

CAN THE CONSTITUTION BE REFORMED?

Eliseo Aja

Tenured Professor of Constitutional Law

The reform of the Constitution is a possibility since the beginning of constitutionalism, that is, since the U.S. Constitution of 1787 and the French Constitution of 1791. These reforms require qualified majorities and a more complex procedure than those necessary to pass ordinary laws. This means that reforms are limited only to those cases in which new laws or judgments cannot solve a serious constitutional problem. Two centuries later, these characteristics are common to most of the contemporary democratic systems, albeit with some particularities especially due to the proliferation of Constitutional Courts.

The most relevant consequence of the reform being regulated by the Constitution itself is the difference between the concept of constituent power, unlimited, and the power of reform or constituent-constituted power, bound to comply with the reform regulations laid down by the Constitution. Several entries analyzing this concept have been posted in this blog, including references to very reliable books written by Muñoz Machado, García Roca and other Professors of Constitutional and Administrative Law. This allows me to go straight to the two main points of a possible immediate reform.

The first question that every reform should try to answer is: are there severe political problems in Spain that recommend a constitutional reform? Many voices consider the Spanish constitutional system has serious problems in three fields: 1) regulation of the democratic institutions (electoral dimension in particular but not limited to) –since the changes introduced in the party system, 2) the system based on autonomous communities (distribution of competences and funding, as well as the role of the Constitutional Court and the Senate), and 3) acknowledgment of a special position for Catalonia and some other autonomous communities within an inclusive multinational system.

Constitutional reforms are not only necessary to solve essential problems such as those mentioned above. Another ground is citizen disaffection with the public institutions as shown by the 15-M anti-austerity movement and its slogan “we are not represented” or other forms of contempt. This sense of alienation from the public institutions can only be solved if the citizenship perceives that the necessary reforms have been carried out, and that they have through sufficient public debate.

Albeit with different nuances, several publications propose interesting solutions to these problems for which a consensus could be reached after proper debate. And as for the proposals made by some political parties, no arguments are raised during the institutional fora. Instead unargued skepticism prevails – leaving aside comments such as “this is very complicated” or “there is no possible way to do it”.

As a consequence, the second question posed should be: according to the way the Constitution is drafted, is it possible to reform it? Or are the consensus and majorities laid down actually impossible to achieve? Some might base their opinions on the current lack of consensus, without realizing that consensus never exists at the beginning of a reform process but develops precisely as a consequence of the debates and negotiations carried out during the process.

Another issue about the reform is that it does not require consensus but a majority of three-fifths or two-thirds of both Congress and Senate, pursuant to the simple reform procedure (Article 167 of the Spanish Constitution) or the more complex one (Article 168). In some circumstances, a referendum might be compulsory too. This might be an obstacle or not depending on the impact that the parties defending the reform have on the constituency.

There is a general perception that the three-fifths majority is reasonable: approximately 210 of the 350 parliamentarians of the Congress and 156 of the 260 senators. At the same time, however, the two-thirds majority is seen as virtually unachievable. Some even affirm that such a demanding majority turns into the impossibility to reform the Constitution. Nothing further from the truth. Leaving aside the fact that this is reserved for specific subjects, the two-thirds majority required represents 232 out of 350 deputies. This figure could for instance be reached with the votes of Partido Popular, Partido Socialista and Ciudadanos or with other combinations. The 1978 Constitution was adopted by Congress by 325 votes in favor out of 350 votes.

Those who are against the reform usually add that the reform through the more complex procedure should be adopted in two consecutive legislative periods. This requirement, however, can also be found in 11 European Constitutions and does not represent a major obstacle if the majorities are achieved.

The key to ascertaining if the reform is possible is not to gain parliamentary seats corresponding to the parties as they are right now, but to generate new positions that satisfy the majorities through consensus. With the 1977 electoral results in mind no-one would have believed that consensus for the adoption of the Constitution would encompass opinions ranging from Franco's minister Fraga to the communist Santiago Carrillo, nationalists included. But consensus was reached. The figures required this time are much lower than 325 votes. The question now is whether the current decision-makers understand the need for reforms and show themselves capable of opening negotiations.