THE PROCESS OF REFORM OF THE SPANISH CONSTITUTION AND PARLIAMENTARY MINORITIES

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Abstract: This paper analyzes three aspects of the constitutional reform procedures provided for in arts.167 and 168 Spanish Constitution: ownership and exercise of the parliamentary iniciative, single reading and urgent procedures and qualified majorities at the decision stage. If those want to be truly democratic, they should integrate the minorities in all their phases although not always with the same degree of intensity. Verified some deficiencies, this paper offers some proposals for change: confering the initiative of reform to the same number of Members of Parliament that hold the legislative initiative, eliminating the special and summary procedures in this field and linking the qualified majorities to those reforms which affect the essential elements of the democratic principle. This being so, the way in which the constitutional reform is carried out will keep up with the importance of what is being reformed.

Keywords: Spanish Constitution, constitutional reform, democratic procedure, parliamentary minorities, parliamentary procedure, parliamentary deliberation, qualified majorities.

1. INTRODUCTION.

When talking about minorities and constitutional reform, emphasis is usually placed on material aspects, on the existence of unamendable clauses that occasionally aim to safeguard minorities, with formal aspects being relegated to a second tier. The absence of these clauses in the Spanish constitution (SC) force us to look at the procedural aspects of reform in order to understand the role that minorities, in this case parliamentary minorities, are called on to play. In order for a procedure to qualify as democratic, including constitutional review, emphasis should not only be placed on the moment of decision; more important than the application of majority rule is that from start to finish there should be an inclusive majority principle that respects and involves the minorities. It is not enough to give them the possibility that in the future they might no longer be in that position and they

might manage to reverse a provisional decision. Today, everyone, those in the majority and those in the minority, must be able to take part in the process, demonstrating its plurality in the formation of the collective will that compels them in the future; thus the restrictions of political self-determination suffered by some when it comes to decision making will be better accepted (Requejo, 2000; 2013; 2016).

Rather than offering an exhaustive study of a well-known process, I will focus on specific aspects of the initial, middle and decision phases which are key to identifying the level of participation of parliamentary minorities in constitutional reform and gauge whether that is enough to ensure their proper protection. They are none other than the ownership and exercise of parliamentary initiative, the impact of special and abbreviated procedures in deliberation, and finally, the necessity and the significance of qualified majorities.

2. THE CONFIGURATION OF THE PARLIAMENTARY INITIATIVE: A NECESSARY INTERROGATION

In the initial phase of constitutional reform "liberty" and "pluralism" must be prioritised so that the involvement of parliamentary minorities is ensured from the beginning (Requejo, 2000, p.93).

Article 166 SC concerns the proposal[1]. There is a common proposal for both ordinary reforms, as in art. 167 SC[2], and for more substantial or total reforms, as in art. 168 SC[3],

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[1] "The right to propose a constitutional amendment shall be exercised under the provisions of section 87, subsections 1 and 2."

[2] "1. Bills on constitutional amendments must be approved by a majority of three-fifths of members of each House. If there is no agreement between the Houses, an effort to reach it shall be made by setting up a Joint Committee of an equal number of Members of Congress and Senators which shall submit a text to be voted on by the Congress and the Senate.
2. If approval is not obtained by means of the procedure outlined in the foregoing sub-section, and provided that the text has been passed by the overall majority of the members of the Senate, the Congress may pass the amendment by a two-thirds vote in favour.
3. Once the amendment has been passed by the Parliament, it shall be submitted to ratification by referendum, if so requested by one tenth of the members of either House within fifteen days after its passage."

[3] "1. If a total revision of the Constitution is proposed, or a partial revision thereof, affecting the Preliminary Part, Chapter II, Division 1 of Part I; or Part II, the principle of the proposed

which is the extent to which they are equivalent. The article does not detail who can initiate the process, nor how, preferring instead to refer to art. 87 SC, which regulates legislative initiatives plurally, assimilating one with the other with one caveat; popular initiatives are excluded from constitutional reform. Doctrinal criticism focuses here on having removed the need to strengthen the representative system which could serve as a justification for such a restriction. Nonetheless, there is usually nothing to object to in the parliamentary proposal, as it presents various elements for debate and improvement in view of the minorities.

Firstly, I will refer to those who act in the initial phase. The initiative for constitutional reform, like legislative initiative, belongs to the Congress and the Senate in accordance with the Constitution and parliamentary Standing Orders. It is the latter which differentiate between the two in terms of initiation. While legislative bills can be initiated by fifteen members of Congress, a congressional parliamentary group (art. 126 Congress Standing Orders –CSO–), a Senate parliamentary group, or twenty-five senators (art. 108 Senate Standing Orders –SSO–), proposals for constitutional reform require one fifth of congressional members, two congressional parliamentary groups (art. 146 CSO) or fifty senators not belonging to the same parliamentary group (art. 152 SSO). It is clear that the regulations increase the required numbers for reform with the consequent disadvantage to smaller parliamentary minorities. However, as Pérez Royo (1987, p.137) notes, art. 87 SC refers to parliamentary Standing Orders in order to specify the terms of the initiative, it is not a blanket referral. Any realisation should be in accordance with a systematic interpretation of constitutional provisions and it does not seem that it has been so. Without having to go beyond the aforementioned art. 166 SC, it is possible to deduce the equivalence it aims for between the parliamentary proposal of constitutional reform and legislation, therefore Standing Orders referred to should not add distinctions that the

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reform shall be approved by a two-thirds majority of the members of each House and the Parliament shall immediately be dissolved.
2. The Houses elected thereupon must ratify the decision and proceed to examine the new constitutional text, which must be passed by a two-thirds majority of the members of each House.
3. Once the amendment has been passed by the Parliament, it shall be submitted to ratification by referendum."

Constitution has tacitly ruled out. Not challenging this added difficulty in initiating reform means interpreting higher law in light of the lower law rather than the other way around, as it should be. This is particularly worrying when it involves the constitution. The access of parliamentary minorities to the process of constitutional reform is at stake, and this is nothing exceptional in this area, as the Council of State noted in its report on the modifications of the Spanish Constitution on the 16th February 2006, p. 339. "Procedural economy" and "parliamentary rationalisation" which recommend that the Houses do not waste their time with proposals that would find it difficult to proceed with their meagre support (García-Escudero, 2007, p.35; Aranda, 2012, pp.397, 398), along with the call to not trivialise the process (García-Escudero, 2012, p.191) or to underline its importance (Vera, 2007, p.219), are arguments that are often invoked in defence of the parliamentary Standing Orders. Nonetheless, approving this means trivialising the supremacy of the Constitution and moving consensus, which must be present in the decisional moment, to a prior time in which it is not forthcoming (Santaolalla, 2001b, p.2721), as the democratic principle advises leaving the door of reform open to minorities rather than closing it.

It is not necessary to revise the constitutional text to correct this distortion; the equivalence between legislative parliamentary initiatives and parliamentary initiatives for constitutional reform is clear enough. It is another matter for the parliamentary Standing Orders to respect them and it is those which should be modified.

The second aspect worth noting is, as already indicated, the fact that these parliamentarians, whatever their numbers, are limited to initiating a reform. They are allowed only to present a proposal for reform, to create a mere "proposal of initiative" (Aragón Reyes, 1998, p.330). In the same way as in legislative proceedings, the Constitution and parliamentary Standing Orders confer initiative on Congress and the Senate; it does not belong to those who propose it, it is institutional. It involves, therefore, the parliamentary majority, because the initiative only exists by the proposal being considered on the floor of the Houses (Aragón, 1998, pp.193, 331; García-Escudero, 2007, pp.55, 64; 2017, p.151; Aranda, 2012, p.397), which triggers the central "deliberative" phase of the process (Aragón, 1998, pp.320, 331). Once Congress and the Senate have adopted a proposal, the proposing parliamentarians can no longer unilaterally withdraw it (arts. 129 CSO and 109 SSO), it is no longer theirs and it is the Houses which have to agree

to its withdrawal during the time from beginning to consider it to the beginning of voting to approve it (Aragón, 1998, pp.321, 331; García-Escudero, 2007, pp.64, 120-127; 2017, pp.151, 170, 171). During the parliamentary procedure, the proposal may be altered by amendments and may be unrecognisable to its proposers moving forward, however they may not prevent that, they may only try to avoid it. For that reason, in my opinion, in the constitutional reform process we are concerned with, as well as in the legislative process, the initiative should belong to the parliamentarians and not to the institutions. This suggestion is not a long way from what art. 80 of the draft Constitution for the review of art. 157 contained; the initiative in the reform there would correspond to "those Members either directly or via parliamentary groups". Without going so far as to gift the initiative to the smallest minority, the individual parliamentarian, what this suggests is a constitutional change that would confer the initiative of their reform to the same section of parliamentarians or the same number of groups that could exercise legislative initiative and remove the consideration, such that they would never lose control over it during the process.

The third and final point is that it is important to dwell on the scope of the constitutional reform proposal. While there is no doubt about the content required by art. 167 SC, it is different for art. 168 SC. Currently, according to this provision, "the principal of the proposed reform shall be approved by a two-thirds majority of the members of each House" and later, in addition to ratifying the decision, the Houses must "proceed to examine the new constitutional text", which allows for various possibilities (Requejo, 2008b, p.2769). The reform proposal initially formulated by the parliamentarians may contain, as in proposals in art. 167 SC, a text detailing what will be reformed and in what terms, according to the parliamentary Standing Orders (Pérez Royo, 1987, pp.200, 201; Santaolalla, 2001d, p.2745), or the proposal may only limit itself to indicating what provisions they want to change and a general explanation of the whys and wherefores, presenting the full text to be studied following the elections once the new Parliament approve the decision of the previous Houses, as the constitutional provision requires (García-Escudero, 2007, pp.45, 60, 68; Punset, 2014, p.226). The Council of State, in its aforementioned report on 16th February 2016 (pp. 337-351), came down for a "minimal" proposal – "scope", "breadth" and "reasons" for the revision– in the first legislature which

approves the principle of the reform, and for the presentation of the complete text in the second. This option seems to be more in line with the Constitution and prevents the new Houses from feeling overinfluenced by being faced with a specific proposal that the people, albeit indirectly, have already had a say on. No matter what the content of the proposal, whether it is more detailed or less, having been approved in a vote on the principle of the reform and then ratified by the new Houses, they are bound by it, because they either have to process an initiative designed by the previous legislature, or formulate a text from that initiative if it is not sufficiently specific (García-Escudero, 2007, pp.91, 96-98; Punset, 2014, p.228). In the first case, although approved by the majority, the content of the proposal at least may have been determined by a minority, without limiting potential subsequent modifications or rejection. In the second case, the majority acquires more importance as plenary sessions of the Houses approve and ratify what goes forward from the minimal proposal originated by the minority, and a committee, commission or plenary sessions of Parliament itself set the tone of what they want in the new provision indicated in a principle for reform (García-Escudero, 2007, p.98; Pérez Royo, 1987, p.201). Imagine the situation of a hypothetical modification of the initiative of constitutional reform that favours parliamentary minorities. It should, as already stated, be owned by the same number of members, senators and groups involved in legislative initiatives, with this proposal not being subject to be taken into consideration, and I would add, in line with the above, that this proposal must be a full text, with specific content, open to amendment and debate in the Houses on the same terms as reform projects and always in a single legislative session, not two. Then it seems disproportionate to dissolve Parliament and call elections because it is no more than a mere initiative, making the majority the protagonists in the decision in the parliamentary setting, and the citizens the protagonists in a referendum which will end the proceedings.

3. PARLIAMENTARY MINORITIES IN DELIBERATION: THE CONTENTIOUS URGENT AND SINGLEREADING PROCEDURES

As in the initiative, in the central amendment and debate phase minorities must have a preferential place. Their involvement in a democratic process of constitutional reform should be particularly significant in the discussion because of the inherent requirements of

liberty and pluralism (Requejo, 2000, p.93; 2016, pp.101, 102, 105; García-Escudero, 2012, pp.188, 189), doubtlessly contributing in this way to the acceptance of the result (Expósito, 2016, p.98). It is not only who initiates or who approves reforms which is important, but also how these decisions are made; democratic procedures are a journey in which the route is as important as getting the tickets or reaching a destination. A "quality" deliberation, involving all, with reasonable arguments from the various political positions, which attempts to include all contributions, gives the final product more legitimacy, beyond the number of approving votes, and can help achieve consensus, without being naive enough to believe that the excellence of the argument must lead to agreement or the triumph of the best option (Taillon, 2012, pp.139-145). The "true audience of the debate are the citizens rather than parliamentarians that have to be persuaded or collaborated with to take the most rational decision" (Requejo, 2016, p.106; 2000, pp.96, 97). It is about making the different groups' positions about the reform known according to their representation in order that it may be ultimately evaluated by citizens. Citizens may also have the opportunity to decide in a referendum and overturn parliament's majority decision.

From this perspective there is little criticism to be made of the current regulation of the central phase in the constitutional reform process. In the face of the silence of the Constitution it is the parliamentary Standing Orders which specify what must occur. Congress Standing Orders refer to processing the reform proposals under art. 167 SC (art. 146 CSO) and to the common legislative procedures of proposals under art. 168 SC (art. 147.5 CSO), which in this latter scenario rules out recourse to special procedures such as single readings, which I will deal with below, but not the urgent procedure which is possible in both scenarios (García-Escudero, 2007, p.100). In the Senate Standing Orders there is no redirection to the ordinary legislative procedure, therefore the reform process can last more than two months (Pérez Royo, 1987, p.167; Santaolalla, 2001c, p.2731; Vera, 2007, p.254; Requejo, 2008a, p.2759; García-Escudero, 2017, p.161). It was preferable to organise a similar process, with more time flexibility, because it ensures that amendments can be tabled for the text being presented and approved by Congress in the timescale set out by the Bureau, and the participation of the various parliamentary groups in the

discussion in committee and in plenary sessions with a duration set by the Speaker in agreement with the Bureau (arts. 154, 155 and 159 SSO).

The generally positive overall view of this phase from the point of view of minorities, by being open to amendments and full participation in the debate, is tarnished by Congress's potential use of special and summary procedures to shorten the process without fully guaranteeing, as I understand, the freedoms it has sought to preserve, more so if they are used systematically and not always with good justification. These short cuts, which are excluded in other standing orders such as in France (arts. 89.2 FC and 117.3 Standing Orders of the National Assembly) and Germany (art. 76 GC) seem questionable to me. The reasons were explained by the Constitutional Court (CC), among others, in its CC Judgement (CCJ) 139/2017 on 29th November, in which it stated, in relation to legislative procedures –but one may clearly extrapolate to constitutional reform–, that

> "the democratic principle requires that in legislative proceedings the minority may make proposals and vote on the majority's proposals (CCJ 136/2011, FJ 5), such that, while it is true that the final decision of the process generally belongs, in our standing orders… to the majority…, it is no less true, nonetheless, that that decision, as required by the democratic nature of the legislative process, cannot be adopted without the participation of and without having previously heard from the minority…. In other words, the exercise of the right to amend and subsequent parliamentary debate about a legislative initiative gives democratic legitimacy to the law created as the manifestation of the general will thus stated (in this sense, CCJ 119/2011, 5th July, FJ 6)".

All of this is eroded significantly in the single reading procedure referred to in arts. 150 CSO and 129 SSO, and in the urgent procedure in arts. 93 and 94 CSO and arts. 133 and 136 SSO. While in one, important procedures are omitted, in the other all of the procedures are preserved, but with significantly shorter timescales.

The single reading procedure, adopted by plenary sessions of the Houses on the motion of the Bureau having consulted the Board of Spokesmen, is admissible when the "nature" of the bill suggests it, or "the simplicity of its formulation so permits". It means submitting a bill to a debate following all of the rules but with a single plenary vote (arts. 150 CSO and 129 SSO). Congress Standing Orders do not allow amendments to be tabled, which has led legal scholars to maintain "the impossibility of presenting proposals to modify the text" of the initiative, with consequent "restriction in the exercise of the right to participation of the parliamentary minorities" and the disappearance of any "political negotiation or transaction about the original text" (Gómez, 2007, p.5; 2019, p.396; Ridaura,

2012, p.255). Nevertheless, parliamentary procedures allow the formulation of amendments following the agreement of the full House to follow this process, as has been established in practice in constitutional reforms to date (García-Escudero, 2012, p.173; 2017, p.158; Aranda, 2012, p.401). It cannot be otherwise. According to Constitutional Court case law, of which the recent ruling CCJ 139/2017, 29th November is the best example, the nature or simplicity of the bill are not "sufficient reasons… to impede… the exercise of the right to amend", being "constitutionally unacceptable undermining of the legislative process, also the single reading procedure" and by extension I believe, with greater reason, of constitutional reform.

In contrast to Congress, in the Senate the single reading, noted in art. 129 SSO, seems to be cast aside in the reform procedures of arts. 167 and 168 SC, given the specific regulation in arts. 154 and 159 SSO, which allude directly in the former and by reference in the latter to the involvement of the Constitutional Committee. A contradiction (Aranda, 2012, pp.400, 401), that in my opinion, should be corrected in line with the upper chamber.

The urgent procedure maintains all of the steps but speeds them up considerably; in Congress the ordinary timescales are reduced by half or more if the Bureau shortens them (art. 91 CSO) and in the Senate the procedure lasts 20 days. Adopting these measures needs the agreement of the Bureau of Congress which may be at the request of the government, two parliamentary groups, or one fifth of the members (arts. 93 and 94 CSO) and the agreement of the Bureau of the Senate at the request of a group or of twenty-five senators, notwithstanding that this procedure may also be followed for projects that the government or Congress declare urgent (arts. 133 SSO). Similarly, outside of art. 133 SSO, the Bureau of the Senate can also, at the request of the Board of Spokesmen, reduce the time for legislative initiatives to one month (art. 136 SSO). As it is not set that an initiative following this procedure must comply with any particular conditions, its application to constitutional reform would in principle present fewer obstacles in Congress than single reading. In the Senate it should be discounted, considering the flexibility in setting terms in the Standing Orders for revising the Constitution.

With that in mind, it is the approval in Congress of the reform of art. 167 SC in a single reading that may be most controversial, as the initiative did not give the impression of the nature or simplicity warranting this type of procedure, as required by parliamentary

Standing Orders and by the Constitutional Court (CCJ 153/2016, 22nd September; 238/2012, 13th December, and 274/2000, 15th November) to some extent.

With the argument that "it deals with open clauses or concepts", the high Court granted the responsible parliamentary bodies a wide "margin of appreciation", leaving to them the confirmation of these requirements and the decision of whether it is correct to follow this path (CCJ 139/2017, 29th November; 215/2016, 15th December; 185/2016, 3rd November; 129/2013 4th June; 238/2012, 3th December) without binding them in the future, whatever procedural option is chosen, (CCJ 215/2016, 15th December). The Constitutional Court has limited itself to clarifying that

> "neither the constitutional importance or significance of a legislative text, nor its public repercussions, nor its material complexity nor, finally, the existence of diverse, related technical or political criteria are incompatible with the use of this parliamentary procedure for that which is not a forbidden topic, including constitutional reform". (CCJ 139/2017, 29th November).

In legal scholarship, it has been argued that single reading fits with simple, brief initiatives, about which there is agreement that will avoid changes to the text, initiatives that produce similar agreement about the process to follow, and initiatives that only need ratification in the Houses due to having been agreed upon outside (Gómez, 2007, pp.8-11; 2019, pp.397, 398; García-Escudero, 2012, pp.173, 174; 2017, p.158). The opinion stated here about reform initiatives is different, as I will have the opportunity to explain.

What has happened up to now in practice? Have any of these procedures been used in constitutional reform?

In the first constitutional reform of 1992, which affected art. 13.2 SC, there was consensus about its content and the approval in Congress via a single reading and urgent procedures, as it was approving an initiative proposed by all parliamentary groups and the results of votes in both Houses. However, the situation was rather different in the second reform, in 2011, which affected art. 135 SC, to the extent that its legality was doctrinally questioned, as was the possibility of following single reading and urgent procedures due to the absence of agreement, apparent from the fact that it was backed only by two majority groups, the complexity of the text to be incorporated and the negative effects of excessive speed on the proper "reflection", "negotiation" and "transaction" demanded by such a procedure. The revision went forward in only 13 days with an extreme reduction in the

timescales for presentation of amendments, all later rejected (García-Escudero, 2012, pp.173, 179, 197; 2017, pp.159, 175-179; Aranda, 2012, pp.399, 400, 402; Ridaura, 2012, pp.256-259).

In these circumstances, it is easier to see the harm that weakened deliberation does to parliamentary minorities, but to my understanding, regardless of the level of consensus about a proposal and its passage, a single reading may be inappropriate, even if there is unanimous support in the heart of the House. A constitutional reform, however timely its objective and simple its formulation, is always complex, and is always of a nature that demands not cutting time, but instead the opposite, intensifying debate (Aranda, 2012, p.400; Gómez, 2019, pp.411, 412), as it is a modification of supreme law, and the constituent-constituted power is being exercised via a procedure which, as has been indicated, should serve to legitimise the result and ensure the efficacy and ultimately the supremacy of the Constitution (Aláez, 2018, p.641). Diminished deliberation, whose main recipients are the citizens, does not contribute to these objectives. The democratic principle is not adhered to by offering so few channels for allowing social expectations to be set in law; once these have begun their journey by whatever route is set, debate about them should be kept alive which involves their proposers and those who have to convert the proposals into law, but also those who will be subject to the law. If, as noted by Bastida (1998, p.432), "consensus does not respond to the majority" but rather to "maximum proportionality", achieving it in Parliament cannot be understood as an expression of the "will of all" (Bastida, 1998, p.428), denying the existence of other wills and thus justifying the absence or reduction of discussion as unnecessary. In the Houses there can be consensus and thus the majority/minority dichotomy can disappear, but outside Parliament in a democratic society there is pluralism and extraparliamentary minorities for whom, lacking parliamentary discussion which considers them, only have the possibility of a parallel monologue. In view of current law, this will not ensure their participation in later debate in which they could demonstrate their disagreement, as a referendum is not mandatory. The pluralism in those who are the targets of these decisions cannot be satisfied with a miserly debate which, reducing argument and explanation to a minimum, does not respect their dignity as a minority, as it deprives them of participation as external interlocutors in a dialogue which is nothing of the sort, as such a mutilated debate seems to implicitly reject

the "possibility of the other" (De Otto, 1987, p.64). Nor are they considered as current minorities, but rather as potential majorities. In democracy, Böckenförde (2000, p.96) reminds us in another field, "no one can claim that their own ideas and objectives are the only valid ones", nor prevent discussion "of the ideas of political opponents", because "that would deny their political freedom and equality to think differently, and, ultimately would deny them recognition as a subject in the political process". When debate is devalued, it not only threatens or weakens the rights of parliamentary minorities, it robs citizens of their rights too. And if there are no minorities in Parliament because there is a consensus, that does not mean that they have disappeared outside it. They must also be recognised in the debate, at least with a discussion that later lets them set out their position, engage in and demonstrate their dissent. What Bastida (2011, p.175) called the "democratic liturgy" of the revision process, as with any other type of liturgy, is not an empty ritual. It must reflect that its result is the fruit of a whole, and not just a part, however numerous.

The Constitutional Court did not understand it this way, even in the supposition which in my view was least questionable, of the existence of parliamentary minorities who oppose a reform and it being processed under special or summary procedures. In CC Order 9/2012, 13th January, which rejected an appeal for constitutional protection of rights made by some of these parliamentarians, the Court maintained that single reading and urgent procedures in the reform of art. 135 SC did not violate their rights under art. 23.2 SC of equal access to public functions and positions. The sacrifice of the debate and the difficulty of reaching a broader consensus were not arguments that carried weight for the Constitutional Court, despite their democratic importance, minimal pluralism rather than maximum, as should prevail in deliberation. According to the Court, neither the Constitution nor Congress Standing Orders exclude, specifically one should add (Gómez, 2019, pp.408-413), the single reading procedure from the approval of a constitutional reform, as it does not set "prohibited subjects for this procedure". There is nothing to object to, therefore. It is for the parliamentary bodies in the hands of the majority to decide on the provenance of the single reading without the need for justification. On the basis of this "vexing parliamentary formality", as Villaverde (2012, p.487) rightly called it, the Court did not judge whether the nature or the simplicity of the proposal made it admissible. Were minorities prevented from tabling amendments and taking part in the debate? No. Were they able to give their

opinions about the reform? Yes. This is what mattered and what led to the consideration that the fundamental right in question had not been infringed. The Constitutional Court had already recognised in previous rulings that the procedural flaws that produced such deep irregularities that they substantially harm the process of arriving at the will of the Houses can lead to them being declared void. Due to the complexity of the matter being dealt with, a constitutional reform requires measured, deep debate in which the key for determining the quality of the deliberation is not whether the minorities have been able to take part, but how they have taken part. A single reading imposes on the proceedings a "triple cut", as Aranda (2012, p.399) put it, to "timescales, which entities may act, and the actions they can take" affecting the minorities, and public opinion, which may end up bereft of any kind of explanation and marginalised from a process that could have helped them to feel some ownership of the reform. However, here the Court prioritises the principle of the majority, or majority rule, as essential "for the functioning of the democratic system and the supremacy of Parliament", over a minority principle which is a defining principle of the system, perhaps even more so than the principle of the majority. Ensuring that a decision is taken by the majority, whoever they may be, is not sufficient; a pluralistic deliberation is essential, in which majorities and minorities are considered equal, in which there is dialogue and to which both contribute, giving the debate legitimacy (Gómez, 2019, pp.410, 411). The support of the majority is no salvation, nor compensation for the democratic deficit of a stunted debate (Requejo, 2013). Democratic pluralism brings with it contradiction and debate, which must be more thorough when the object is the reform of the laws which enshrine it.

The approach I maintain is obviously a long way from what is written above, and is much closer to the democratic sensibility shown by the extract from ruling CCJ 139/2017, 29th November, quoted previously. I hope that this represents the first step in a change of perspective, which will continue, as it should, outside of the specific context that gave rise to it, and which will allow more weight to be given to the minority principle in this phase of the procedure.

In CC Order 9/2012, 13th January, the Constitutional Court similarly accepted the urgent procedure in the reform of art. 135 SC. However, in rulings CCJ 103/2008, 11th September, and 238/2012, 13th December, it recognised that in the urgent procedure "the

opportunities of the minorities to participate in the process of creating the rule are notably limited" and that therefore reinforcement should be made to "the checks about whether the decision to adopt it respects legally established conditions", rejecting the idea that the "adoption of the procedure is in itself unconstitutional" and supposing in principle that "it weakens some of the constitutional principles that must inform legislative procedures with regard to the process of forming the body's will" (CCJ 234/2000, 3rd October; 185/2016, 3rd November, and 215/2016, 15th December). What must be ensured is that the procedure is applied equally to all political forces with parliamentary representation, and that the "reduction in time" is not "so great that it [substantially] harms…, the process of forming the will of a House, consequently damaging the exercise of the inherent representative function of parliamentary statute" (CCJ 136/2011, 13th September; 44/2015, 5ht March; 143/2016, 9th September; 185/2016, 3rd November, and 215/2016, 15th December), by having "impeded, obstructed or limited the powers belonging to members of parliament and the parliamentary groups they make up" (CCJ 215/2016, 5th December, and 143/2016, 19th September). Again, the parliamentary bodies are responsible for determining whether to follow this route, without having to justify the urgency, as the Court did do in the revision of art.135 SC, appealing the announcement of elections, given that the stability that the change aimed to introduce was already legally required (Ridaura, 2012, p.259). The brevity of a procedure does not necessarily call its quality into question, however, in the case of constitutional reform, given the complexity of its objective and its effects, its ultimate end point and the importance of what is in play, it does not seem to be the best fit with the principles that must guide it (Gómez, 2019, p.413). While it is true that, at least here, none of the steps are omitted, there is always the risk that such haste will make them unworkable, falling into legal fraud, not to say constitutional fraud, as Aranda (2012, p.399) warns.

4. QUALIFIED MAJORITIES AT THE MOMENT OF DECISION: AN INSTRUMENT OF CONSENSUS OR AN OBSTACLE?

As already indicated, freedom should dominate in the initiative and deliberation phases, however, in the decision, although the link between freedom and the principle of the majority is not in doubt, equality is usually predominant.

The legislative procedure is as follows. In the first two stages the parliamentary minorities are given a significant role, driving the process, speaking in the debate about their own or others' proposals and tabling their amendments to be incorporated in others' proposals, while in the final step majority rule returns which, neutrally with respect to the different "opinions present", confers "equal validity to the individual will of the whole" and "identifies the collective decision with the decision of the majority" (Requejo, 2000, pp.27, 29). In reality, as Böckenförde (2000, pp.92, 93) noted, following Kelsen (2006), the majority, more than a mere "necessary technical solution" to be able to reach a decision, is a requirement of the freedom and equality linked to democracy, which obliges "votes to be counted, not weighted".

The same does not happen in constitutional reform. In Spain qualified majorities in decision-making[4] substantially change that and with it, the place of minorities. The procedure in art. 167 SC requires both three-fifths of both Houses to approve the reform with identical content (Pérez Royo, 1987, p.165). If agreement cannot be reached, all is not lost. The reform can succeed as a Joint Committee may be established to produce a text for approval by three-fifths of the Senate and Congress. Apart from specifying that the Committee must include equal numbers of Members of Congress and Senators it does not offer any details. It is reasonable to think, as Pérez Royo (1987, p.170) highlighted, that it must reflect the representation and proportions of the composition of the Houses in order to ensure that the procedure followed up to now is not perverted. For the same reason, the Committee must focus exclusively on resolving the differences, respecting as far as possible the agreements already reached by procedures with many more democratic guarantees (Pérez Royo, 1987, p.172; García-Escudero, 2017, p.166). If the text produced by the Committee still does not achieve approval by the margins indicated, but has been

[4] Remember that in the procedure in art. 168 SC 2/3 majorities are also required to approve the principle of the reform in both Congress and the Senate. It seems excessive, according to Pérez Royo (1987, p.202), considering that the reform happens over two legislatures and that already makes it sufficiently difficult. A simple majority should have been enough, as required in the first instance in other European countries whose reform processes also run over two legislatures (Amérigo and Jerez, 2006, pp.182, 183, 187). Qualified majorities are so exceptional that it would be advisable to reserve them only for the final approval of some reform proposals.

approved by three-fifths of the Members of Congress and by an overall majority of Senators, the reform may be approved ultimately in Congress by a two-thirds majority, breaking the perfect original bicameralism of the two Houses at the point of decision-making (Santaolalla, 2001c, pp.2730, 2731; García-Escudero, 2012, pp.167, 168).

In reforms under art. 168 SC, maybe due to the nature of what it covers, or maybe to make an unwanted change more difficult, a two-thirds majority in both Houses is needed to approve a reform in a vote on the final text (García-Escudero, 2007, p.103). Constitutionally speaking, there are no second or third chances here. If the support of a two-thirds majority is not forthcoming, the reform will fail. However, legal scholarship maintains that, if the Senate, by such a majority, were to amend the text approved by Congress, one might extrapolate here the mechanism of a Joint Committee (Pérez Royo, 1987, p.206; Santaolalla, 2001d, p.2746; García-Escudero, 2007, p.106; Requejo, 2008b, p.2770) or even a kind of "navette" formula between the two Houses (Punset, 2014, p.228). This would be in line with the perfect bicameralism within the overall process in art. 168 SC, as has been argued to justify this broad interpretation; however, not so much with the intent to obstruct, not to say impede, these types of reforms (Vera, 2007, p.256).

The role of these qualified three-fifths and particularly two-thirds majorities when it comes to approving reforms upsets the majority-minority relationship. In principle in a democratic system, the absence of supermajorities seems to be more in line with the positivity and dynamism that characterise it (Bastida, 1998, p.443). Qualified majorities break the aforementioned neutrality of majority rule and destroy the principle of equivalence of options that ensures "all… of the same opportunity to realise it", favouring those who want to maintain the status quo (De Otto, 1987, pp.59, 60; Böckenförde, 2000, p.93; Taillon, 2012, p.244). In contrast to what happens with absolute majorities, which prevent "the lesser" from imposing on "the greater" while ensuring the "equal political freedom" of the decision-makers without inordinately benefitting some content, qualified majorities move from counting to weighting; not all votes are worth the same, those in support of the privileged option have more weight, with the consequent failure of "equal liberty… to participate in the creation of the collective will" (Taillon, 2012, pp.240, 245-247).

Although some have warned of the danger of simplistic views (Böckenförde, 2000, p.93), which do not take note of the fact that these supermajorities can be a risk to democracy "manipulating the rules of the game" (Taillon, 2012, p.249) or "slowing or preventing the adoption of essential decisions" (Expósito, 2016, p.91), in my view it is possible to find a reading which is admissible in democratic terms, which would allow them to be accepted, although exceptionally in "specific cases" as stated by the Constitutional Court in case law related to the legislative process which can be extended to constitutional reform. Thus, while it is true, according to the same Court, that the principal of the majority, "vital for the functioning" and "the guarantee of the principle of participative democracy", (CCJ 167/2001, 16th June) which "calls for the clearest identity possible between those who govern and the governed" (CCJ 12/2008, 29th January and 136/2011, 13th September), "is the instrument our Constitution has chosen to channel the will of the citizens" (CCJ 136/2011, 13th September). Nevertheless it is consensus and the safeguarding of political pluralism, also invoked in CCJ 146/1993, 29th April and 191/2016, 15th November, which are advanced by some qualified majorities "needed when the nature or character of the decisions or agreements that must be made justify them" (CCJ 238/2012, 13th December). This seems to happen in "certain questions which, affecting the foundations of the system itself, are only accessible via more demanding procedures and with qualified majorities", excluding them "from political debate" and in this way balancing "the reversibility of regulatory decisions… inherent in the idea of democracy" (CCJ 31/2010, 28th June; 163/ 2012, 20th September; 224/2012, 9th November).

What reasons could be used, therefore, to accept qualified majorities from a democratic perspective?

Substantially, qualified majorities should provide stability to content essential to the democratic principle: pluralism, participation and fundamental rights, which cannot end up at the whim of the majority at any given time, and without which the existence of the minorities and the openness of the system cannot be ensured (De Vega, 1985, pp.88, 89; De Otto, 1987, pp.60, 61; Pérez Royo, 1987, p.197; Böckenförde, 2000, pp.93-95; Santaolalla, 2001a, p.2710; Requejo, 2008a, p.2758; Taillon, 2012, p.247; Requejo, 2016, pp.106-107; Aláez, 2018, p.647). Otherwise, as happens with some material subject to the greater requirements of art. 168 SC, we are thinking here of the regulation of the Crown or

of some symbolic content in the Preliminary Part (Jiménez, 1980, p.88; De Vega, 1985, p.148; Pérez Royo, 1987, pp.198, 199; Tajadura, 2016, pp.267-269), it is indefensible to have the abusive "petrification" that makes it harder for a future majority to be able make changes they feel are warranted (Requejo, 2016, p.107), while other areas which merit such inflexibility, such as the dignity of the person, equality, or the reform process itself, are incomprehensibly not subject to it (De Vega, 1985, p.148; Requejo, 2008b, p.2766; Tajadura, 2016, p.269; Aláez, 2018, p.647). Content which is less important for the democratic characterisation of the system could well be revised solely by absolute majority: a greater majority which is not too severe would only be explained from the desirability of making it easier to differentiate how constitutional rules are dealt with from how sub-constitutional rules are dealt with.

Procedurally, qualified majorities are intended to introduce a parallelism with what happens in the constitutional process, where they are also resorted to in order to achieve legitimacy (Santaolalla, 2001a, p.2709; Rubio, 2012, p.58; Requejo, 2008a, p.2758), seeking a broad consensus which includes the minority. Only understood in this way would they be acceptable, as Bastida (1998, p.443) indicated, as they seek to ensure "the agreement of the greatest possible number of individuals" and approach the idea of proportionality present in consensus (Bastida, 1998, p.457). It is true, as Kelsen (2006, pp.50-52) stated, that when dealing with the reform of an established system, the qualified majority seems to be an "obstacle" to "individual liberty", the absolute majority being more in line with that, whereas "the fewest individual wills necessary" facilitates the "concordance between the individual and the state". However, as Kelsen (2006, pp.42, 46, 52) himself recognised, the principal of the majority is justified ensuring that they are "free, if not all, then at least as many men as possible", in such a way that qualified majorities increase the numbers subject to "their own will", reducing the numbers subject to external "imposition". This marks a tendency towards consensus, which is not circumscribed at this merely quantitative level; it also extends to the qualitative level, in which the qualified majority encapsulates inclusive agreement (Kelsen, 2006, pp.142-145). A majority-minority "compromise" which if already manifest in the previous phases of initiation and deliberation (Kelsen, 2006, pp. 146-148) now jumps to the decision phase, establishing "a democracy of agreement based on qualified or enhanced majorities", to use the words of

our Constitutional Court (CCJ 5/1981, 13th February; 31/2018, 10th April). Involving the minorities in the adoption of collective decisions, the majority transcends being a mere rule and becomes an inclusive principle, and because of that, a reason for the legitimacy of the final result (Rubio, 2012, p.56). In a democratic state the "traditional" principle of the majority, which is the same as majority rule, is not sufficient; it must be complemented by a minority principle, which at the moment of decision-making, obliges the "more" and the "less" to come together under an qualified majority, in quantity and quality, when referring to elements that allow it to be identified. Thus it signifies that the necessary protection of minorities is not satisfied with mechanisms that ensure that they may potentially become the majority in the future, but rather establishes the basis of their involvement in the present in the reform process, from start to end, with the respect due the dignity of each and every one who finds themselves in this situation as a bearer of a "fraction of sovereignty" (Bastida, 1998, pp.439, 441).

Undoubtedly, qualified majorities also have their negative side. As the adoption of the majority decision needs the assistance of the minorities, the space for pluralism is smaller, and the minorities place themselves there, more recalcitrant and radical, so to speak. However, without a doubt, the clearest risk is that the minorities choose not to go along, and can thus block a decision "supported by [an insufficient] majority" (Requejo, 2016, p.107; Bastida, 1998, p.443; Santaolalla, 2001a, p.2710). Nonetheless, this "obstructionism", whatever its purpose, "making it difficult or even impossible to adopt majority decisions" or forcing it "in line with a compromise between the majority and the minority" on the terms desired (Kelsen, 2006, pp.159, 160), cannot prevent, as the Constitutional Court indicates (CCJ 238/20012, 13th December), these majorities being resorted to when agreement is essential in forming the collective will, the bigger the better, given the nature of what is being revised and the consideration that minorities merit in a democratic state.

5. CONCLUSION

Frankly, the position of parliamentary minorities in the constitutional reform procedures in arts. 167 and 168 SC can be improved, particularly in the initial and central phases. Their consideration in the decisional phase, in some cases objectionably excessive,

does not compensate for the previous deficiencies which need to be significantly rectified, as the minorities cannot be relegated at those times when liberty must be prioritised. Paradoxically, the terms of current constitutional reform significantly favour minorities in matters which, as a general rule, they are outside of, because in those situations equality usually dominates.

The procedure should be revised, which places parliamentary minorities in a position corresponding to an agreement with the majority principle, which in a democratic state, can only be inclusive.

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