

Parliamentary Decisions on its own Behalf and Spanish Constitutional Law

María Salvador Martínez¹

A phrase like „Parliament decisions on its own behalf“ („Entscheidungen in eigener Sache“) has not been codified in Spanish legal and political discourse. Nevertheless, it is acknowledged that there are certain issues where political parties within parliament possess distinct interests that may influence their legislative choices². To counter the potential hazards involved, various elements have demonstrated varying degrees of efficiency in ensuring that decision are being made for the common good, despite the influence of party-specific concerns.

The political arena

The *raison d'être* of political parties is to strive to gain power and, once achieved, to maintain it. Consequently, parties are bound by the rules and dynamics of the political arena, which inevitably frame their actions and decisions³. It is therefore reasonable to assume that when parliament makes legislative choices on matters that directly affect parties or their prospects in the political arena (such as their legal framework, funding, the electoral system, parliamentary regulations...), the inherent needs and interests of parties may influence their stance. The Spanish experience reveals three natural tendencies of parties in parliament when making decisions that affect them: they are reluctant to be subject to obligations or constraints that impede their freedom, they strive to maximize their benefits and exploit them to their advantage and, more specifically, most established parties show little inclination to carry out reforms that could jeopardize their position within the party system.

The first step in tackling this situation is to acknowledge that, in specific matters, parties within parliament do indeed decide on their own affairs. This does not suggest fostering a sense of mistrust towards parties, the democratic parliament and, ultimately, the democratic system. On the contrary, it is crucial to embrace

¹ Prof. Dr. María Salvador Martínez is Associate Professor of Constitutional Law, Director of the Political Parties Studies Centre at UNED University (Spain) and of the Research Project PID2021-124531NB-I00, El Estado de partidos: raíces intelectuales, rupturas y respuestas jurídicas en el marco europeo.

² That is generally acknowledged, for example, by J. J. González Encinar, *Democracia de partidos vs. Estado de partidos*, in: González Encinar (coord.), *Derecho de Partidos*, 1992, p. 17-40; and M. Salvador Martínez, *Partidos políticos. El estatuto constitucional de los partidos y su desarrollo legal*, 2021, p. 48-50.

³ *Ibidem*.

this reality in order to strengthen democracy. Only by confronting this intricate reality we can effectively address any issues that may arise from it. Law must not be naive if it aims to be effective and uphold its binding force⁴.

Secondly, law must act accordingly. This implies that in situations in which parties decide on their own matters, there should be an even stronger link between the legislator and constitutional principles, as well as enhanced supervision of the decisions made. It also means that in judging these decisions it will be necessary to consider the context in which they were made and the consequences they will have on the party system⁵.

There is no definitive formula that guarantees that the legislator will consistently make the best decisions in the interest of the general public, prioritizing the common good over the self-interest of the parties. Nevertheless, certain elements can contribute to this goal.

The procedural element

In matters where parties have a vested interest, decisions should be made with broad parliamentary consensus, involving as many parliamentary groups (political parties) as possible. Qualified majorities may be required for this purpose. Additionally, it is important to demand a stricter adherence of two types of safeguards during the legislative process: those that ensure the expression and defence of different positions at stake, and those that serve the quality of the law (preparatory reports, expert consultation...). Moreover, these decisions should ideally have a strong social support.

The Spanish constitution establishes a special category of legislation known as *ley orgánica*, which is reserved for certain matters and requires the approval of a qualified (absolute) majority⁶. In consequence, it necessitates a broader agreement among parliamentary groups. Most of the matters in which parties in parliament may have a particular interest (electoral system, party regulation, financing ...) must be regulated by this type of law.

Moreover, the initial legislative decisions concerning matters that affect the parties, such as the Party Law, the Electoral Law and the Parliamentary Rules of the two chambers, *Congreso* and *Senado*, were made in Spain almost at the same

⁴ Ibidem.

⁵ M. Salvador Martínez, *Partidos políticos. El estatuto constitucional de los partidos y su desarrollo legal*, 2021, p. 44-47.

⁶ Article 81 of the Spanish Constitution: 1. Organic laws are those relating to the development of fundamental rights and public liberties, those which establish Statutes of Autonomy and the general electoral system, and other laws provided in the Constitution. 2. The passing, amendment or repeal of the organic laws shall require an absolute majority of the members of Congress in a final vote on the bill as a whole.

time as the current constitution of 1978 and were based on an agreement among virtually all political parties. With these initial decisions, the groundwork for the new democratic system and its fundamental rules was being established, and there was a clear understanding that a broad consensus was necessary⁷.

Subsequently, the experience with reforming or replacing those initial legislative decisions has been inconsistent in terms of consensus. In 2002, the 1978 Party Law was replaced by a new Party Law, primarily aimed at regulating the illegalization of parties to address terrorist violence. This decision was immensely complex and posed one of the greatest challenges a democratic legislator can face. There were legal, political, and social debates on the matter⁸ and, subsequently, the new Party Law was approved with the support of the two major parties and some of the smaller ones, but it did not achieve the broad consensus that the 1978 Party Law had garnered. Regarding regulation on party financing, all legislative decisions and subsequent reforms have been approved with wide support across parties⁹.

In terms of electoral and parliamentary matters, there has been a high level of consensus in the reforms implemented for specific aspects (vote of Spaniards residing abroad, voting right of people with disabilities). However, there has been insufficient determination to approve other more far-reaching reforms¹⁰. This is partly due to a certain apprehension surrounding modifications of the foundational decisions of the democratic system, and partly due to the sense of security provided by regulations whose effects are already known and which favour political stability (that is, the majority and established parties).

Party constitutional law

The democratic legislator has a very wide margin of manoeuvre to make decisions, as long as they respect the constitution. The way to ensure that the decision

⁷ E. Linde Paniagua, *El régimen jurídico de los partidos políticos en España (1936-1978)*, in: R. Morodo Leoncio (ed.), *Los partidos políticos en España*, 1979, p. 76-155.

⁸ About the new Party Law' debates, for example: F. Bastida Freijedo, *Informe sobre el borrador de la LO de partidos políticos*, en *Debates Constitucionales* n° 5, 2003; F. Fernández Segado, *Algunas reflexiones sobre la Ley Orgánica 6/2002, de Partidos Políticos, al hilo de su interpretación por el Tribunal Constitucional*, *Revista de Estudios Políticos*, n° 125, 2004, p. 109-155; A. Martín de la Vega, *Los partidos políticos y la Constitución de 1978. Libertad de creación y organización de los partidos políticos en la Ley Orgánica 6/2002*, *Revista Jurídica de Castilla y León*, 2004, n° extraordinario (25 años de Constitución), p. 201-228; and J. M^a Porras Ramírez, *Comentarios acerca del estatus constitucional de los partidos políticos y su desarrollo en la Ley Orgánica 6/2002*, *Revista de las Cortes Generales*, n° 57, 2002, p. 7-36.

⁹ *Ley Orgánica 3/1987*, de 2 de julio, sobre financiación de los Partidos Políticos and then *Ley Orgánica 8/2007*, de 4 de julio, sobre financiación de los partidos políticos.

¹⁰ About the reform of the electoral system, see M. Garrote de Marcos, *El sistema electoral español. Memoria, balance y cambio*, 2020.

taken in a specific matter is not only constitutional, but constitutionally the best one, the most adequate, is to strengthen the theoretical constitutional framework. This explains the relevance of party constitutional law. In matters in which parties have a special interest, it is the scholar's task to contribute to the definition of the constitutional principles involved, to develop them as precisely as possible, and thus to guide the legislator towards, constitutionally, the best decision¹¹.

In matters that most directly affect parties, the Spanish legislator initially passed laws with minimal regulation, focusing on party freedom and including so-called „party privileges“ (such as generous state funding)¹². When defects of these laws became evident, scholars were clear in pointing out the need for specific reforms: especially, to establish requirements of internal democracy, to regulate the financing system completely and correctly, and to establish effective economic-financial control mechanisms¹³. The legislator, however, was not interested in pursuing these reforms, because they implied obligations, limits, and controls for parties; and scholarly opinion alone was not enough to push it to take these measures. These only came about when other elements also added pressure to the legislator: public opinion, recommendations of national technical bodies, and international reports.

The constitutional court

A firm and well-developed constitutional doctrine, widely supported by the legal community, also facilitates the task of another actor that plays a fundamental role in these matters: the constitutional court. It has a special responsibility for controlling the constitutionality of laws passed in matters in which parties have a specific interest. This court must act with awareness of this circumstance and ensure that such decisions respect constitutional principles.

The Spanish Constitutional Court has played a relevant role in defining the constitutional position of parties. It has stated how the rules regulating party registration should be interpreted, excluding any possibility of political control (SSTC 3/1981, 85/1986). It has developed the constitutional principle of internal democracy, requiring parties to adopt democratic organization and functioning rules and recognizing the rights of party members (SSTC 56/1995, 226/2016). And it has declared the parties illegalisation system constitutional while specifying how some of its regulations shall be interpreted (SSTC 48/2003, 5/2004,

¹¹ M. Salvador Martínez, *Partidos políticos. El estatuto constitucional de los partidos y su desarrollo legal*, 2021, p. 44-47.

¹² For an overview, see M. Salvador/J. Alguacil, *Parteienrecht in Spanien. Eine Perspektive*, *Zeitschrift für Parteienwissenschaften* n° 2, 2021, p. 137.

¹³ M. Satrústegui Gil-Delgado, *La reforma legal de los partidos políticos*, en *Revista Española de Derecho Constitucional*, n° 46, 2006, p. 81 y ss.

6/2004, 31/2009 and 138/2012). Regarding the equal opportunities' principle, however, the work of the Court has been very undecided. This principle is hardly developed in its case law, and with respect to certain elements of the electoral system (such as electoral barriers) it has always recognized that the legislator has a very wide margin of decision (STC 75/1985, 225/1998 or 197/2014). This attitude explains why the Court has never declared any legal precept unconstitutional in matters affecting parties.

Additional factors

As noted above, the Spanish experience has shown that there are three additional factors that can encourage the legislator when there are decisions that it must, but does not want to make, usually because they involve more controls or obligations.

The first is the international input, which is increasingly important in matters affecting parties. At the supranational level, there are treaties, case law, soft law, guidelines, reports, papers, and other legal documents. From all of these certain binding and relevant standards can be derived in matters of electoral law, party fundings or fight against corruption among others. Moreover, the contribution of the international organizations is especially valuable because it comes from institutions far removed from the national political sphere and unaffected of the specific interests that parties of a particular country may have. In Spain, for example, reports of the Council of Europe's anti-corruption body GRECO (recommending that the legislator should intensify the regulation of the financing system and strengthen the economic-financial control mechanisms of the parties) contributed decisively to legal reforms approved in Spain in 2012 and 2015¹⁴. In a different way, the jurisprudence of the European Court of Human Rights on illegalisation of parties acted as a fundamental guide for the Spanish legislator when he decided in 2002 to establish a new system of illegalization and dissolution of parties¹⁵.

The second factor is the activity of internal technical bodies, such as the Tribunal de Cuentas (the Court in charge of auditing the economic and financial activities of parties). The annual reports of this Court, recommending certain legal reforms for several years, contributed to encouraging the legislator to improve regulation of

¹⁴ M. Iglesias Bárez, La reforma de la financiación de partidos políticos en España: modelo y anti-modelo, in: C. Garrido López/E. Sáenz Royo (coords.), *La reforma del Estado de partidos*, 2015, p. 87-107; and O. Sánchez Muñoz, La financiación de los partidos políticos en España: ideas para un debate, in *Revista Española de Derecho Constitucional*, 2013, nº 99, p. 161-200, and La insuficiente reforma de la financiación de los partidos: la necesidad de un cambio de modelo, *Revista española de derecho constitucional*, nº 104, 2015, p. 49-82.

¹⁵ M. Iglesias Bárez, *La ilegalización de partidos en el ordenamiento jurídico español*, 2008.

the financing and economic control of political parties. It was clearly decisive in the approval of a new Party Financing Law in 2007 and its subsequent reforms¹⁶.

Finally, at certain times, citizens can push the legislator to adopt measures that the parties don't want taken. This has been the case in financing matters, where legal reforms have been taken at times of political crisis, usually after corruption scandals linked to party financing and when the public opinion turned against the ineffectiveness of control mechanisms. In fact, one widespread criticism of the Spanish legislation on financing is that the main measures have only been approved in response to specific moments of social reproval¹⁷. Also, in relation to internal party democracy, the most relevant reforms were approved in 2015 in a context of political crisis and due to the dissatisfaction of citizens with traditional parties and their behaviour¹⁸.

¹⁶ See, footnote 14 references.

¹⁷ J. J. González Encinar, *Democracia de partidos vs. Estado de partidos*, in: González Encinar (coord.), *Derecho de Partidos*, 1992, p. 17-40; and M. Salvador Martínez, *Partidos políticos. El estatuto constitucional de los partidos y su desarrollo legal*, 2021, p. 48-50.

¹⁸ An overview in M. Salvador/J. Alguacil, *Parteienrecht in Spanien. Eine Perspektive*, *Zeitschrift für Parteienwissenschaften* n° 2, 2021, p. 138, 140-141.