Models of Constitutional Amendment in Spanish History

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Abstract: Constitutional amendment in Spanish History was seen from three different points of view: an unawareness about constitutional amendment (Enlightenment), exclusion with the constituent power (conservative ideology) and complementarity with the constituent power (liberal-progressive ideology). These three approaches were linked to different concepts of Constitution: the Aristotelian, the historical and the rational-normative.

Keywords: Constitutional amendment, Spanish Constitutional History, Enlightenment, Liberals, Fundamental Laws, Conservative Ideology, Progressive Ideology, Flexible Constitution, Rigid Constitution, Constitutional amendment limits, Constitutional Law

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1. Introduction

If we consider –as I believe we should– that the first Spanish Constitution was actually the 1808 Statute of Bayonne, there would be a total of eight historical Constitutions that have been in force in our country (1808, 1812, 1834, 1837, 1845, 1869, 1876 and 1931). This list leaves aside the Constitutions of 1854 and 1873 (which, although approved, were never

put into practice) and the numerous constitutional projects... that never got to be more that projects.

Only half of the eight historical Constitutions mentioned contain amendment clauses. This circumstance may lead to consider that the issue of constitutional amendment was of minor importance for our constituents; however, this would be a hasty conclusion. In spite of the theoretical discrepancies that even today exist about the concept of constitution –especially due to a revitalization of materialist positions–, a formal and rational-normative model of constitution has been imposed, in which the presence of amendment provisions is unavoidable: there is no recent constitution that does not provide for its own amendment in order to correct the defects that are revealed over time, or to adapt its provisions to changing circumstances. For that reason, the issue of constitutional amendment has become mainly (though not exclusively) a procedural one, in which the essential points are what, according to the constituent, can or cannot be amended within the constitution; who must bring about the amendments; when is it possible (or not) to amend it; and which are the procedures that must be followed to make it effective.

The situation was very different in Spain's constitutional origins. The concept of constitution had yet to be outlined, and this circumstance influenced the decisions regarding its amendment. As we shall argue in the present paper, the absence of references to the amendment procedure was not due to a lack of interest on the part of the constituent, but simply to the fact that it was incompatible with the current concept of constitution; or, on the contrary, because it was so obvious and implicit that it was considered redundant.

Bearing this in mind, we can differentiate three approaches to constitutional amendment in Spain: unawareness, exclusion and complementarity with the constituent power. Each of these models responds to a different concept of the constitution, as we shall describe. From a chronological perspective, the first approach predates the other two, which coexisted in the same historical context and struggled to impose themselves.

2. Unawareness about constitutional amendment

Even though the first Spanish constitutional text was that of Bayonne (1808), constitutionalism began much earlier, in the 18th century Age of Enlightenment, when scholars began to handle the concept of constitution and to consider the need to limit the power of the State for the protection of individual rights.

The first concept handled by the Enlightenment was the Aristotelian constitution. This concept was not applied to a legal text, but to the *de facto* political-social regime and system of government of a community. For that reason, this concept of constitution had no real prescriptive value; on the contrary, it merely described the prevailing socio-political regime of a country.

The use of this Aristotelian concept was not only caused by the direct knowledge of Aristotle (especially, of his works *Politics* and *Constitution of the Athenians*) –as Thomism was the dominant theory in the Faculties of Law of the time–, but was also due to the extraordinary influence that Montesquieu exerted on the Spanish Enlightenment. Montesquieu's constitutional perspective was absorbed in Spain by an important sector of the Enlightenment: José Cadalso, for example, used the Aristotelian concept of constitution in his *Cartas Marruecas* (which, even from a formal point of view, followed very closely Montesquieu's *Persian Letters*); José Agustín Ibáñez de la Rentería, in his *Reflexiones sobre la forma de gobierno* –a commentary on the *Spirit of Laws* by the President of the Parliament of Bordeaux– also accepted this concept, as did many other representatives of the Spanish Enlightenment such as Victorián de Villava or the first writings by León de Arroyal.

This purely descriptive (as opposed to normative) idea of the constitution prevented the idea of constitutional amendment from being perceived. Legal theorists recognised the possibility of change in political regimes; however, what actually mattered was determining when they were of such a magnitude that they led to a new constitution. Many classical authors, from Aristotle to Polybius, had adopted the same stance when identifying different successive systems of government: such successions represented not an amendment, but the birth of a new constitution.

This perspective can be clearly perceived in the *Discurso de recepción a la Real Academia de la Historia*, a speech offered by Gaspar Melchor de Jovellanos in 1780, in which the Asturian author argued the need for jurists to possess historical knowledge [Jovellanos, (1858), pp. 288-298]. Jovellanos described the evolution of the Castilian Constitution, defending the thesis that there had been four different successive constitutions in Castile. The first was the Gothic Constitution, characterised, according to him, by the existence of *concilios* (councils) in which the different estates of the realm were present and which, as a whole, expressed the general will. As for Jovellanos' reference to the "general will", it was obviously inspired by Rousseau, he did not invest it with the same meaning: in his view, it was not a holistic will created by the sum of individual wills, as conceived by the Genevan author, but a decision based on social estates.

In his speech, Jovellanos described how this Gothic Constitution had been replaced after the enactment of the *Decretos de Recaredo* (Laws of Reccared) in the sixth century, which conceded predominance to one of the estate classes: the clergy. According to Jovellanos, this situation would continue until the eighth century, when the *Reconquista* (Reconquest) gave rise to a new constitution characterised by the dispersion of power: as the aristocracy recovered lands for Christianity, they established feudal settlements of which they were masters and lords. This constitution would be replaced by a fourth when Alfonso X The Wise started to rule, concentrating all power in his hands and thus overcoming the feudal political structure.

We can draw several conclusions from the trajectory described by Jovellanos. Firstly, the fact that this was not a totally original approach: a very similar periodization was delineated by William Robertson, who might have influenced Jovellanos on this point. Secondly, it seems clear that the Spanish author employed the term "constitution" in an Aristotelian sense, identifying it with the system of government of Castile at each historical moment. Each constitution implied a change in the political regime: in the Gothic Constitution, the power belonged to the community of estates (democracy); in the constitution that followed the Laws of Reccared, it belonged to one of the estates, the clergy (aristocracy); during the *Reconquista*, the power was held by another privileged group, the nobility (aristocracy); and, finally, the last constitution emerged with the concentration of power in the hands of the King (monarchy). The third and last aspect worth mentioning is that all these

constitutional replacements happened not only as a result of regulatory changes (as with the Laws of Reccared), but also due to purely factual circumstances, such as military campaigns (*Reconquista*) or the increasing economic and military power of the King (with Alfonso X). This means that there were no constitutional amendments resulting from normative modifications, but mere constitutional replacements as a consequence of contextual alterations.

3. The excluding approach to constitutional amendment

The Aristotelian concept of constitution typical of the Spanish Enlightenment would be progressively replaced by a different one: the concept of historical constitution, which began to be outlined from 1790 onwards. The date is significant, since this new concept would emerge as a reaction to the theories of the constituent power starting to arrive from France, in spite of the *cordon sanitaire* imposed by the Count of Floridablanca preventing the entrance of foreign revolutionary works in Spain. Some of the Spanish enlightened who supported encyclopaedism changed their attitude towards the French enlightenment following the violent drift of the French Revolution, especially after the execution of Louis XVI and the subsequent establishment of the Convention's Terror. Such was the case of Pablo de Olavide, Pedro Rodríguez de Campomanes or even Jovellanos himself, who both in his diaries and in his correspondence (especially with his British friend Alexander Hardings) showed his disaffection towards a French Revolution in which he had initially seen the crystallisation of the enlightened principles of the Encyclopaedia.

As a result of this detachment from revolutionary France, many enlightened Spaniards made a retreat towards historicism –an approach that some of them, like Jovellanos or Campomanes, had not abandoned–, rejecting the French constituent process to support a new concept of constitution: the historical approach.

Indeed, in contrast to the idea that the constitution represented an act of will arising from the constituent power of the sovereign nation, the Spanish historicist Enlightenment identified the constitution with the ancient Fundamental Laws containing a pact between the King and the community, represented in the *Cortes*. Medieval documents such as the

Fuero Juzgo, the *Fuero Viejo* or the *Partidas* of Alfonso X ceased to be mere monuments of the past to become the gist of the historical Spanish Constitution. Jovellanos is a clear example of this: from 1790 onwards, he also abandoned the Aristotelian concept of constitution and replaced it with that of the historical constitution –a constitution that would not emerge from an act of will, but from the heritage of the ancient codes:

> "Do we have, by any chance, a constitution in Spain? If you say yes, how come we do not study it, how come we do not know about it? If you say no, being a fact that we had it in the past, we must acknowledge that we have lost it".

And where should they to look for it? Jovellanos answered with the following indication: "in our old codes, in our old chronicles, in our despised manuscripts and our dusty archives" [Jovellanos, (1986), pp. 179-180]

If we have described above how the Aristotelian concept of constitution reached Spain via Montesquieu, now we shall see how his admiration for the English regime would also influence the concept of historical constitution. We can perceive this influence in Campomanes when he opposes the British Constitution –of a historical nature– to the French Constitution –of a rational nature–:

> "In the making of laws, the English have taken the precaution of preserving the ancient ones, recovering them when needed and establishing new ones as required. In this prudent and successive order they have been improving their Constitution (...), adopting the new provisions required by the occurrence of things (...)
> All this has suddenly changed in France, erasing the old system and subrogating an entirely new one based on speculation and exposed to the contingencies of novelty, as we can infer from the present state of things" [Coronas González (1996), 165-166]

The new concept of constitution would substantially alter the pattern of the previous Aristotelian idea: on the one hand, the constitution came to have a genuinely normative sense, being identified with historical laws; on the other hand, it was an element of national unification, as a historical Spanish Constitution began to be identified –even though many

of the laws that comprised it had belonged specifically to the kingdoms of Castile, Aragon or Navarre–. Ignoring these distinctions, the historicist Enlightenment identified the constitution with ancestral documents, whichever kingdom they came from.

With these new parameters, the concept of constitution became perfectly compatible with the notion of amendment; in fact, it was inevitable. Despite the fact that the new approach to the constitution was historical, it could not be considered fossilised; precisely because it was a product of the past, it had to be susceptible to amendment in order to adapt it to the needs of the centuries to come:

> "Do we fear that these documents reveal a constitution that does not exist?", wrote Jovellanos in a rhetorical question. "But wouldn't they also show that it was not in the 13th century what it had been in the 11th, nor in the 16th century what it had been in the 13th? What would it matter, then, if they showed that the 18th century constitution it is not like any constitution of the old times? And what people have not improved, or at least varied and altered their constitution and laws? And, since every political situation is variable, who will claim for stability when stability itself is a very serious evil?". [Jovellanos, (1986), p. 602]

During the Peninsular War, this concept of a historic Constitution was defended by royalists and reformists who sought to nullify the influence of French revolutionary thought, which was increasingly dominant among Spanish liberals. Royalists and reformists refused to admit the validity of a constituent process: according to them, Spain already had a Constitution (the Fundamental Laws), and the only measure needed was to introduce the necessary reforms to avoid absolutism. Hence, the idea of amendment had for them an excluding sense: to defend the reform of the (historical) constitution meant to deny the very idea of constituent power. It was not possible to create a new constitution; the only measure that the nation could assume was the amendment of the old Fundamental Laws.

This position was clearly stated in 1809. In the absence of Ferdinand VII (retained by Napoleon in Bayonne), the provinces had spontaneously set up *Juntas Provinciales* (Provincial Councils) which, in order to unify their criteria, had created in September 1808 a *Junta Central* (Central Council) composed by two members from each province. In this

Central Council there were three very different political positions: the absolutist, in favour of maintaining the status quo of the Old Regime; the liberal, deeply influenced by French revolutionary thought; and the reformist, halfway between the other two and in favour of reforming the Fundamental Laws (overcoming the Old Regime), but avoiding the introduction of radical changes (as the liberals intended).

In April 1809, the Aragon representative, Lorenzo Calvo de Rozas, from the liberal sector, presented a proposal to the Central Council to convene a French-style Parliament, composed of a single chamber with undifferentiated representation (that is, not divided according to estate), and to start a constituent process [Fernández Martín, (1885), pp. 436-438]. The proposal was submitted to the Central Council so that its members could express their opinion. Jovellanos –representative for Asturias in the Central Council– pronounced himself on 21st May 1809, explaining his idea of a historical constitution and of amendment as the very negation of the idea of constituent power:

> "And I shall note that many voices here talk about making a new Constitution in this Council, and even putting it into practice; and in this I do think that there would be great inconvenience and danger. Does Spain not have its Constitution? It certainly does; for what is a constitution but the object of fundamental laws, which establish the rights of the Sovereign and those of the subjects, and the healthy means of preserving the former and the latter? And who doubts that Spain possesses these laws and knows them? Are there any laws that have been attacked and destroyed by despotism? Let them be restored. Do we lack any healthy measure to ensure the observance of all of them? Let us establish it" [Jovellanos, (2006), 696-697].

Pursuing this idea, Jovellanos managed to set up an internal commission in the Central Council, called the *Junta de Legislación* (Legislation Council), whose task would be to compile the Fundamental Laws and propose the necessary amendments thereof. For the first task, Jovellanos set the criteria that the Legislation Council should adopt in order to determine which ancestral laws were "fundamental": those that established the rights of the King, of the nation and of its individuals, as well as those that established the system of government and Spanish public law.

However, we should remember that Jovellanos' concept of historic constitution –which, as we shall soon see, was adopted by conservative thinking– was structured on three concentric levels. At the core were those elements so consolidated in history that they were no longer subject to amendment (for example, the monarchy or the confessional nature of the State). The second level included legal contents that delimited the prerogatives of the King and of the nation and that, because they affected both, could only be modified with the agreement of both subjects; finally, the third and last level included those aspects of the historical constitution that only affected one of the elements of the pact (that is, the King or the nation) and therefore could be unilaterally modified by them (for example, the internal organization of the Parliament, that could only be reformed by the Parliament itself). Thus, the historical constitution presented different levels of rigidity, ranging from unamendability to unilateral amendment.

This position was later defended by the royalists in the Cortes de Cadiz. In the debate about Title X of the 1812 Constitution, dedicated to constitutional amendment, the royalists rejected the rigidity of the amendment procedure established there, which they considered unnecessary, false and dangerous. These three adjectives corresponded to the aforementioned constitutional levels that Jovellanos had conceived: the proposal was unnecessarily rigid for the constitutional core, since there was no room for amendment there; it was false with regard to the second level, since what was contained therein could always be amended simply by the concurrence of the will of the Parliament and the King (whom the Constitution of Cadiz excluded from the reform procedure); finally, it seemed to be dangerous for the outermost level –which the royalists called the "regulatory provisions"– because it established procedures of an inappropriate rigidity to amend aspects of little relevance.

The theories of the historical constitution, and the intrinsic nature of amendment that they implied, spread throughout the 19th century, first by moderate and then by conservative thinking [Varela Suanzes, (2014), pp. 128-160]; this explains the absence of amendment procedures in the constitutions that emerged from these schools of thought. Indeed, neither the 1834 *Estatuto Real* (Royal Statute) nor the Constitutions of 1845 and 1876 contained amendment provisions whatsoever. Far from being an oversight, or a sign of disinterest on the part of the constituent, this was a logical consequence of the constitutional paradigm on

which they were based. These texts had been conceived as documents that formalised the historical Constitution, being the latter the prevalent one. According to this notion, the conservatives considered that these Constitutions contained an unamendable core, as well as other complementary provisions that could be modified at any time by the simple concurrence of the will of the two co-sovereign subjects: King and the Parliament. The silence of those texts concerning amendment stemmed from the fact that the idea of amendment was so closely linked to the notion of historical constitution that it was not necessary to mention it.

4. Constitutional amendment as a complement of the constituent power

A very different vision was held by the liberals, who supported the idea of a formal or rational-normative constitution –that is, a written document born from the will of the constituent power located in the sovereign nation–. This concept crystallised in the 1812 Constitution; however, the idea had already been raised in Spain by constitutional projects such as those by Manuel de Aguirre (1786), León de Arroyal (1795) or Álvaro Flórez Estrada (1809). According to these authors, the constitution was a mere act of will; thus, constitutional amendment was a necessary resource to update that will, allowing the sovereign subject to express itself anew.

The beginnings of Spanish constitutionalism established firmly some of the elements of constitutional amendment that still today are part of its essence. One of these elements was the differentiation between the constituent power and the amendment power, already stated in the Cortes de Cadiz. Although the distinction between the two powers was not perfectly clear, from the constituent debates we can deduce that, at least, the liberal deputies from the metropolis considered both powers as different, being the amendment power subject to constitutional provisions while the constituent power was immune to them. This can be inferred from the constitutional text, when it establishes how to formulate the empowering documents that the electoral boards must issue to the elected deputies of a reforming Parliament:

> "They must also give them a special power to amend the Constitution as decreed by the Parliament, which is as follows [literal text of the decree]. All this, in accordance

> with the provisions of the Constitution itself. And they are obliged to recognise and consider as constitutional what they establish by virtue of it". (Art. 382)

However, we must acknowledge that in the constituent debates this difference is not clear-cut. This is due, in part, to the attempt to hide all references to the constituent power under a historicist garb, so as not to show that the doctrines of Sieyès were actually being followed. In any case, we cannot ignore that even in France –the main inspiration for liberals in the Cortes de Cadiz– that distinction was not clear either. Sieyès himself considered the amendment power as a simple exercise of the constituent power. Hence, it was irrelevant to impose procedural or temporal limits on it: the reforming body, as constituent power, could always avoid both, since nothing could restrict the sovereign power [Sieyès, (1789), pp. 113-114].

In contrast to this, a much lesser-known member of the French Parliament –an obscure lawyer from Dijon called Nicolas Frochot– maintained a more lucid approach. Frochot started by clearly differentiating between holding the sovereignty and exercising it. The nation kept the former but could transmit the latter, to the extent and with the powers it considered appropriate at any given time. Thus, for example, when a constituent assembly was convened, the nation conferred upon it the exercise of the constituent power; when a legislative parliament was convened, the nation conferred the exercise of the legislating power; and when an amending body was created, the nation merely conferred the exercise of the power to amend the constitutional text. We see here that Frochot conceived the amendment power as a genuine constituted-constituent power, halfway between the power to create a new constitution and the legislative power. This avoided all excesses: when an amendment was proposed, the body in charge could not go beyond the subject matter that had been submitted for its examination, nor ignore the constitutional procedures foreseen to carry out the amendment [Assemblée Nationale, (1888), pp. 96-97].

The final text of the 1791 French Constitution was, however, a compromise solution: although it established the procedures to which the amending body had to submit (according to Frochot's thesis), the wording seemed to imply that its observance was more of an invitation or even a plea, since the amending body could decide not to respect those guidelines (according to Sieyès' thesis).

Apart from the fragile distinction between the constituent power and the amendment power, the rational-normative concept of Constitution brought about other aspects of constitutional amendment that are still in force today, such as the requirement that the amendment be explicit. Even though this was not formally included in all constitutions, this requirement already appeared as indispensable in the constitutional project designed by Álvaro Flórez Estrada in 1809:

> "Since the happiness of a nation depends on the observance of a good constitution, any alteration or amendment made without the circumstances established in the preceding article, *which must be cited whenever it is verified*, shall never be validated, and no citizen may claim any contrary habit or custom" [Flórez Estrada, (1810), p. 36]

In fact, this requirement was included in the project by Flórez Estrada because the amendment was carried out by the same Parliament that could also exercise the legislative power; therefore, the explicit nature of the amendment was useful for differentiating constitutional amendments from the exercise of the legislative power. In the progressive constitutions, based on the principle of national sovereignty (1812, 1869) or popular sovereignty (1931), such provision was not necessary since, as we shall see below, constitutional amendments were carried out by a Parliament invested with special powers.

Indeed, we can detect in the early stages of Spanish constitutionalism a third common (though not consubstantial) element in constitutional amendments: rigidity. Since at least the two nineteenth-century progressive Constitutions (1812 and 1869) included legal supremacy, rigidity was the only element that made it possible to differentiate the general legislative will from the reforming will. As Ramón de Salas wrote in 1821,

> "I know (...) that a political constitution must be given a character of stability and eternity, so to speak; because only in this way will the people respect and worship it with a kind of religious cult; and indeed a constitution that can be changed too easily cannot be seen as a fundamental law and as the foundation and key to the social construction".

However, Salas himself warned that, precisely for this reason, the constitution should not include "regulatory provisions" (a concept, as we saw, already handled by the royalists in the Cortes de Cadiz) so as not to give rigidity to non-essential provisions which, by their very nature, should be easily modifiable:

> "A constitution should comprise nothing more than principles that are immutable by their very nature (...) On the contrary, a constitution that comprises regulatory provisions, as well as and norms and principles of secondary legislation, must necessarily be subject to alterations and corrections without much difficulty, because secondary regulations and laws are variable by nature according to the circumstances. The constitution then loses its character of stability, and a distinction is introduced between regulatory and fundamental articles".[Salas, (1982), pp. 316-317]

Salas' logic, therefore, involved defining the constitution from a material point of view, considering that there were certain matters and principles which, by their very essence and nature, could be considered "constitutional" and others which, on the contrary, lacked that status. However, the constitutional form would endow them all with the same rigidity, a very different circumstance from that which would occur under the paradigm of a historical Constitution.

The first Spanish Constitution to adopt a rigid procedure was that of Cadiz. The initiative for amendment had to be taken by at least twenty members of Parliament. Once this had taken place, the proposal had to be read three times, with an interval of six days between each reading. Once these readings had been completed, a vote would be taken on whether the proposal merited a debate; if admitted, the proposal would follow the same procedure as laws, after which the Parliament would have to decide by a two-thirds majority if the following parliamentary assembly should discuss the matter again.

If this was approved, the following Parliament had to observe the same formalities once again to decide, by the same two-thirds majority, whether the amending assembly (invested with special powers) would be the next or the one after the next. The members of the

parliamentary assembly in charge of that task would obtain in the following elections special powers of reform, drafted in the manner already mentioned at the beginning of this section. Once the new Parliament was convened, the amendment proposal would be debated and voted once more, requiring a qualified majority of two thirds. The King, who would have no part in this amendment procedure, would simply have it published and disseminated among all the peoples of the kingdom (Arts. 376-384).

The amendment procedure had a much greater complexity than that established for laws, and opened the way for the two main aspects of rigidity that would be included in later formal constitutions: the requirement of qualified majorities, on the one hand, and the establishment of what could be called a "double amending instance" –that is, the fact that the parliamentary assembly that promoted the reform could not be the same as the one that approved it–. The first of these two elements –rigidity– would be less transcendent in Spanish constitutional history. It would only appear again in the 1931 Constitution, and with a very particular characteristic: the demand for a qualified majority (two thirds) was only foreseen for amendments carried out within the first four years from the approval of the Constitution (in an attempt to give it more stability), while for subsequent reforms an absolute majority was sufficient. The double amending instance, however, would be present in all the progressive Constitutions (1869 and 1931), becoming the staple of rigidity.

The preference for this criterion of rigidity has a double justification. On the one hand, it allowed the electoral body to pronounce itself, choosing the new members of Parliament according to their position towards the amendment proposal. On the other hand, it invested the amending Parliament with special powers, avoiding the need to mutate the nature of the ordinary Parliament. And, finally, in constitutions that established a unicameral parliament (1812 and 1931), the debate by two successive parliamentary assemblies made it possible to obtain a sort of double deliberation in the absence of an upper house.

One last question that was present in the history of Spanish constitutionalism was that of the limits to amendment. None of the progressive Constitutions included material limits, although the 1869 Constitution involved a debate on whether individual rights –

dogmatically conceived by progressives as natural freedoms– should be unamendable, as they were prior and superior to the Constitution itself

Some of the constitutions, however, did include temporal limits. According to a provision in the 1812 Cadiz Constitution, no amendments could be carried out in the first eight years "after the Constitution had been put into practice" (Art. 375). This provision gave rise to some interesting debates during the Liberal Triennium (1820-1823). The discussions tried to determine whether the decree issued in 1814 by Ferdinand VII, which declared the Constitution null and void, had interrupted the eight-year period. Some members of Parliament –who were not in favour of reforming the Constitution for the time being– argued that the term should be recalculated from the day on which Ferdinand VII pronounced his oath of fidelity to the Constitution, after its imposition by the uprising in Las Cabezas de San Juan. Other liberals, however, understood that the royal decree had been an illegitimate act and that, as a result, the Constitution remained "unapplied" but had not lost its validity, which meant that the deadline had expired.

But even if this opinion were admitted, there were voices who doubted that the eight years had passed. A careful reading of the Constitution indicated that the time limit should be calculated not from the date of its approval or from the King's oath of fidelity, but from the date when it was "put into practice". For this to happen, the implementation laws required by the constitutional text –such as the law of the jury or the law of the printing press– had to be enacted. In other words, the legislative activity would determine the exercise of the amendment power, since, as long as the former did not act, the deadline for exercising the latter could not be established.

6. The mixed conception of constitutional amendment

History rejects rigid categorisations; any closed scheme tends to explode when contrasted with factual data. We could say the same about the Spanish amendment models, due to a Constitution that does not seem to fit the aforementioned characteristics: that of 1837. This was a formal, progressive Constitution and, as such, based on the dogma of national sovereignty; nevertheless, like conservative Constitutions (grounded on the idea of a historical Constitution) it lacked an explicit amendment procedure. Why?

The most plausible explanation can be found in the process of political design of the 1837 Constitution. Initially born as a mere reform of the Constitution of 1812 after the mutiny of La Granja, it became finally distanced from the procedures foreseen in that Constitution, opening a new constituent process as a result. This gave rise to a pact between progressive and conservative forces that gave the 1837 Constitution a "transactional" character, with key principles of progressivism (such as national sovereignty) mixed with those of conservatism (such as bicameralism) [Varela Suanzes, (2014), pp. 376-483]. This eclectic nature explains why this Constitution, which was basically progressive, omitted an amendment procedure in the manner of conservative Constitutions.

This lack triggered a relevant debate when, in 1844, the Narváez government presented in the regular Parliament a proposal for the amendment of the Constitution. Had it been a formal and progressive Constitution, the regulated procedure of amendment would have sufficed; had it been a conservative Constitution, the amendment would have been possible with the intervention of the King and the Parliament (except for the constitutional core, which would be unamendable). But, in a hybrid Constitution such as that of 1837, the procedures to follow were uncertain.

It was precisely this hybridisation that made it impossible to achieve a clear and satisfactory response for all political actors. The progressives, supported by some moderates, concluded that, in the absence of an explicit amendment procedure, it should be understood that there was no possibility for change in the constitutional text. Thus, the progressive newspaper *El Clamor Público* commented the following:

> "The first [argument of the moderates in favour of the amendment] is taken from the silence of the Constitution, which neither prohibits its own amendment, nor establishes what to do if necessary (...) It would be absurd to deduce from this omission the power to vary the fundamental law. The opposite consequence would seem more legitimate to us, and it could be argued with good reason that the silence of the Constitution regarding amendments means that there is no legal way to amend it" [Anónimo, (1844), p. 1].

This position was supported by a moderate puritan like José Posada Herrera, with arguments that identified the constituent power with the amendment power:

> "I believe that, prior to purporting to amend the constitutional law (...) we must examine whether we are competent to do so (...) I believe that the regular Parliament, such as that which is now assembled, is not allowed to amend the constitutional law except in serious cases, in necessary cases, in those circumstances in which it is necessary to create a constituent power (...) This constitutional amendment is not, gentlemen, an expression of the will of the country. The nation has not requested and does not want the proposed constitutional reform (...) The power to amend constitutions belongs only to the constituent powers, and these are born of circumstances; they possess indeclinable qualities and conditions that cannot be accommodated to conventional times; they are born out of necessity, they last as long as necessity, and they belong to no one but the first to occupy them (...) but to make a constituent power out of a regular, ordinary body; to establish the precedent that at all times, in all circumstances, the Parliament with the King can reform the Constitution of the State, is to plant at the apex of social power a perpetual banner of revolution" [Posada Herrera, (1844), p. 166]

Posada Herrera's real intention was to prevent the ordinary Parliament from acting constantly as a revolutionary power that could change the Constitution and alter the very foundations of the State. In his view, constitutional amendment implied the very exercise of constituent power, which should be reserved for serious circumstances and situations in which the nation itself had expressed its desire to undertake constitutional changes.

In contrast to those who identified the silence of the 1837 Constitution as an absolute impediment to amendment, others authors deduced just the opposite. Such was the case of the –also moderate– Francisco Pacheco, who presumed that this silence was a proof of constitutional flexibility; because, according to him, to deduce unamendability from the absence of procedure

> "would be an absurdity. This would be equivalent to condemning societies to death (...) to deprive them of the right of conservation that they possess as individuals. The

> constituent power must reside in someone, since it is necessary for such cases (...) If the law does not expressly deny it, reason must interpret this silence as a tacit acquiescence (...) It follows from this, gentlemen, that the constituent power and sovereignty reside in a legitimate way, and with full rights, in the constituted powers of the nation" [Pacheco, (1845), p. 87].

Antonio Alcalá Galiano reached the same conclusion:

> "When, in the set of laws called Constitution, nothing is said about its unamendability or about the need for certain procedures to make greater or lesser variations on it, I believe that we must understand that the power to undertake any changes therein resides in the bodies or persons who are empowered to make laws" [Alcalá Galiano, (1843), pp. 421-422]

In any case, the answer to this dilemma –unamendability versus flexibility– can only be elucidated from the facts. And these leave no room for doubt: the 1837 Constitution was not amended, but replaced by a new constitutional text –that of 1845–; this could only mean that the prevailing view was that which identified constitutional silence with an absolute impediment to amendment.

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