens, either individually or through their representative associations, who can intervene and question the representatives of the three administrations to reach a consensus on public security policies and measurement and monitoring indicators.

After the economic crisis, some changes on the way to implement these procedures have been developed, as the example of the change in the model of participation of Madrid. The main instrument to develop citizen participation were the councils at city level. These are mostly sectorial councils for public policy areas or aimed at sectors such as youth, which articulate their proposals in sessions called for

this purpose. There are currently 10 Sectoral Councils constituted in the Madrid: Women's Council, Consumer Council, Youth Council, Volunteer Council (Solidarity Forum), Madrid Forum for Dialogue and Coexistence, Disability Council, Council for the Elderly, Council of Associations, Council for Development Cooperation and Trade Council.

A change of orientation took place in 2015, leading to the implementation of new mechanisms intended to implement deliberative democracy and participatory budgets. So-called "Local Forums" were established in each District with a self-management perspective and with great influence of the associations based in each District. In addition, the "Madrid Decide" Platform was set up, for the development of initiatives proposed by citizens to allocate a small part of the budget. Through the platform a series of phases were announced such as the launching of proposals, a viability study, the collection of support, voting and final results.

With the new political colour change in 2019, a new model of participation incentives is expected, in which the so-called local facilitators will disappear and be replaced by participation technicians. These are examples of the variety of participatory practices developed in the last decades. The assessment of its deliberative character and its contribution to increase deliberation at a systemic level will depend on our normative approach to these questions.

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