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The Traces of Formalism

The Invisible Spanish Model of Constitutional Codification

PATRICIA GARCÍA MAJADO

I. Introduction

Although at first glance, amendment codification may appear to be simply a formal question, the way in which a Constitution incorporates constitutional amendments into its text has significant implications. Amendment codification deserves the attention of constitutional law scholars because it directly affects the constitution itself.

The way in which the Spanish Constitution codifies amendments has traditionally been overlooked in Spanish constitutional scholarship. There is no constitutional provision obliging amendments to be codified in any given way. There is no set form or model for doing so. Moreover, the issue was hardly discussed in the constitutional debates in 1978, nor did it attract any attention at the time of the two constitutional amendments to date, first in 1992 and then in 2011. Doctrinal studies on the subject have so far also failed to shed any light on the issue.

This is unexplored territory in Spain, yet is quite legally important. We need to interrogate the possible reasons for and consequences of the Spanish model of codifying constitutional amendments which, as I will explain below, follows the invisible model. Hence, my objective in the following pages is to demonstrate how a question of format – or what has been ingeniously called 'constitutional architexture'[1] – is based on substantive presuppositions. In other words, my aim is to explain how the fact that the 1978 Spanish Constitution follows a certain model of – invisibly – codifying amendments to the Constitution is not an accident, but rather a choice that is inherent to the Constitution's formalist conception of itself.

[1] See Akhil Reed Amar, 'Architexture' (2002) 77 *Indiana Law Review* 671.

The silence of Spanish constitutional doctrine in this respect may have something to do with this unquestioned, perfect alignment.

Bearing in mind that the two axes central to this work are formalism and invisibility – each unarguably a trait of the Spanish system – I will begin by explaining those starting points and constructing the subsequent analysis from there. I will explain why the Spanish Constitution is a merely formal Constitution and then why the Spanish model conforms to the invisible model of codifying constitutional amendments. Based on that, I will analyse how the invisible model is the best fit with this formal self-understanding of the Spanish Constitution. To that end, I will examine the strong link between invisibility and three fundamental traits of formalism that are clearly visible in the Spanish Constitution: the redundancy of repealed constitutional norms, the prohibition of implicit constitutional reforms, and the monopoly over constitutional change.

II. An Examination of the Spanish Constitution

When analysing the implications of the Spanish model of codifying constitutional amendments, it is necessary to begin by answering two questions that will guide the rest of this study. First, what type of Constitution is the Spanish Constitution? And, second, what type of codification model is used in Spain? These questions are addressed below.

A. Formalism: The Spanish Constitution as a Formal Constitution

The Spanish Constitution is the supreme law in the Spanish legal system. It stands at the top of the legal hierarchy. All other laws are therefore subordinate to it. If the Spanish Constitution is defined by its position within the legal hierarchy of the system, this means that it is not defined by the type of content it regulates, whether the subject is fundamental rights, the separation of powers or any other substantive rule. It therefore does not matter for analytical purposes whether the body of law defined as 'the Constitution' contains one kind of rule or another, or whether it is more or less democratic. As long as this body of law is at the top of the legal hierarchy, it is the Constitution. We know this to be true from constitutional provisions themselves and, fundamentally, from the clauses concerning constitutional amendment. In the Spanish Constitution, these are found in Title X.

The Spanish Constitution has no unamendable clauses. It is therefore completely amendable. There are no explicit or implicit limits to its modification. Very early on, the Constitutional Court declared that 'the Spanish Constitution, unlike the French or German, does not exclude the possibility of amending any of its clauses, nor does it place more express limits on the power of constitutional

amendment than those which are strictly formal and procedural'.[2] The Court went on to highlight that there was no 'legal core that is inaccessible to the processes of constitutional amendment', such that it is entirely possible for amendments to be made that aim to modify the foundations of constitutional order as long as they are carried out within the framework of the processes for amending the Constitution, as 'following those procedures is, in every case, obligatory'.[3]

Thus, it is possible not only to change what is in the Constitution, but also to change the Constitution itself, namely its foundational elements,[4] as long as the established procedure is followed. What in other legal systems of a similar level would amount to a constitutional substitution – the modification of basic structures of the constitutional text, which is often foreclosed by ordinary constitutional amendment – is, in Spain, permitted as a complete revision of the supreme law. This must be done using a special amendment procedure in Article 168. To put it another way, the Spanish Constitution makes revolution possible through law. From this possibility, we can again deduce formalism, as it will be the constitutional rules that are approved following the legally established amendment procedures. This ensures the validity of the 'form' of the Constitution, although its content may change completely.

In Germany after the Second World War, the most important thing was to ensure human dignity – which explains the existence of unamendable clauses in the first article of the German Basic Law. However, in Spain, after the difficult years of the Franco dictatorship, the essential idea was to respect pluralism and consequently to ensure that the various – and quite different – political and ideological options could coexist under the same higher law. This explains why the constitutional framers chose the most open Constitution possible, free of unamendable clauses. As a consequence, any person would be permitted to advocate to put any concept, idea or rule in the 1978 Constitution, as long as it was achieved through legally established procedures.

That, as the Constitutional Court made clear very early on, 'is a framework of sufficiently broad coincidences so that political choices of entirely different natures fit within it'[5] such that 'there is space in our constitutional order for as many ideas as people want to put forward'.[6] With that in mind, the content of the Spanish Constitution cannot be something that remains static by law. On the contrary, the nature of the Spanish Constitution is that it must be fully subject to the possibility of change. It is here that the formal conception of Constitution

[2] STC 48/2003, 12 March (SCC: Spanish Constitutional Court).

[3] STC 103/2008, 11 September.

[4] Benito Aláez Corral, 'El procedimiento de reforma constitucional cuarenta años después' in Ramón Punset Blanco and Leonardo Álvarez (eds), *Cuarenta años de una Constitución normativa* (Cizur Menor, Thomson-Reuters Aranzadi, 2018) 641.

[5] STC 1/1981, 8 April.

[6] STC 42/2014, 25 March.

makes its presence felt. A formal Constitution is not a militant Constitution[7] – protecting certain values or political options to the detriment of others – but rather an 'amoral' Constitution.[8]

This formalism, which can be seen quite clearly in the rules on constitutional amendment, can also be seen in other rules within it. These also show that the important idea in the Spanish system is to respect procedure but not to pursue, maintain or protect substantive political options. One example is in the regulation of political parties. With regard to Organic Law 6/2002, 27 June, on political parties, the Constitutional Court explained that such parties (and groups) were able to pursue whatever ends they wished or ideas they deemed appropriate, even if they were anti-democratic. All they were prohibited from doing was pursuing those ends or expounding those ideas through *activities or behaviours* which violated the law.[9] Therefore, parties can only be prohibited or made illegal for actions that break the law and not because their ideas do not respect democratic principles. The Constitution is indifferent to political choices; it demands only that legally established procedures be followed.

In summary, the Spanish Constitution is a formalist Constitution. And, most importantly, it is what it is, not because that is how the person writing this text interprets it, but because that is how the Constitution itself is designed to be. This can be deduced from the Constitution's own provisions and from Constitutional Court interpretations over more than 40 years. It is so because of the position the Constitution occupies in the legal hierarchy, not because of the *content* it regulates.

B. Invisibility: The Invisible Model as the Spanish Model for Codifying Constitutional Amendments

In order to identify the Spanish model of codifying constitutional amendments, we must start with the only amendments that have been made to the 1978 Spanish Constitution to date: first, in 1992 and then in 2011. These are the only amendments through which we can identify the model.

Before its amendment in 1992, Article 13.2 excluded foreign nationals from the rights to political participation in Article 23, 'except in cases which may be established by treaty or by law concerning the right to vote in municipal elections,

[7] The expression 'militant democracy' (*streitbare Demokratie*) is from Karl Loewenstein, 'Militant Democracy and Fundamental Rights' (1937) 31 *American Political Science Review* 417.

[8] Richard Albert, 'America's Amoral Constitution' (2021) 70 *American University Law Review* 773. This amorality has also been highlighted in Spanish legal scholarship. See especially Javier Jiménez Campo, 'Algunos problemas de interpretación en torno al Título X de la Constitución' (1980) 7 *Revista del Departamento de Derecho Político* 81, 87–90; and Pedro de Vega, *La reforma constitucional y la problemática del poder constituyente* (Madrid, Tecnos, 1985) 157–60, who talks about 'ideological indifference'.

[9] STC 48/2003, 12 March.

and subject to the principle of reciprocity'. The amendment added the words 'and the right to be elected' following the words 'the right to vote', recognising the rights of non-nationals to both vote in and stand for office in municipal elections – in the original Spanish version, the change was from 'active "o" [or] passive suffrage to active "y" [and] passive suffrage'. The reason for the amendment was to avoid any contradiction between the Spanish Constitution and the 1992 Maastricht Treaty that was under ratification at the time. This change is the only modified wording currently in the Constitution. The other amendment, of Article 135, was much more comprehensive. The full content of the article was changed, including, fundamentally, the principle of budgetary stability and the prioritisation of paying off the public debt over any other item due to the economic crisis of the previous decade. The result of the amendment was a completely new Article 135, which became much longer than the previous one: the new Article 135 comprises six sections instead of the two sections in the old Article 135. No trace of the old text remains in the new.

In both cases, the approved constitutional amendments were inserted directly into the text, replacing the rules that had previously been there, leaving no trace of that prior text in the new text. Nor is there any indication about the modification of the text in the Constitution itself. In effect, the very constitutional amendments, once approved, established that 'article (X) will be worded as follows: …'. The Spanish Constitution therefore only contains the new text, completely disregarding the previous wording. This is precisely what we expect to see in the invisible model of amendment codification.[10]

Before proceeding to analyse this model, a word of caution is in order. The official state bulletin website (Boletín Oficial del Estado (BOE)) publishes a consolidated version of the Spanish Constitution,[11] which includes all of the modifications and indicates which sections and clauses were subject to amendment. These give an indication of precisely what has been changed and when, including a link to the amendment act itself. There is also a link that provides access to the original text – it indicates when the text was approved and until when it was in force – so that it is possible to consult the current version of the Constitution and previous versions of it. However, the fact that this is so does not determine the identity of the Spanish model of codifying constitutional amendments, as it is a function only of the BOE website. The official (non-interactive) texts include only the amended content with no additional comment – hence our classification of Spain as an example of the invisible model of codifying constitutional amendments.

Despite their material differences and the difference in time between the two constitutional amendments, they do have some things in common. First, they were both partial modifications to the Constitution which followed the simple

[10] See Richard Albert, *Constitutional Amendments: Making, Breaking and Changing Constitutions* (Oxford, Oxford University Press, 2019) 238.

[11] See Boletín Oficial del Estado, www.boe.es/buscar/act.php?id=BOE-A-1978–31229.

amendment procedure in Article 167, as they did not affect the Preliminary Part, Chapter II, Division 1 of Part I, or Part II, changes to which would have required the more rigorous, special amendment procedure of Article 168. Second, both amendments were carried out through urgent procedures with a single reading, which allowed certain procedural hurdles to be bypassed and some deadlines to be halved. This means that they were both very fast constitutional amendments. Third, both amendments were driven by Spain's membership of the EU. The first was a consequence of the ratification of the Maastricht Treaty and the second, to a large extent, was a result of the pressure of EU fiscal policy in the context of the economic crisis in the then-preceding decade.

Are these peculiarities sufficient to explain the choice of invisibly codifying constitutional amendments in Spain? The answer is no. Even if constitutional amendments had been approved regarding other topics or of other kinds, and even if the special, extended procedure of constitutional amendment Article 168 had been used, the codifying model would have been similarly invisible. This choice, as we will try to demonstrate below, is a function of these contextual questions. The choice stems instead from the structural identity of the Constitution and from the formalist understanding that the Spanish Constitution has of itself.

III. Formalism and Invisibility: Two Sides of the Same Coin

Having analysed why the Spanish Constitution is a Constitution in a formal sense and how the Spanish model is invisible, the next step is to highlight the connection between these two issues. The aim is to explain why the latter follows from the former. This will require us to examine the link between the invisible model and three profoundly formalist traits of the Spanish Constitution: the redundancy of repealed constitutional rules, the prohibition of implicit constitutional amendments, and the monopoly over constitutional change in the hands of the constitutional amendment power.

A. Invisibility and the Redundancy of Repealed Constitutional Norms

The invisible model provides the most certainty about which constitutional rules are in force: only those that are visible are effective. The text of preceding constitutional rules disappears completely following an amendment. The key aspect is that in Spain, these rules are removed, not because there is a political desire to 'leave the past behind', but rather because it makes little legal sense for a formal constitution, as we will see below, to preserve rules that are no longer in effect.

From the formal perspective, the 'past' is only a repealed rule, a rule that has lost its validity in time,[12] and therefore a rule that no longer belongs in the legal system. For formalism, it makes no sense to preserve something that is no longer in effect (whether in the constitutional text itself or in footnotes) and hence is not part of the legal system. Why, paraphrasing Jellinek, drag around 'the dead weight of repealed laws'?[13] The invisible model, then, is the model which best succeeds in demonstrating that repealed rules no longer exist because they are deleted directly. It is the best demonstration that only rules that are in force should be 'visible' because it is only those rules that exist legally. The law itself, not its history in the form of repealed law, is what matters. The constitutional preamble – which does not have legal weight – would, in any case, be the right place to refer to this historical contextualisation or to changes that have been made.[14] However, in the Spanish Constitution, the preamble has never been modified.

The fact that this is the formal perspective does not mean to say that there are no reasons for preserving rules which are no longer in effect. It only means that the reasons for doing so are strange for a formal Constitution. For example, particularly with regard to the appendative model, it has been suggested that preserving prior constitutional rules may allow the people to 'learn from their mistakes', seeing what institutions or regulations there were in the past and how they have changed over time, and how society as a whole has progressed.[15] However, talk of 'mistakes' and, in contrast, 'successes' does not fit comfortably within a formal model of a Constitution, because that would be considering the content, which could be judged as 'good' or 'bad'. The formal model only deals with the categories of valid and invalid; there are no good or bad rules, no mistakes or successes.

If preserving prior constitutional rules serves to identify mistakes and successes, it seems evident that it would also serve to identify whether amendments were forward or backward steps, democratically speaking. Once again, from a formal point of view, it is not possible to talk about 'forward steps' or 'backward steps', but rather 'valid' or 'invalid' constitutional amendments, depending on whether the amendments were made following the legally established procedures, because amendments can change the Constitution completely. The Spanish rules for constitutional amendment are not a mechanism for defending or supporting

[12] Hans Kelsen, 'Derogation', in Donald Davidson, Jaakko Hintikka, Gabriel Nuchelmans and Wesley C Salmon (eds), *Essays in Legal and Moral Philosophy* (Dordrecht, D Reidel Publishing Company, 1973) 262.

[13] Georg Jellinek, *Reforma y mutación de la Constitución* (Madrid, CEC, 1991) 13.

[14] On the constitutional preamble, with particular reference to the Spanish Constitution, see generally Javier Tajadura Tejada, *El preámbulo constitucional* (Granada, Comares, 1997).

[15] See especially Reed Amar (n 1) 685–86, who highlights that preserving the original text is a way of calling attention to 'the arch of history'; Mehrdad Payandeh, 'Constitutional Aesthetics: Appending Amendments to the United States Constitution' (2011) 25 *Brigham Young University Journal of Public Law* 87, 114; and Albert (n 10) 244, who states that said text becomes a 'living history lesson' for today's generations.

democratic ideals and values (remember, there are no unamendable clauses), but are instead a mechanism allowing society's needs and demands to be reflected in the Fundamental Law, regardless of their content.[16] The important thing is not *what* is amended, but rather *how* it is amended – hence the formal nature of the Constitution.

Therefore, because they are repealed, the only reason for preserving prior constitutional rules would be extra-legal. They would only serve to assess, based on their content, those forward or backward steps produced by the various modifications to the constitutional text. This function is irrelevant for the Spanish Constitution, which is not concerned with content, but solely with the procedures used to incorporate that content – in short, it is concerned only with the means. The invisible Spanish model is therefore the model that best highlights that the only important thing for the legal system is the rules that are in effect: 'established' law. The Spanish Constitution only shows that which legally exists.

B. Invisibility and the Prohibition of Implicit Constitutional Amendments

The Spanish Constitution contains no instructions explaining whether amendments must be explicit or whether they could also be implicit. Nothing is said about whether amendments must specify what they are amending or whether the Constitution may be implicitly modified by laws that meet the procedural requirements for constitutional amendments yet contradict the constitutional text,[17] on the understanding that the later law repeals the previous law. However, this was explicitly addressed in the 1931 Spanish Republican Constitution, which specified in Article 125 that 'the proposal shall specify the article or articles that must be removed, amended, or added'.

This question was not ignored in 1978. In a discussion about constitutional amendment, the Independent Group presented amendment 649, which proposed including a section in what was then Article 161, specifying that: 'All amendments to the Constitution shall explicitly indicate the text to be modified or added.'[18] The reasoning for this, as explained by Senator Ollero, was to avoid implicit constitutional amendments. He explained why:

> It must be a general principle that all amendments of a text mean suppressing what has been modified. Ignoring this principle will only serve to produce constitutional confusion. A much more dangerous confusion in our case when what is being introduced in this project is a constitutional justice system, one of the specific functions of which is to create explanatory legal doctrine on constitutional matters. It will be difficult to clarify

[16] See generally Benito Aláez Corral, *Los límites materiales a la reforma Constitucional de 1978* (Madrid, CEPC 2000).

[17] See Karl Loewestein, *Teoría de la Constitución* (Barcelona, Ariel, 1979) 186.

[18] *Boletín Oficial de las Cortes* no 136, 26 July 1978, 271.

> anything from a legal standpoint if the texts are contradictory … Accordingly, this is why we propose the addition of a section 4 that prevents the possibility of these implicit constitutional amendments, which may distort constitutional order and guarantees.[19]

Senator Ollero would make the same argument in the Senate session on 5 October 1978,[20] again highlighting what that prohibition would contribute to the legal security of the system. Ultimately, however, he withdrew his proposal so as not to prolong the constitutional debates or delay the approval of the Constitution. The senator's speech, noted above, clearly advocated for the prohibition of implicit constitutional amendments. However, it seems inarguable that, at the same time, he was likewise advocating for the invisible model of codifying constitutional amendments. It was not for nothing that he said 'amendments of a text mean suppressing what has been modified'. This would not happen in either an appendative model, which would simply append changes to the end of the constitutional text, or in an integrative model, where the previous text would be preserved (for example, in footnotes). This need for 'suppression' of prior constitutional rules inevitably leads to the invisible model, which is characterised by removing them completely from the constitutional text.

Although the amendment put forward by the Independent Group did not succeed at the time, the Spanish Constitution, by the formal conception it has of itself, requires constitutional amendments to be explicit. If any law adopted using the procedures or with the majorities outlined in Articles 167 and 168 were treated as a constitutional amendment,[21] it would become extremely difficult to know what the Spanish Constitution was at any given moment.[22] Some of it would be found in the text formally called the Constitution and other parts would be disseminated through various laws meeting the characteristics noted above which contradicted the constitutional text. It would be rather complicated to distinguish a constitutional amendment from a law that was simply unconstitutional.

The Spanish Constitution avoids this risk by requiring amendments to pass through a stricter procedure than is used for laws – hence the fact that laws enacted using procedures meeting the requirements for constitutional amendment cannot be treated as constitution-level laws. The Constitution is defined by the supreme position it occupies in the hierarchy of the legal system. Because of that, constitutional amendments must be presented explicitly as such in order to

[19] *Diario de Sesiones del Senado*, no 52, 8 September 1978, 2518.

[20] *Diario de Sesiones del Senado*, no 67, 5 October 1978, 3329–30.

[21] As explained by Juan Luis Requejo Pagés, 'Artículo 167' in Miguel Rodríguez-Piñero y Bravo-Ferrer and Maria Emilia Casas Baamonde (eds), *Comentarios a la Constitución Española. XL Aniversario* (Madrid, Wolters Kluwer, 2018) 187, the problem of implicit constitutional amendment may only arise from the procedure of art 167 SC. The requirements of art 168 SC are so specific (calling an election and obligatory referendum) that it is practically impossible for a law to be approved by this procedure by chance.

[22] This risk was alluded to by Loewestein (n 17) 186.

allow their identification as higher law in the Spanish system.[23] If what matters, from the formalist point of view, is the 'form' of the Constitution, only explicit modifications allow us to know what that is at any time. With that being the case, the model of constitutional amendment codification that best fits with this is no doubt the invisible model. There is no more explicit constitutional amendment than one which not only says what it will modify in the Constitution, but one which, once approved, is inserted directly into the text, replacing the old with the new. The invisible model is therefore nothing more than the almost obligatory result of constitutional amendments in Spain having to be explicit.

That being the case, if it is the amending power that explicitly decides what is to be modified and with what wording, removing what is no longer in force, and directly inserting its will into the text, we might say that in Spain, whoever amends the Constitution also 'harmonises'[24] its meaning because the amending power determines where the modification is inserted and on what terms. Eliminating uncertainty in this way about the constitutional content that is in force avoids recourse to the Constitutional Court to decide about what has really been amended.[25] The Court, in such a case, would become a 'hidden sovereign'[26] – a covert power of constitutional amendment – whose existence would undermine the monopoly of constitutional amendment power established by the Spanish Constitution. We will address this point below.

C. Invisibility and the Monopoly of Constitutional Amendment

As the Supreme Law of the Spanish legal system, all of the powers of the State, without exception, are subject to the Spanish Constitution. This has unavoidable implications for constitutional change. The Constitution cannot be the supreme

[23] Ignacio de Otto, *Derecho constitucional. Sistema de fuentes*, 12th edn (Barcelona, Ariel, 2010). In contrast, see Fernando Santaolalla López, 'Art 167', in Fernando Garrido Falla (ed), *Comentarios a la Constitución Española de 1978*, 2nd edn (Madrid, Civitas, 1985) 2405; Javier Ruipérez Alamillo, *En torno a la reforma constitucional y a la fuerza normativa de la Constitución* (Valencia, Tirant lo Blanch, 2018) 248, although these authors preferred, for legal security and clarity, that amendments be explicit. De Vega (n 8) 162 ff also believes it to be preferable 'not to resort to the bad technique of implicit constitutional amendment'.

[24] See especially Albert (n 10) 246 who has used the term 'harmonization' to refer to the act of aligning the two texts, the original and the amended.

[25] The necessary intervention in these cases of 'an arbiter of disputes over constitutional interpretation' was highlighted early on by David E Kyvig, *Explicit and Authentic Acts: Amending the US Constitution, 1776–2015* (Lawrence, University Press of Kansas, 2016) 102. The existence of greater interpretive activity, particularly in the appendative model, is also highlighted by Payandeh (n 15) 124 f and Albert (n 10) 232–33.

[26] The expression is from Otwin Massing, 'Recht als Korrelat der Macht' [1967] *Der CDUStaat* 123, who reviewed and critiqued Peter Häberle, 'La sociedad abierta de los intérpretes constitucionales: una contribución para la interpretación pluralista y procesal de la Constitución' in *Retos actuales del Estado Constitucional* (Oñati, IVAP, 1996) 29, where we took it from.

law if it can be validly amended outside of the established procedures. That would suppose the existence of powers that are not subject to it, preventing it from being supreme law. This is exactly what prevents there from being a constituent power in Spain that, as such, could act outside of the constitutional provisions for amendment. Thus, the Constitutional Court has held that:

> The unconditional primacy of the Constitution requires that all decisions of power remain, without exception, subject to the Constitution, with no spaces for the public power free from the Constitution or areas of immunity from it. In this way the democratic principle is also protected, as the guarantee of the integrity of the Constitution must be seen in turn as preservation of the respect due to the will of the people, invested in constituent power, the source of all legal-political legitimacy.[27]

Consequently, 'the supposed democratic legitimacy of a legislative body cannot oppose the unconditional primacy of the Constitution' because:

> [T]he legitimacy of acts or policies of a public power basically consist of them conforming to the Constitution and the legal system. Without conforming to the Constitution, there can be no attribution of legitimacy. In a democratic conception of power, there is no more legitimacy than that founded in the Constitution.[28]

That being the case, once the Constitution is approved, there is no distinction between the constituent power and the constitutional amendment power.[29] The former dissolves into the latter, becoming a constituted-constituent power. It is constituent in what it can change (which is anything it wishes), and it is constituted insofar as it is subject to the rules that the Constitution itself has decided to establish.[30] Not for nothing did the Constitutional Court speak of 'constitutionalised constituent power in arts 167 and 168 SC'.[31] The formal conception on which the Spanish Constitution is based therefore leads to unified powers of constitutional reform, specifically to the existence of a single power of constitutional change which can make partial or total modifications of the foundational text. All that is required is conformity to the established procedure for making these modifications.

The invisible model of codifying constitutional amendments is therefore the model that best reflects this unity born of formalism. Why is this the case? When other models of constitutional amendment's codification are used, such as the appendative or the integrative models, there are really two texts: the original – maintained in some form (in the text, in footnotes etc) – and the result of the amendment. The preservation of the two texts highlights that there are two distinct

[27] STC 42/2014, 25 March.

[28] STC 259/2015, 2 December.

[29] On this distinction, in classical terms, see the work by Emmanuel-Joseph Sieyès, *Qu'est-ce que le tiers état?* (Paris, PUF, 1982) and John Locke, *Two Treaties of Government*, Book II, ch XI (Guernsey, Guernsey Press, 1986).

[30] Raymond Carré de Malberg, *Contribution à la théorie générale de l'État*, vol II (Paris, Recueil Sirey, 1922) 497.

[31] STC 259/2015, 2 December.

powers of constitutional change, which may both act in the present: the constituent power and the constitutional amendment power.[32] In effect, it indicates what each one has done. As such, this is consistent with the idea of preserving in some way the basic constitutional design of the constituent power.[33]

In contrast, the Spanish Constitution, by directly inserting modifications into the text, removing prior rules and not having any additional reference to the modification, shows that there is only a single text, whether it is the result of the moment of constitutional creation or a subsequent moment of constitutional amendment. There are no longer two texts – the old and the new – only the latter. This is consistent with the existence of a single power of constitutional change in Spain. If, after the approval of the Spanish Constitution, the constituent power disappeared and there were only an amending power which was materially unlimited and which could therefore completely change what the first power decided, why preserve what the constituent power had created if it no longer exists and everything it did can be altered? Why, in short, differentiate between what the two powers did if only one exists in the present, and therefore only one may act in the present? The logic underlying the invisible Spanish model is therefore plain and powerful: there exists a single power of constitutional change and a single constitutional text.

Closely linked to that, the invisible model is also consistent with the existence of a single type of constitutional rules. All of the rules in the Spanish Constitution have the same legal weight because they all occupy that supreme position in the legal hierarchy, regardless of their actual content. They are therefore all equally 'constitutional'. Proof of that is that they can all be modified by the amending power. If some of them could not be amended, they could be said to be hierarchically superior to the rest but, as we have already seen, this is not the case in Spain.[34] The invisible model demonstrates, better than any other, the equal weight of the provisions of the Constitution. To put it another way, the invisible model shows that there is no distinction between the true 'Constitution' (which would be only within the reach of constituent power) and mere 'constitutional law'

[32] Payandeh (n 15) 101–05 highlights exactly the argument related to the existence of two 'sources of authority' (constituent power and amending power) as one which was argued in the First Congress of the US to choose the appendative model of codifying constitutional amendments. On this discussion in the First Congress, in which integrating the amendments in the Constitution was seen as substituting rather than reforming it, see generally Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* (Cambridge, MA, Belknap Press, 2018) 164 ff; Edward Hartnett, 'A "Uniform and Entire" Constitution; Or, What if Madison Had Won?' (1998) 15 *Constitutional Commentary* 251; Jason Mazzone, 'Unamendments' (2005) 90 *Iowa Law Review* 1447, 1778 ff; Price Marshall, '"A Careless Written Letter": Situating Amendments to the Federal Constitution' (1998) 51 *Arkansas Law Review* 95.

[33] This relationship between the Indian doctrine of the basic structure and the integrative model of codifying constitutional amendments that system follows has been noted by Albert (n 10) 238.

[34] However, the opposite happens with other models of codifying constitutional amendments. With regard to the appendative model, it is suggested that it allows separation to be maintained between 'the two classes of constitutional norms'. See Carlos González, 'Representational Structures through Which We the People Ratify Constitutions: The Troubling Original Understanding of the Constitutions' Ratification Clauses' (2005) 38 *University of California Davis Law Review* 1373, 1491.

(which would be susceptible to change by the amending power).[35] Consequently, the constitutional rules arising from amendments, regardless of their content, are not inferior to the original rules created by the constituent power; they are their equal. Later rules (the amendment) simply overwrite and eliminate the previous ones (the original). This complete replacement (and elimination) is a perfect demonstration of this hierarchical equality. The existence of a single type of rule (what we identify as the Constitution) produces a single power of constitutional change, and thus a single text.

In summary, the invisible model, by eliminating previous constitutional rules, is the model of codifying constitutional amendments that best shows this idea of unity underlying the Spanish Constitution. Consequently, rather than transmitting this image of preservation, as other models do, the invisible model best transmits an idea of dynamism – absolutely everything can be changed. By overwriting the text, the invisible model best echoes the 'omnipotence' of the constitutional amendment power and therefore the mutability of the Spanish constitutional system, in which there are no absolutes and everything is subject to potential change by the current generation.

IV. Conclusion

The Spanish Constitution contains no provisions on how to codify constitutional amendments, nor was this issue a subject of discussion during the constituent debates. However, this does not mean that the choice of such a model was accidental or thoughtless. As the best fit with the conception that the Spanish Constitution has of itself, the invisible model seems to have been seen as the only possible option. And in any event it has never been questioned.

Although it may not be initially apparent, formalism and invisibility maintain a close relationship in the Spanish Constitution, as two sides of the same coin. There are three main areas where this close relationship can be seen. First, the invisible model best demonstrates the invalidity of repealed constitutional norms by removing them completely from the constitutional text. A formalist constitution is reluctant to preserve rules that are no longer in effect. Second, this model aligns best with the requirement that Spanish constitutional amendments ought to be explicit. There is no reform more explicit than that which is inserted directly into the articles of the constitutional text, replacing the old with the new. Third, the invisible model best demonstrates that in Spain there is only one power of constitutional change: the derivative power of constitutional amendment. Thus, the existence of a single unified text – rather than two, as in other models such as the appendative or the integrative – shows that there is a single normative will which is, in fact, substantially unlimited. Understood in this way, invisibility is the purest expression of the sovereignty of constitutional amendment power.

[35] This classic distinction is from Carl Schmitt, *Teoría de la Constitución* (Madrid, Alianza Editorial, 2011) 57.