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The parliamentary opposition in Spain: Theory and practice*

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1. *The lack of a constitutional statute for the opposition in Spain.*

Unlike its neighbours France and Portugal (as well as other countries such as Colombia and Ecuador), the opposition in Spain lacks a legal statute. Only in the Autonomous Community of Catalonia is there a statute for the leader of the opposition[1]. This does not mean to say, of course, that the opposition in Spain does not enjoy constitutional-legal protection. As observed by constitutional scholar Giuseppe de Vergottini – and irrespective of whether this expression means something beyond democracy, pure and simple – Spain cannot be considered a regime with a 'guaranteed opposition'[2]. One of the higher values of the Spanish legal system, as enshrined in Article 1.1 of the Constitution, is political pluralism, and to guarantee this, both the fundamental law and the parliamentary regulations establish a number of tools and guarantees to ensure that the opposition can fulfil its function. As is characteristic

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[1] Vid. Article 77 of the Regulation of the Parliament of Catalonia.

[2] Cf. G. De Vergottini, *La forma de gobierno de oposición garantizada*, in *Teoría y Realidad Constitucional,* 9, 1979, p. 5 ff. However, it is doubtful that this supposed form of government contributes anything new to the concept of the democratic form of government. It seems more consistent to understand the guarantee of opposition as an essential element of democracy (Cf. M. Fondevila Marón, *The protection of political minorities in the European context,* in S. Baldin – A. Di Gregorio (eds), *The legal and political conditions of political parties in central and Eastern Europe,* Trieste, 2023, p. 16 ff.).

of a parliamentary regime, the Spanish Constitution establishes that the Cortes Generales control government action (Article 66), that the government is accountable to the Congress of Deputies for its political management (Article 108), that the government is subject to interpellations and questions put to them in the houses (Article 111) and that the Congress can challenge the government using a motion of no confidence (Article 113). The parliamentary regulations expand upon these and other issues, from the possibility of introducing amendments to laws to creating commissions of enquiry. Therefore, to speak of the lack of a legal statute for the opposition is to speak of the non-existence of a regulation that expressly enshrines its rights and duties. In this respect, it is very characteristic of the Spanish founding charter that the term 'opposition' as such does not appear in it.

However, all things considered, and given that the opposition does have certain recognized rights that guarantee its existence and grant it the capacity to act, it might be thought that the issue lacks real academic and political relevance, and could be reduced to a mere point of legislative technique. Indeed, few of Spain's neighbouring democracies have this express statute. This is doubtless due to the radical transformation that political regimes, and especially parliamentary regimes, underwent during the twentieth century, when governments gradually increased their political influence and power to the detriment of parliaments, few of which today can faithfully argue that they are really capable of controlling government action, let alone demanding that they be politically responsible. While in the mid-twentieth century French political scientist Maurice Duverger asserted that, along with the classic division of powers that established a series of checks and balances between the legislative, executive and judicial branches, another division of powers existed between the government and opposition parties[3]. Indeed, it was later – and correctly – asserted that the latter division of powers ended up replacing the former[4]. As such, it is difficult for the legislative branch to counteract executive action and the majority party, termed the 'modern prince' by Marxist thinker Antonio Gramsci[5], has been described as the place where political parties formalize previously adopted agreements[6]. In the current 'partitocratic state'[7], the majority party (or majority coalition) can potentially monopolize all the important positions in the state institutions. In any case, the majority party – or, rather, its leader – controls most of parliament and the executive branch and also influences judicial power through appointments. For these reasons, and because today's political party is a double agent of, on the one hand, the voters

[3] Cf. M. Duverger, *Los partidos políticos,* Madrid, 1957, p. 438.

[4] Cf. P. De Veja García, *Obras escogidas,* Madrid; 2017, p. 516.

[5] Cf. A. Gramsci, *Notas sobre Maquiavelo, sobre política y sobre el Estado moderno,* Buenos Aires, 1971, p. 28.

[6] Cf. M. García-Pelayo, *Obras Completas,* Madrid, 2009, p. 2014.

[7] The term *Parteienstaat*, sometimes translated as 'partitocratic state', was coined by Heinrich Triepel in 1927 (Cf. H. Triepel, *La Constitución y los partidos políticos,* Madrid, 2015, p. 14).

and on the other, transnational bodies[8] that often lack democratic legitimation, it is necessary to advocate that minority parties – whether they lost the elections or won them, but were unable to form a coalition government – fulfil a significant institutional and constitutional role.

2. *An implicit constitutional statute?*

At this point, the following question arises: even if no explicit statute exists, is it possible to speak of the existence of an implicit statute? Some authors have answered this question in the affirmative, based on the ideal model of parliamentarism enshrined in the Spanish Constitution, fundamentally in Titles III, IV and V[9]. However, it is important to avoid the risk of confusing the parliamentary legal statute with a legal statute for the opposition. Usually, constitutions in parliamentary regimes, as well as parliamentary regulations – and this clearly applies to Spain – establish the rights of (all) the parliamentarians and not the specific rights of the opposition. In some cases, such as the Venice Commission Rule of Law Checklist[10] regarding the parameters that define the relationship between the parliamentary majority and the parliamentary opposition in a democracy, there is an apparent mix of both approaches, since this document contains demands relating to both types of statutes. There is no harm in this, as long as it does not produce conceptual confusion. The opposition statute must be founded upon an appropriate parliamentarian statute, with all parliamentarians allowed to ask questions and make interpellations, to present amendments, legislative proposals and the like, benefitting, a priori, the opposition members of the house above all. Furthermore, if, for example, qualified majorities are required to appoint members of constitutional bodies, while a minority has the ability to summon parliament or even, in some systems, call for a referendum, this also provides the opposition with guarantees. Finally, the possibility that a minority of deputies can lodge an appeal against unconstitutionality constitutes a guarantee for the opposition as well. However, none of this forms part of an opposition statute, as would giving the opposition more opportunities to ask questions during parliamentary debates than the

[8] Cf. J-J. Ruiz Ruiz *El gran ausente: por un estatuto de la oposición política tras 40 años de Constitución,* in *Revista de Derecho Político,* 2018, p. 275.

[9] Cf. J-F López Aguilar, *La oposición parlamentaria y el orden constitucional,* Madrid, 1988, p. 169.

[10] Vid. Opinion 845/2016 of 24 June 2019 [CDL-AD(2019)015].

majority deputies (also a component of the Vienna Commission checklist). As established by the Spanish Constitutional Court, the party affiliation of political representatives has legal – and not only political – significance[11]. The related case decided by the High Court concerned the exclusion of opposition councilmembers from most of the advisory committees in a Spanish city hall by agreement of the councilmembers from the majority party. Specifically, of the five committees created, four exclusively contained councilmembers from the majority. The Court determined that the non-proportional composition of these committees was unacceptable, that it amounted to a divided assembly and, thus, that it prevented the minority from participating in decision-making.

Given that the idea of an implicit opposition statute can be confusing, it may be preferable, in the interest of clarity, to replace it with the idea of the guarantee of opposition as a determining factor in a democracy. For instance, it is possible to speak of an implicit constitutional opposition statute in the German Constitution of 1949, with the Federal Constitutional Court (*Bundesverfassungsgericht*, or FCC) deriving a 'right to opposition' and specific rights of the opposition fundamentally from Articles 5, 8, 9, 17, 21 and 38 of the Constitution, in addition to Article 92.3 of the Penal Code[12]. The FCC, in fact, understood that freedom of opposition is a characteristic of a liberal democracy, recognizing the opposition's right of access to parliament and to give its opinion regarding the formulation of laws. It also recognized a general right on the part of the opposition to criticize the majority. However, the interpretation of both items was very limited. Firstly, this freedom was not extended to the right to parliamentary initiatives or to undertake the third reading of bills. Moreover, when the opposition complained that the speeches made in parliament by the government, combined with those of the parliamentary majority, were taking up much more time than was allotted to them, the FCC dismissed the claim for compensation, saying that the government's speeches could not be considered simply and exclusively an additional, expanded representation of the majority point of view[13]. Moreover, the German Court interpreted the rights of the opposition in a restrictive way, allowing it to freely criticize the majority, but not giving it the function of oversight, which falls solely within the scope of Parliament. Nor can it be considered an organic part of the

[11] Vid. STC 32/1985, FJ 2º.

[12] Cf. L. Mezzetti, *Giustiza Costituzionale e oposizione parlamentare. Modelli europei a confronto,* Rimini, 1992, pp. 50-68.

[13] Vid., BverFGE 1, 44 (151) and 10, 4 (49).

parliament or exercise its own rights in this respect (a matter for parliamentary groups alone), with the *Bundesverfassungsgericht* also avoiding any clear assertion of a right to equal opportunities for the opposition with respect to the government. Clearly, it would be difficult for particular rights, different to those of other political representatives, to be derived from an – always supposed – implicit statute. This is only logical, since in no way can this be derived from the principles of parliamentarism. Accordingly, it is no surprise that the French Constitutional Council, in a decision favourable to reform by Constitutional Law 2008-724[14], declared a reform of the rules of procedure of the National Assembly unconstitutional, as it categorized the parliamentary groups as 'majority' and 'opposition', conferring on the latter certain types of specific rights (like obtaining reports on the application of laws and the presidency, and summaries from commissions of enquiry), considering that this accorded unjustified unequal status in violation of Article 4 of the Constitution of 1958.

Any legal opposition statute worthy of its name must guarantee equality of arms between the opposition and the government. This means giving opposition representatives specific rights that are, therefore, different to those of the representatives from the majority. Politically and constitutionally, the government – as enshrined in Article 97 of the Spanish Constitution (although this is true of almost all democratic governments) – directs domestic and foreign policy, civil and military administration and exercises executive and statutory authority, in addition to the possibility of legislating virtually without limits by decree and choosing which media outlets will be hired to handle institutional publicity. This gives the government a privileged position that must be counteracted by the opposition. However, the rights conferred upon the opposition cannot involve decision-making, since in a democracy, majority rule governs, and for that very reason, the minority cannot be allowed to bring government to a standstill using the filibuster. At this time of 'counter-democracy'[15], to paraphrase historian Pierre Rosanvallon, political regimes are characterized above all by the blocking options available to various actors, but this must not extend to the point of impeding reasonable governance by the majority.

[14] Vid., *Décision* 2006-537 DC.
[15] Cf. P. Rosanvallon, *La contrademocracia: la política en la era de la desconfianza,* Buenos Aires, 2007.

3. The tools of the parliamentary opposition

3. 1. Parliamentary tools to control the government

According to the Spanish Constitution (Art. 66.2), the Cortes Generales, amongst other powers, control government action. This function is exercised through the following mechanisms: investiture (Art. 99); information requests which, according to Constitutional Court Ruling (henceforth STC) 203/2001, are embedded in the constitutional power of control attributed to the Cortes by Article 66.2; questions and interpellations (Art. 111.1)[16]; motions with and without prior interpellation and resolutions in which the house makes known its position regarding a particular matter or urges the government to act in a specific way (Art. 111.2); constructive motions of no confidence (Art. 113), motions of confidence (Art. 112) and appearances (Art. 110).

In short, these are the mechanisms of a rationalized parliamentary regime. These mechanisms are not specific to the opposition, but with controlling government action being a function of the houses, they fall to the parliamentary groups. However, the increasing importance and dominance of government vis-à-vis the houses and growing polarization have had a combined effect on several of these tools. The 11th Congress of Deputies (the shortest in Spain's constitutional history, spanning only 111 days between 16 January 2016 and 13 May 2016 after the elections of 20 December 2015) put an end to the period of two-party rule in the country, and for the first time, the Congress of Deputies was unable to invest a prime minister. After the obligatory dissolution of the Cortes provided for by Article 99.5 of the Constitution in such cases, new elections were held on 26 June 2016, producing the 12th Congress of Deputies after the constitution of the Cortes on 19 July, but with the formation of the government further delayed until 29 October of that year. In other words, for 203 days Spain had a caretaker government with restricted power[17], a consequence of being in a state of prorogation. The unusual result was this caretaker government working alongside a parliament with full powers. This raised the question of whether this temporary government should be subject to the control of the Cortes[18]. For the government, this subjection did not exist, as there was no vote of confidence (the

[16] The questions can concern any issue that rests with the government, while the interpellations affect the behaviour of the government related to overall policy and must, unlike questions, be lodged during the plenary session.

[17] Vid., Art. 21 of Law 50/97 of the Government.

[18] For an exhaustive analysis of this issue, cf. D. Delgado Ramos, *Problemas actuales del Derecho Parlamentario,* Madrid, 2018, pp. 19 and ff.

Cortes had not invested it), while for the houses, this amounted to a constitutional fraud that deprived deputies and senators who had legitimately won a seat in their election of their primary responsibilities. STC 124/2018 resolved the matter, ruling that the government criterion infringed Article 66.2 of the Constitution.

Especially in the current political climate, it is not uncommon for the government's responses to interpellations and questions to be vague, imprecise, discursive or even aggressive towards the questioner. The problem in these cases is that there is no efficient remedy. Even regarding a right like access to documents and information in the hands of the government, in accordance with recent constitutional jurisprudence, the deputies lack an effective defence in the parliament. In STC 165/2023, the Court analysed a conflict that arose from an unsatisfactory response on the part of the government to a request for information. The affected deputies requested protection from the president of the house, who rejected them, claiming that material control of the response offered by the government was not a matter for that body. When the question came before the Constitutional Court, it decided, in a 7-to-4 ruling, to dismiss the appeal brought by the opposition deputies, arguing that the Regulations of the Congress of Deputies (RCD) did not contain any provision that allowed the president to evaluate the government's response[19]. However, the particular vote for this ruling signed by the four dissenting judges argued that the majority ruling omitted the fact that the governing body of the house always has a duty to ensure the rights of the minorities. The primary impediment to this is that the presidency of the house is a majority entity, in the sense that the holder is elected by the majority of the members.

The use of the motion of no confidence has changed considerably as a consequence of the new political situation. It could be argued that before 2015, it was so difficult for this measure to be successful in practice that, strictly speaking, its role as a mechanism for political control was dubious. From 1978 to 2015, the tool was only used on two occasions: the first by then Deputy Felipe González against Prime

[19] This differs from what is provided for in the regulations for the parliaments in some autonomous communities like Catalonia (Arts. 7, 8 and 219 of the regulation), where if the president determines that the requested information should be provided, they 'must communicate their decision to the responsible authority so that it is immediately enforced', and if it is not, other types of action come into play (questions for the government, appearances by the authority who refused to provide the information, motions for resolution or even the application of the penalty system related to the transparency law). The Regulations of the Congress of Deputies, on the contrary, do not provide for any type of action by the highest authority in the house. In fact, the appeal to the president for protection made by the deputies in this case was based on a custom stemming from Article 32 of the RCD.

Minister Adolfo Suarez in 1980, and the second in 1987 by Senator Antonio Hernández Mancha against Prime Minister González. In both cases, the motions failed, but while the first launched the candidate politically – his Spanish Socialist Workers' Party, or PSOE, won a large majority of 202 (out of a total of 350) deputies in the following elections – the second motion resulted in the ostracism of the candidate. The results explain why one of the actions was enormously useful and the other political suicide: Gonzalez's motion received 152 votes in favour, 166 against and 21 abstentions, while Hernández Mancha received only 66 votes in favour, 195 against and 71 abstentions. Between 2015 and 2023, three motions of no confidence were submitted. The first was presented by Podemos Party leader Pablo Iglesias against Prime Minister Mariano Rajoy of the People's Party, or PP; the second by PSOE leader Pedro Sanchez, again against Prime Minister Rajoy; and the third by the far-right Vox party through an independent candidate against Prime Minister Sanchez. The first was only symbolically effective, with 82 votes in favour, 170 against and 97 abstentions, and did not benefit the political career of the candidate, who holds no position as of 2024. The second motion, on the other hand, was successful, with 180 votes in favour, 169 against and 1 abstention. After the victory, Pedro Sánchez called for elections, which produced the aforementioned 11th Congress of Deputies. The third motion of no confidence was a farse; the candidate chosen to present it was a nonagenarian who began his political activity in the 1950s with the Communist Party, and it was clear that, even if he had been successful, he was not a candidate for the presidency of the government. This last motion received 52 votes in favour and 298 against. Above all, these last three motions demonstrate the flimsiness of a constitutional design intended to guarantee political stability, but actually fostering the contrary: when a government does not have an absolute majority (the norm in recent years), the motion may be successful, but this in no way means that the incoming government will find it possible to govern.

Finally, the use of the motion of confidence has been described as scarce and anomalous. It has only been employed twice, once by Adolfo Suarez to counteract the motion of no confidence presented by the PSOE four months earlier, and in 1990 by Felipe González to remedy an erroneous vote for investiture during the 4th Congress of Deputies, when not all the deputies participated due to some appeals against the election results. In both cases, confidence in the government was maintained. Indeed, more than a tool of control characteristic of a model of rationalized parliamentarism,

this motion served to politically reinforce governments that had the support of the house.

3. 2. The parliamentary opposition before the Constitutional Court[20]

At national level, the two primary mechanisms available to the parliamentary opposition vis-à-vis constitutional jurisdiction are the appeal against unconstitutionality (also known as the constitutional challenge) and the appeal for protection (also known as the writ of amparo). The former is, in fact, the primary recourse accessible to political minorities to preserve their rights in a state of law where constitutional justice is exercised. Moreover, because political minorities can defend themselves from possible abuse by the majority in court proceedings, and because the Constitution is a law imposed on the governors and the governed that all jurisdictional bodies – including, ultimately, the Constitutional Court – are obliged to protect and enforce, in a democratic state, no other forms of resistance are acceptable. The corollary to this is that in a state of law, it is primarily the political minorities that, as they look after their own interests, also look after the guarantee of constitutional supremacy. For that reason, they must have standing. When in cases like, for example, Turkey, this standing is given to the principal opposition party, it forms part of a specific statute. In Spain, although standing is granted to, amongst others, 50 deputies and senators, regardless of whether they are from the government or the opposition (without, therefore, being designed as a specific right of the latter), the result is a tool primarily intended for the opposition.

In any case, the appeal against unconstitutionality is always objective in nature, as clearly supported by STCs 4/1981, 5/1981 and 17/1990. The reasons why the opposition – or in the particular case of Spain, the 50 deputies who belong to the opposition – lodge an appeal may be political. However, if only the majority bodies (prime minister, assemblies, the executive branches of the autonomous communities) could lodge such an appeal, because the Constitutional Court operates an adversarial system, the result would be entrusting the defence of the Constitution to the very individuals who have a greater interest in violating it and more opportunities to do so[21].

[20] For a more detailed examination of this topic, see M. Fondevila Marón, '*Oposición política y justicia constitucional*' in *Anales de Derecho,* 2023, p. 91 ff.

[21] Hans Kelsen used this same argument against Carl Schmitt to oppose giving the President of the Reich custody of their country's Constitution (Cf. *La polémica Schmitt/Kelsen sobre la justicia*

There is, therefore, a predominant public interest in ensuring that the Constitutional Court perform its function of keeping the legal system up to date and removing any laws in violation of the Constitution.

Some Spanish constitutionalists since the 1990s have questioned the central role assigned to the Constitutional Court[22]. The substance of their arguments is a criticism of the possibility that the Court could serve as a tool for the minority against the majority. Using this type of argument, and asserting that the opposition had used the Court as an obstructionist tactic, Organic Law 4/1985 eliminated an earlier appeal regarding autonomy statutes and organic laws initially provided for in Spanish legislation, which was then recovered, albeit only with respect to draft bills, by Organic Law 12/2015. That argument was fallacious, in that there were seven appeals lodged and four – at least partially – estimated (including a key resolution for the Spanish legal system, STC 76/1983). Moreover, this occurred during a parliamentary term in which the dominant party filled 202 of the 350 seats in parliament, 95 more than the main opposition party. This argument was also levelled against the appeal against unconstitutionality in general, since most of these challenges in Spain have not been presented by the opposition. In fact, a true cause for criticism from the perspective of this study is the fact that Article 162.1. a) of the Constitution does not legitimize the minorities in the autonomous communities to lodge an appeal against unconstitutionality, at least with regard to the law of their respective community[23].

The appeal for protection (especially as provided for in Article 42 of the Constitutional Court Organization Act, or LOTC), in turn, has also been used as an tool by opposition parliamentarians to defend their rights. In a considerable number of rulings on this type of procedure, the Court has constructed an entire 'theory of representation'[24] around Article 23 of the Constitution. This has involved indicating,

constitucional: el defensor de la constitución versus ¿Quién debe ser el defensor de la Constitución?, Buenos Aires, 2009, p. 293).

[22] Cf. F. Rubio Llorente, *Tendencias actuales de la jurisdicción constitucional en Europa,* in F. Rubio Llorente – J. Jiménez Campo, *Estudios sobre la jurisdicción constitucional,* New York, 1998; L-Mª López Guerra, *Los retos al Tribunal Constitucional español desde la perspectiva del "constitucionalismo politico",* in *Anuario Iberoamericano de Justicia Constitucional,* 2021.

[23] Cf. J. Ruipérez Alamillo, *La protección constitucional de la autonomía,* Buenos Aires, 1994, p. 155. This author also criticizes the limitation that Article 32.2 of the Constitutional Court Organization Act establishes for filing an appeal for unconstitutionality (only against laws or acts with the force of law 'that may affect its sphere of autonomy'), which is not found in Art. 162.1 a) of the Constitution.

[24] Cf. E. Martín Núñez, *La garantía jurídica de la democracia como derecho fundamental. Un análisis de la jurisprudencia del Tribunal Constitucional sobre la participación política*, in *Revista Catalana de Dret Públic,* 2008, p. 4.

on the one hand, that the right to access (*ius ad officium*) guaranteed in Section 2 of this article also incorporates, as an 'additional guarantee', the right of parliamentarians and their groups to exercise office on equal terms and within parliamentary law (*ius in officium*) – without which the first right would be completely undermined – and, on the other hand, the close connection between this 'additional guarantee' in Article 23.2 of the Constitution and the fundamental right of citizens to participate in public affairs via their representatives recognized in Article 23.1 (for all the rulings, STC 39/2008). With these premises, the jurisprudence of the Constitutional Court guaranteeing the equal standing of all members of parliament will hold, as a thesis, that the breach of regulations is an infringement of the second section (in relation to the first) of Article 23, revisable subject to constitutional relief. This constitutional provision is conceived by the Court as a 'legal definition', by which any right recognized by law (from creating a parliamentary group to the prohibition on prematurely dissolving a commission of enquiry, to the possibility of bringing questions, motions, requesting appearances, etc.) forms part of this *ius in officium*.

Although these constitutional processes have – without being specially designed for this purpose – helped to guarantee the role of the opposition, from the point of view of a legal statute per se, it would be useful if some of them, for instance the conflict between constitutional bodies, actively legitimized the opposition[25]. Something of this sort occurs in Germany, where in accordance with Article 63 of the Federal Procurement Act, parliamentary groups, amongst other subjects, can initiate this procedure, even before parliament, challenging the will of the majority.

3. 3. The lack of coordination mechanisms between the parliamentary opposition and the general opposition

An opposition statute does not merely involve the regulation of the parliamentary opposition. Especially at a time characterized by the existence and actions of counterweights, there is a need to regulate the non-parliamentary (or in the terms of the Venice Commission, 'general') opposition. The reasons for this are both legal and political, with the former related to the demand for transparency and the

[25] See, in this respect, J-A Montilla Martos, *Minoría política y Tribunal Constitucional,* Madrid, 2002, p. 115.

latter to the failure of some political groups on the far left – especially Podemos – to organize their social base around their parliamentary group.

Leaving aside here questions regarding the need for a regulation that does not criminalize expressions of protest, which must be protected under the freedom of expression, there is a need to formalize channels for dialogue between the parties with parliamentary representation and social agents. Spain has no specific regulations governing lobbies and interest groups. Instead, the ethical codes of conduct for the members of the upper and lower houses contain a rather feeble regulation regarding making parliamentary agendas public[26]. This regulation, which is clearly insufficient, has not successfully eliminated suspicions about possible hidden agendas[27] and undeclared interests amongst the parliamentarians. For these reasons, it would be more than appropriate to incorporate these groups into the parliament, bringing social and parliamentary groups into contact, without merging them. This is not, as has been suggested[28], because of the risk of succumbing to corporatist temptations – since the deputies really only represent those who voted for them – but because it is one thing to build bridges between different democratic participation and discussion forums, and quite another to confuse them.

4. The change in the party system and the new government-opposition dialectic

4.1. The end of the two-party system

The Constitution and the election laws are designed to guarantee the stability of the government by laying the foundations for a party system with four national parties, where the two primary parties (the most centrist) have an advantage over the other two[29]. This was certainly the case for more than three decades, between 1982 and 2015, although the first symptoms of instability in the system could be detected at the

[26] Vid. Article 9 of the Code of Conduct for the Members of the Parliament of Catalonia and Article 6 of the Code of Conduct of the Cortes Generales.

[27] Cf. D. Fernández Cañueto, *Representación política y relación representativa en España: entre el debate tradicional y el actual* in J. Tudela et al., *Libro blanco sobre la calidad democrática en España,* Madrid, 2018, p. 170.

[28] Cf. A. Garrorena Morales, *Escritos sobre la democracia- La democracia y la crisis de la democracia representativa*, Madrid, 2014, p. 204.

[29] Cf. A. Torres del Moral, *El estado español de partidos,* in *Revista del Centro de Estudios Constitucionales,* 1991, p. 103.

beginning of the second decade, a consequence of the existence of regional nationalist parties with sufficient representation to determine the investiture of the government. When political scientist Giovanni Sartori rated Spain as a political system with a 'stable and effective' government in 1994, he did so because one party had been dominant in the country since 1982[30]. Indeed, between 1982 and 1993, the socialist PSOE enjoyed three consecutive absolute majorities. However, when the Catalan parties with representation in the government became decisive for governance in 1993, the politicians began to recant. When Prime Minister Felipe González gave 15 per cent of the personal income tax (IRPF) to the autonomous communities in exchange for their support during his investiture, the PP – which governed in a number of the autonomous communities at the time – vehemently opposed the move. However, when PP leader Jose María Aznar needed the support of the Catalan Convergence and Union (CIU) party to govern in the following legislative term, he handed over 30 per cent of the IRPF. Similarly, after the fourth absolute majority in Spain between 2000 and 2004, this time under the PP, came to an end and the PSOE won once again, Prime Minister José Luis Rodríguez Zapatero and Minister of Labour Jesús Caldera approved the return of documents and photographs from the National Historical Archive in Salamanca to Catalonia (despite Zapatero having repeatedly opposed this transfer when he was in the opposition and Caldera having participated in a public march against the move). The prime minister also promised to approve the text of any statutory reform presented to him by the Catalan parliament, with the second in command in the Republican Left of Catalonia Party threatening that if the prime minister did not keep his promise, 'he would have to go'. The result was an autonomy statute that clearly overreached the Constitution, followed by the subsequent STC 31/2010, which – despite the Court's tremendous restraint – produced not only a significant division and loss of credibility for the Constitutional Court, but also obvious discontent amongst the citizens of Catalonia. However, probably the greatest exercise in recantation occurred with Prime Minister Sánchez, when his investiture depended on the support of Catalan nationalists. Almost immediately after winning the election, Sánchez pushed for legislation that would give amnesty to a group of Catalan independence leaders, convicted as part of the procès (a pro-independence social and

[30] Cf. G. Sartori, *Ingeniería Constitucional Comparada,* Madrid, 1994, p. 126. The tripartite typology distinguishes between governments that are: a) stable and effective; b) stable and possibly effective; and c) unstable.

political movement), despite having repeatedly stated during the campaign that it would be unconstitutional.

Although Spain enjoyed four absolute majorities between 1982 and 2004, there was only one between 2004 and 2023, achieved by the People's Party in 2011. The subsequent elections, as discussed above, have produced the end of the two-party system in Spain, which transitioned from having two and a half parties to being host to a true multi-party system. While in 2011, the PP won with 186 deputies, in 2015, although the party once emerged as the winner, it only claimed 123 seats, while the PSOE had the worst result in the party's history, winning only 90 seats. That year, two new parties, the conservative-liberal Ciudadanos and the left-wing Podemos burst onto the scene with more than 40 deputies each. After the parties failed to form a government, the new election held in 2016 slightly improved the PP's results, giving the party 137 deputies, while the PSOE dropped even further, to 85 seats, and Podemos continued to rise. In April 2019, a new election – held after the vote of no confidence – saw the PSOE win 123 seats and the PP only 66, but the parties were still unable to form a government, due to the lack of an agreement between the winning party and Podemos. In November of that same year, another round of elections was called, and although the PP and far-right Vox party improved their results at the expense of Ciudadanos, which completely collapsed, the first coalition government in the history of Spanish democracy was formed between the PSOE and Podemos. In 2023, a second coalition government was formed, but for the first time, the party that received the most votes (the PP) is not a member; rather the coalition comprises the PSOE and a new left-wing group, Sumar, which initially absorbed Podemos, before the latter party broke away in December of that year.

4.2. Political polarization and fragmentation: the difficulties involved in governing from the right

The current political climate in Spain is highly unstable. On the one hand, the government coalition and the parties that support it, without formally being part of the coalition, are fragile, and there are frequent clashes between the coalition parties, as well as blackmail on the part of the nationalist parties, particularly the Catalans, who voted for the investiture. In fact, the government has been unable to pass its budgets, and in six months has only managed to bring forward one of the more than 40 laws

promised. On the other hand, there does not appear to be any solid alternative to the government. The obvious choice, the People's Party, seems to have accepted that it will either quite probably need to govern with the votes of the far-right Vox party (despite the party's political adversaries' understanding of how to capitalize on the partnership to grab votes), or bet everything on winning an absolute majority in the next election. In the short- to medium-term, reaching an agreement with political parties other than Vox looks quite difficult, given that the right-wing nationalist parties (Junts in Catalonia, the PNV in the Basque Country and the like) prioritize the nationalist over the political cleavage, and do not seem willing to negotiate with the party that applied Article 155 of the Constitution in 2017, imposing direct rule over Catalonia. This unstable climate is characterized by two elements that – although this does not have to be the case – have occurred together: political polarization and parliamentary fragmentation. As a consequence, many legal/constitutional provisions to structure the government-opposition dialectic have been altered.

Beginning with the consequences of polarization, a quite illustrative example can be seen in the General Council of the Judiciary. The requirement for a qualified 3/5 majority to appoint the members is, a priori, a very reasonable and advisable provision, and one included on the Venice Commission checklist. However, a deadlock lasting more than five years has developed. Moreover, this affects the day-to-day functioning of parliament. Government control sessions often turn into what renowned scholar Piedad García-Escudero has termed 'counter-control', where instead of the government having to face the criticism of the opposition and defend its administration, the role of the opposition is being judged by the government. It matters little, given the tone and quality of the responses, that the control function of the houses has intensified and that the government has been subjected to more questions in recent legislative terms. Additionally, as observed by García-Escudero, this 'counter-control' is materializing both in the deplorable technique of 'whataboutism' and – in a more legal respect – in commissions of enquiry, often created by the majority to investigate the previous government, in other words, the current opposition[31]. This inversion of the rules goes beyond simply bad behaviour or even low politics. In a democracy – unlike in authoritarian regimes, where the government claims to legitimize the opposition, usually allowing the existence of nominal opposition parties that do not really aspire to replace those in power – it is the opposition that legitimizes

[31] Cf. P. García-Escudero Marquez, *Prólogo,* in Jose-C Nieto-Jiménez, *Consecuencias de la fragmentación y la polarización en las Cortes Generales,* Valencia, 2024, p. 23.

the government, accepting that while today it is their turn to fill the opposition role, tomorrow they may be in government[32]. The criticism of the opposition, the constant attacks and reproaches and the permanent challenging of its role are, therefore, signs of a political culture that is closer to authoritarianism than to a democratic regime. Finally, the difficulties surrounding the investiture of government, which have damaged the image of the head of state as the individual who bears responsibility for proposing a candidate, are also a consequence of polarization (and fragmentation, although to a lesser extent)[33].

Fragmentation (primarily, although at times combined with polarization) has had a number of consequences of its own[34]. Firstly, there has been a decrease in the number of draft laws presented by the government (proyectos de ley), which do not always have the necessary support, but an increase in the number of bills presented by deputies and senators (proposiciones de ley), even at times by the group that holds the majority, since this approach dispenses with bureaucratic formalities. Secondly, the budget veto is not only used, but abused. In the third place, there has been a persistent use of fraudulent extensions to present amendments, which is really a filibuster tactic used by the majority to block the propositions of the minority. A fourth consequence is the decrease in legislative activity in the Cortes and an even greater use of executive orders, often contrary to constitutional jurisprudence (STC 61/2018). Fifth, in the lower house, there are fewer government appearances in proportion to the number of times they are required, while in the upper house, in the absence of regulations, the government only appears on its own initiative. Finally, there has been an increase in the number of motions with and without prior interpellation, many of which are passed with votes against those who support the government, but without any mechanism to control the process.

Polarization, obviously, does not occur because of the absence of a legal statute for the opposition. Its causes are social and, although in the case of Spain it has deep and ancient roots, it is aggravated as a consequence of social networks. However, the absence of such statute favours this situation, since it is much easier, in such environment, when opposition lacks formal institutionalization, to marginalize it.

[32] Cf. J. Ruipérez Alamillo, 'Charles de Secondat on the state of parties or pluralism as a modern materialization of the principle of separation of powers, in *Teoría y Realidad Constitucional,* 2020, p. 237.

[33] Cf. for what follows, J-C Nieto-Jiménez, *op. cit.,* passim.

[34] *Ibid.*

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Abstract: This work analyses the government-opposition dialectic in Spain, placing particular emphasis on the second decade of the twenty-first century, during which time a change occurred that brought an end to the two-party system. This analysis is based on a study not only of the tools afforded the opposition by Spanish legislation, but also the actual use made of these tools, as well as the current possibilities of guaranteeing power switching between the two major parties.

Keywords: Opposition – Spanish Constitution – Two-Party System – Political Polarization – Political Fragmentation

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