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EDITORIALE

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JOSÉ MARÍA PORRAS RAMÍREZ

THE MONARCH AS HEAD OF STATE IN A PARLIAMENTARY SYSTEM OF GOVERNMENT: THE CASE OF SPAIN

SUMMARY: 1. The inclusion of the Crown in the Spanish Constitution. – 2. The functions with external legal relevance of the parliamentary monarch. Special reference to the royal proposal of the candidate for President of the Government. – 3. Is it necessary to reform the constitutional statute of the Crown? The contemporary debate about royal inviolability. – 4. The transparency of the Crown. Building a new symbolic-political narrative around the idea of exemplarity. – 5. Conclusions.

1. *The inclusion of the Crown in the Spanish Constitution*

Until the current Constitution was in charge of demonstrating the contrary, in Spain it had been considered unfeasible to harmonize Monarchy and Democracy; especially when the historical experience itself had shown unsuccessful previous attempts to fully reconcile, even, Monarchy and Parliamentarism. Thus, the memory of the constant use made of his prerogative by the King, in order to give the Crown a central position in constitutional practice, was still close in time. The fact that the Crown was erected as the supreme instance of political guidance and decision, had converted the Monarchy, during the reign of Alfonso XIII (1886-1931), into the legal expression of the State form, as protagonist and key piece of a political system that placed it at its peak and on which it made its subsistence depend.[1] Hence, when said regime came to fall, for not allowing or foreseeing its evolution, the Monarchy collapsed with it, once the well-intentioned attempts, timidly outlined and soon aborted, which encouraged its effective and sincere parliamentarization, had been frustrated. Such failed purposes were intended

[1] A.M. Calero Amor, *La prerrogativa regia en la Restauración (1875-1902)*, in *Revista de Estudios Políticos*, 55, 1987, 275.

not only to limit the royal prerogative, but, above all, to achieve the transfer of the political center of gravity from the monarch to the parliament, so that the latter, as an immediate and authentic representative of national sovereignty, once suffrage was universalized, it could monopolize the fiduciary relationship that legitimizes the existence of a government that it is thus, finally, both organically and functionally, separated from the Crown.[2]

Thus, in Spain this gradual process, developed through mere political practice, failed, unlike what happened in the United Kingdom,[3] in Belgium[4] or in the Netherlands,[5] where the emergence of the parliamentary Monarchy was made possible, as *"factual model"*, through conventions, in within a constitutional framework that did not need to formally recognize it as such.[6] In Spain, such failure was due to the refusal of the Crown, backed by the privileged sectors associated with it, to divest itself of decisive functions and competences. In short, the Crown did not accept being relegated to the performance of mere symbolic-representative, declarative and relational tasks, thus seeing itself deprived of the power of government traditionally attributed to the monarch by nineteenth-century liberal-doctrinal constitutions. This resistance to change prevented not only from overcoming the dialectical tension, which had existed for a long time, between the monarchical principle and the principle of representative government, but also made it impossible to combine the Crown with the demands of the democratic principle.

It had to be, therefore, the 1978 Constitution that saw the need to exceptionally replace a political evolution not experienced in Spain, proceeding to legally re-found the monarchical institution. Thus, far from conceiving the Crown, as before, as a constituent power, endowed with sovereignty, it arranged its configuration as a mere constituted power, as a constitutional body, subject, in the

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[2] A. Menéndez Rexach, *La Jefatura del Estado en el Derecho Público español*, Madrid, Instituto Nacional de Administración Pública, 1979, 437.

[3] V. Bogdanor, *The Monarchy and the Constitution*, Oxford, Oxford University Press, 1997, 38.

[4] F. Delperée, *La Constitution: de 1830 à nos jour et même au-delà*, Bruxelles, Racine, 2006, 32.

[5] A.F. Manning, *De Monarchie in Nederland* in *Res Publica*, vol. XXXIII, 1991/1, 25.

[6] I. De Otto y Pardo, *Sobre la Monarquía*, in *La izquierda y la Constitución*, Barcelona, Taula de Canví, 1978, 53.

same way as the others, to the Constitution and the rest of the legal system (art. 9.1 SC). Such initial prescription meant the rupture with any relationship that, in this sense, could be doubted if the Crown maintained, until that moment, with remaining vestiges of the monarchical principle, or with the principle of personalist legitimacy that the fact of having been the King initially designated by General Franco could still implicate. This explains the duty that obliges the monarch to guide his or her actions solely towards the fulfilment of the values and principles that the Fundamental Norm enshrines. And, likewise, it justifies the constitutional derivation of the appraised content of the competences that are granted to the Crown, as redundantly insists on having the art. 56.1, *"in fine"*, of the Spanish Constitution (SC), in order to rule out the existence of original, prior and independent powers to such Norm assisting the King.[7]

Consequently, it is, therefore, the democratic principle that causes, by projecting itself on the normative regulation of the monarchical institution in the Constitution, a consequence that is expressed negatively. This consists, in essence, in the prohibition that the monarch, as head of a non-elective body, although associated with the development of the parliamentary form of government (art. 1.3 SC), can put in to practice prerogatives, considered of free and discretionary exercise, in order to innovate or modify the legal system independently. That is why the acts of the monarch endowed with external legal significance, as expressive of attributions devoid generically of *"potestas"*, should be considered of a due, regulated or mandatory nature, since they are limited to the formal announcement of decisions whose content the King has not determined, because such a task corresponds to the representative political bodies that effectively develop the form of government. Likewise, those royal acts are considered to be exercised dependently, since it is specified, in order to consider them valid, that their performance must be carried out with the necessary endorsement or countersignature from another constitutional body, usually expressed by a member of the Government formally authorized for this purpose, which will assume the responsibility that may arise from them (arts. 56.3 and 64.1 SC).[8]

[7] J.Mª Porras Ramírez, *Principio democrático y función regia en la Constitución normativa*, Madrid, Tecnos, 1995, 149.

[8] J.Mª Porras Ramírez, *Principio democrático y función regia...*, op. cit., 150.

In short, in accordance with the current Constitution, the Crown, whose position and competences are regulated with sufficient precision and detail, in contrast to what is mostly observed in comparative law,[9] still tributary, in most cases, even formally, that is, according to the literal tenor of the Constitution, of the nineteenth-century model of constitutional monarchy, must limit itself to the exercise the characteristic function of the Head of State (art. 56 SC), within a democratic system that assumes the monarchical variant of the parliamentary form of government (art. 1.3 SC). Such a function implies the transformation of the royal institution into a *legally and politically neutralized body*, which, even so, is called, by express constitutional mandate, to establish a close and necessary relationship with the representative bodies that appear endowed with effective political powers.[10] In this regard, it must be taken into account that the Spanish Constitution has adopted a model of *rationalized parliamentarism*, which not only subjects the relationship established between the Legislative and the Executive to legal norms, but also seeks to grant maximum stability to the Government, while that reinforces the position and competences of its President. This entails the redirection of the Crown to the performance of the function of the Head of State, thus depriving it of effective political powers that affect the normal operation of the form of government.[11]

2. *The functions with external legal relevance of the parliamentary monarch. Special reference to the royal proposal of the candidate for President of the Government*

In such a framework, the Constitution attributes two fundamental legal tasks to the Crown, linked to its condition as Head of State. The first of these is the one by which the King or Queen is

[9] L. Sáchez Agesta, *Significado y poderes de la Corona en el Proyecto constitucional*, in VV.AA., *Estudios sobre el Proyecto de Constitución*, Madrid, Centro de Estudios Constitucionales, 1978, 112.

[10] M. Aragón Reyes, *La Monarquía parlamentaria. Comentario al art. 1.3 de la Constitución* in *Dos estudios sobre la Monarquía parlamentaria en la Constitución*, Madrid, Civitas, 1990, 104.

[11] S. Ceccanti, *La forma di governo parlamentaria in transformazione*, Bologna, Il Mulino, 1997, 98.

urged to *declare*, both internally and in the field of international relations, the will of the State-person. To this end, it is up to him or her to legally formalize, through its solemn and generic manifestation, those acts that, expressing the decisions of the remaining constitutional bodies in the exercise of their competences, require, by express constitutional provision, taking into account of its singular transcendence, its certifying and perfective exteriorization by the Crown, in order to make possible, ultimately, its unitary legal imputation to the State. In fact, most of the attributions assigned to the King in the Constitution (arts. 62 and 63 SC) and in the laws appear linked to the special position of formal pre-eminence that the Head of State comes to occupy, in accordance with 56.1 SC, as apex of the state organizational apparatus.[12]

Along with this *declarative function*, the Constitution also requires the Crown to formally relate to the representative bodies that, exercising political power, carry out, in a practical way, the parliamentary system of government. Said *relational function* obliges the Crown to develop inter-organ coordination and mediation tasks, contributing to the establishment of the necessary link that must exist between the Government, Parliament and the electoral body. Such a task is manifested in the exercise of regulated and, in any case, dependent competences, which do not imply the existence of *"potestas"*, that is, a free autonomous capacity for action and decision, of a discretionary nature, assisting the monarch. Therefore, such powers cannot be associated, as has sometimes been wrongly said, with the condition of "arbitrator and moderator of the regular functioning of the institutions", a function art. 56.1 SC assigns to the King but without legal consequences of any kind.[13] Otherwise, the revival of a "fourth power" empowered to act as guarantor of the established constitutional order would be promoted. And without a doubt that is not what is deduced from the coherent interpretation of the set of rules referred to the Crown

[12] As H. Kelsen indicated "the imputation to the State is carried out through one of its organs…". H. Kelsen, *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze* (1911), (Spanish translation, *Problemas capitales de la Teoría jurídica del Estado*, México, Porrúa, 1987, 156).

[13] M. Herrero yRodríguez De Miñón, *La posición constitucional de la Corona*, in AA.VV., *Estudios sobre la Constitución española. Homenaje al Profesor Eduardo García de Enterría*, Madrid, Civitas, 2001, vol. III, 1921.

in the Spanish Constitution. Not in vain, such a legal system does not move in the historical-cultural context that led B. Constant to propitiate, in the origins of continental European parliamentarism, the attribution to the King of a "neutral or preserver power", which "receives and transmits by inheritance", in order to keep him "inaccessible to the political passions of the citizens". A "harmonious and moderating power", "judicial of the other powers" (Executive and Legislative, fundamentally), which attributed to the King the prerogative of "interpreting opinion", commissioning the formation of the Government; denying, potentially, through the veto, the sanction of laws; and dissolving Parliament, when he deemed it necessary or convenient to overcome the confrontations and contradictions that threaten the stability of the political system and the preservation of hard-won civil liberties.[14]

Despite the enormous influence that this theory exerted throughout the 19th century and that, even today, in a way that is sometimes latent and unconscious, it continues to be noticed, emerging, as a decontextualized vestige, in the letter of the Constitutions and in the writings of some academics,[15] the truth is that such a vision, in accordance with a systematic interpretation of the Spanish Constitution, has lost all virtuality and legal effectiveness, when it is predicated of the parliamentary monarch. And so it happens given its impossible accommodation with a correct understanding of the meaning and scope acquired by the democratic principle in it. For these purposes, as P. Cruz Villalón has pointed out, in the republican paradigm of the contemporary constitutional State, "the age of majority", "the self-sufficiency of the political community" must be certified. Hence, expressions of a moderating, neutral or arbitral power have no place in it, since it is the political community itself that "arbitrates and moderates itself... and not from instances by force external" to it.[16]

Thus, the reason for the insistence on wanting to continue ambivalently configuring the Head of State, that is, not only as the

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[14] B. Constant, *Cours de politique constitutionnel* (1820). (Spanish translation, *Curso de política constitucional*, Madrid, Taurus, 1968, 13 ss.).

[15] C. Esposito, *Il Capo dello Stato parlamentare*, in AA.VV., *Studi in onore di Emilio Crosa*, Milano, Giuffrè, 1960, vol. I, 759.

[16] P. Cruz Villalón, *De la Monarquía en España*, in *Claves de la Razón Práctica*, 171, 2007, 4.

highest representative of the legal-political organization, whose unity and continuity he or she expresses, but, at the same time, as holder of an institution that enjoys a "reserve of power", which is activated when a crisis situation is detected that threatens the normal functioning of state institutions and, even, if possible, the established constitutional order itself, probably it should be attributed to the still powerful ideological inertia of the monarchical principle, so relevant during the formative stage of the dogmatics of European public law. Thereby, this principle expresses a distrust towards the rational and regulated responses that, to conflict or exceptional situations, a democratic Constitution based on a political system that has become unstable and fragmented can offer.[17] In addition, it should be observed that the political systems that have been concerned with introducing this arbitration power, putting it in relation to the Head of State, have usually done so at foundational moments of a new constitutional order that, therefore, emerges with the weakness and insecurity typical of these situations, thus requiring, in the opinion of some, a personalized regulatory instrument.[18]

However, and whatever the reasons that move the constituent power to attribute such moderating and arbitral powers to the Head of State, it is clear that they can only be consistently assigned to him, given his status as an elected body of political representation, either directly (as in Portugal), or indirectly, that is by Parliament (as in Italy).[19] That is why such a power cannot be granted to a King, that is the head of a non-democratically elected body, embedded in a constitutional order that is said to be informed by the democratic principle. Consequently, such reference made to the monarch in the Spanish Constitution has to be understood empty of effective content, as in other monarchical constitutions happen, such as the Belgian and the Dutch, that also contain said clause

[17] G.U. Rescigno, *Commentario art. 87, I-VII comma* in G.U. Rescigno; A. Cassese; G. de Vergottini, in G. Branca (cur.), *Commentario alla Costituzione (arts. 83-87): il Presidente della Repubblica*, Bologna, Zanichelli, 1978, 134.

[18] W. Kaltefleiter, *Die Funktionen des Staatsoberhauptes in der parlamentarischen Demokratie*, Köln/Opladen, Estdeischer Verlag, 1970, 48. G. Silvestri, *Il Presidente della Republica: dalla neutralità-garanzia al governo delle crisi*, in *Quaderni Constituzionali*, 1, 1985, 47.

[19] S. Galeotti, *Il Presidente della Repubblica garante della Costituzione*, Milano, Giuffrè, 1992, *pássim*.

considering it the mere formal residue of a function effectively carried out by the King in the past but now become non-existent given conventions inspired in a new explanatory constitutional paradigm.

With these characteristic notes, thus redefined, the relational function of the Crown manifests itself in the cases contemplated in art. 62 *b*) SC. In accordance with what was indicated, the King summons and dissolves Parliament (*"Cortes Generales"*) and calls elections, albeit "in the terms provided for in the Constitution". And, in the same way, he dissolves the Parliament (*Cortes*) and calls for new elections in the exceptional case provided for in art. 99.5 SC in which his intervention is due to the verification of the absence of political will, on the part of the Congress of Deputies, to grant the essential parliamentary confidence and thus invest any candidate for the Presidency of the Government, after two months from the start of the procedure. Such a circumstance forces the monarch to certify said lack of agreement, which makes the normal functioning of the parliamentary system of government impossible; and, subsequently, to appeal, also in a regulated manner, to the electoral body to renew the assembly mandate in order to allow the resumption of the procedures aimed at establishing the essential relationship of trust that must mediate between Parliament and Government.[20]

Even so, beyond such cases, the Constitution attributes, apparently, a greater role to the King when it requires him to exercise a competence of a relational nature, through which it corresponds to him to "propose the candidate for President of the Government..." (art. 62 SC, in relation to art. 99 SC). It is necessary, therefore, to establish a constitutionally adequate interpretation of such precepts to which an excessive relevance has been assigned, which is not consistent with the interpretative framework in which the competences attributed to the Crown must be explained in the Constitution. For this, we have the help provided by the accumulated experience in the implementation of such norms, which has generated conventions, as result of political practice, today incorporated into the determination of the meaning and scope of constitutional norms that have thus been stripped away of potential exor-

[20] A. Bar Cendón, *La disolución de las Cámaras Legislativas en el ordenamiento constitucional español*, Madrid, Congreso de los Diputados, 1989, 169.

bitances, incompatible with the goals established by the Fundamental Norm itself.

The competence in question is aimed at the Crown promoting the activation of the Government formation process, which is, properly speaking, the one of investiture of its President. To this end, the Constitution has determined that it is the King, as Head of State, as is the case in other similar systems related, such as the German,[21] who promotes the initiative of presenting the candidate to the Congress of Deputies to occupy the Presidency of the Government, in accordance with art. 99.1 of the Constitution. Said procedure will begin "after each renewal of the Congress of Deputies, and in other constitutional cases where appropriate". Therefore, two events, qualitatively different, motivate its opening: the parliamentary elections and the cessation of the Government, as long as, in the latter case, it does not occur due to the loss of parliamentary confidence derived from a motion of censure since this entails, given its constructive nature, the automatic investiture of an alternative candidate of its own (art. 113 CE). In any case, it should be noted that, until now, except in 1981, when President Suárez resigned, the procedure of art. 99 CE has always been developed after the celebration of electoral processes to Cortes, presenting a different complexity. Therefore, the greater fragmentation acquired by the party system, since the December 2015 elections, has considerably hindered its operation, generating unprecedented political practices in the Spanish parliamentary democracy which come to complement the provisions of the referenced constitutional precepts.

Thus, as it is logical that it happens in the context of a parliamentary Monarchy, informed by the democratic principle, the royal proposal of a candidate for President of the Government is not free,[22] but is conditioned, as it is materialized after evacuating the mandatory consultations (art. 99.1 CE), which allow the King to reliably know the will of the Congress. Such consultations thus acquire a decisive importance since the selection of the proposed candidate is subject to them. In order to obtain all the necessary infor-

[21] J.C. Colliard, *La designation du Premier Ministre en régime parlementaire*, in AA.VV., *Melanges offerts à Jacques Burdeau*, Paris, LGDJ, 1977, vol. II, 107.

[22] I. De Otto y Pardo, *La posición constitucional del Gobierno*, in *Documentación Administrativa*, 188, 1980, 157.

mation he needs to make his proposal the King will evacuate them, in the first place, with the President of the Congress of Deputies, who, in addition to conveying his own opinion on the matter, will provide, at the request of the political forces represented in the Congress, the list of interlocutors with whom the King will meet. In any case, according to the Constitution, it is required that those so called should be individuals "designated by the political groups with parliamentary representation" (art. 99.1 SC). Said consultations will provide the monarch with precise information about the positions defended by the different political forces represented in the Chamber and, what is more important, since this is the objective pursued with them, they will allow him to know their intention, or not, to support a candidate to be invested as President of the Government. Since the consultations have the condition of preparatory acts of the final decision to be adopted, it is clear that they bind the monarch.[23] The experience accumulated up to now, resulting from the operation of the party system itself, has been in charge of demonstrating this without exception.

Thus, it is confirmed that the Spanish Constitution has emulated here, once again, also in this aspect, the provisions of the German Constitution, the forerunner of the incorporation of a fully rationalized parliamentary system of government, aimed at seeking both stability and reinforcing the powers of a monist Executive, while reducing to the maximum the discretionary prerogatives of the Head of State. That is why it came to be determined, in a similar way, that the King is only in charge of exercising the initiative of presenting to the Congress of Deputies the candidate to occupy the Presidency of the Government. This proposal, not a proper designation, is transferred to the Congress so that it may be the one who, if applicable, grants its confidence to the candidate, investing him or her, if he or she reaches the scarcely demanding majority required, that is, the simple majority of the votes of the attendees, in second voting, in accordance with art. 99.1 to 99.3 SC, after judging the program of the Government that he or she intends to form. Thus, it is verified how conditioned or mediated royal proposal is. Not in vain, in Spain, unlike what happens in Belgium or in the

[23] J. Vintró I Castells, *La investidura parlamentaria del Gobierno: perspectiva comparada y Constitución española*, Madrid, Congreso de los Diputados, 2006, 284.

Netherlands (not to mention what happens in republics like the Italian one), the Head of State does not get involved, nor does he commit himself in the political negotiation, using, even, instrumentally, to such effects, an *"informateur"*. Nor does the King help bring the parties close together, building support for a government whose composition and political program he influences, through the election of a *"formateur"*, who only after reaching an agreement appears before the Parliament to obtain the political confidence that ratifies his appointment.[24] On the contrary, in Spain a different procedure is followed, that is more evolved, in which it is not conceivable that the monarch carries out a role of help and substitution, or mediation and arbitration, such as happened in past times. For this reason, in accordance with the Constitution and the political conventions generated in order to apply such constitutional standards, the King must limit his intervention to the selection of the candidate for the presidency of the Government, which, strictly speaking, will result from the agreement reached by the political groups represented in Congress.

Thus, the norms contained in the Constitution itself and in the Regulations of the Congress of Deputies, although they confer on the King the monopoly of the initiative of presenting the candidate, since they do not contemplate, as in Germany, the parliamentary counterproposal (art. 63.3° LFB),[25] try to promote the search for political agreements to facilitate the investiture, in the event that no candidate has the prior support of the majority of votes initially required. Therefore, under normal conditions is the party system itself that self-regulates the agreement, determining, by itself, the name of the person who, by attracting the majority support of the political groups with parliamentary representation, has the well-founded expectation of achieving investiture in Congress. This means that the monarch's round of consultations should become a mere protocol procedure, in which the representatives designated by the political groups limit themselves to communicating the deci-

[24] J. Stengers, *L'action du Roi en Belgique depuis 1831: pouvoir et influence*, Bruxelles, Racine, 1996, 66. C.A. Kortmann, *Constitutional Law in the Netherlands*, Kluwer Law International, 2018, 2007, 64.

[25] G. Hermes, *Artikel 63: Wahl and Ernennung des Busdeskanzler*, in H. Dreier (Hrsg.), *Grundgesetz Kommentar, Band II: Artikel 20-82*, Tübingen, Mohr Siebeck, 2015, 1200.

sion adopted to the King, so that he can act as a simple vehicle for transmitting it.

However, the scene looks very different when the existence of a particular fragmentation of the political-parliamentary spectrum is observed and there is no agreement in the Congress supporting a specific candidate.[26] Such a situation called "*Hung Parliament*",[27] revealing the inability of the party system to self-regulate,[28] was observed for the first time in Spain, once restored democracy, at the beginning of 2016, raising doubts about whether or not it allowed the activation of a supposed "*reserve power*", in fact, of aid and subsidiary mediation, by the King, aimed at promoting, in an extraordinary way, the integration of wills and the materialization of a political agreement. This reasonable doubt, supported by the open and summary regulation contained in art. 99 SC, was dissipated in attention to the political practice that came to develop. By means of it, conventions were generated to regulate the exercise of the royal competence in situations such as the one described, emptying it of any extraordinary and discretionary component. Thus, initially, the monarch offered the candidate of the party with the greatest parliamentary representation to submit to the investiture vote in Congress, but he informed the King of his resignation, as he did not have the necessary support to gain the confidence of the Parliament. After that, the monarch made the offer to the candidate of the next party in number of seats, who accepted the proposal after affirming his confidence in the possibility of obtaining parliamentary investiture, even in the second vote (art. 99.3 SC). But he did not obtain it, once he had exposed his government program (art. 99.2 SC), since he was unable to complete the political negotiations that he had initiated for that purpose. This fact led the King to restart the procedure, as provided for by the Constitution in its art. 99.4, convening, for these purposes, a new round of consultations. It allowed him to reach the reliable knowledge that no candidate had sufficient support to obtain parliamentary investiture, thus not

[26] M. Revenga Sánchez, *La funcionalidad del artículo 99 de la Constitución ante el caso de un resultado electoral fragmentado: ¿mejorar su aplicación o proponer su reforma?* in *Revista Española de Derecho Constitucional*, 109, 2017, 97.

[27] V. Bogdanor, *The Monarchy and the Constitution...*, op. cit., 145.

[28] J.Mª Reniu I Vilamala, *La formación de los gobiernos minoritarios en España*. Madrid, Centro de Investigaciones Sociológicas, 2002, 184.

meeting the conditions required to submit a new proposal to the Congress. After the prescribed period of two months from the first investiture vote and once it was verified that no candidate had obtained the confidence of Congress, the King invoked art. 99.5 SC, thus proceeding to decree, with the endorsement of the President of Congress, the automatic dissolution of the *Cortes* and the calling of new elections. With this behaviour the King avoided the abandonment of the neutral or *"supra partes"* position that the Constitution has conferred on him. He was thus aware that his involvement in the political struggle would have brought him criticism for abandoning it. Hence, he prudently ignored the siren songs that urged him, either not to make any proposals, different from that of the most voted candidate, or to promote an alternative candidacy different from any suggested by the main political parties, once they have failed. In this way, it became clear that the political responsibility that the Constitution implicitly attributes to the party system in the procedure for the appointment of the President of the Government does not have to be transferred, in any case, to an institution that symbolizes the unity and permanence of the State, and that, therefore, it should be left out of partisan confrontations and struggles, limiting himself, at most, to verifying the agreement or disagreement reached by them.[29] It was thus revealed that in accordance with the parliamentary model adopted by the Spanish Constitution, it is not the Crown that appoints the President of the Government, but rather the Congress of Deputies, which must ratify the decision that, through the Head of State, has been offered by political groups with parliamentary representation. Not in vain, this unrestricted decision-making freedom of the Congress makes it possible to reconcile the monarch's actions with the democratic principle in the Constitution, by showing that it is only the parliamentary investiture that grants constitutive legal effects to the royal designation of the candidate.[30] In this way, the temptation to conceive the royal proposal as the expression of a required first confidence, to which that of the Congress would later come to be added,

[29] J.Mª Porras Ramírez, *La Corona y la propuesta de candidato a Presidente del Gobierno: nuevas prácticas y viejas normas*, in *Teoría y Realidad Constitucional*, 40, 2017, 223.

[30] J.L. Requejo Pagés, *Las relaciones entre el Gobierno y las Cortes Generales*, in *Revista Española de Derecho Constitucional*, 70, 2004, 80.

as was characteristic of the dualist parliamentarism established in of nineteenth-century, must be rejected.[31] In addition, it is necessary, in any case, to relativize the exclusivity of the monopoly of the exercise of the so-called "right of presentation" of the candidate for the Presidency of the Government by the monarch, given that Congress can develop said competence, albeit in an extraordinary and reactive way, after accepting the candidate proposed by the King and then filing a constructive motion of censure, incorporating an alternative candidate of their own (art. 113 SC).

Likewise, we must not forget that all those royal acts must be, at all times, validated by the President of Congress (art. 64 SC), which entails its examination and control. Thus, the Constitution has attributed the tacit or implicit endorsement of such acts in the consultation phase. An express endorsement that is expressly stated, both when it is substantiated in the countersignature of the royal proposal of the candidate for President of the Government, which is stamped in the document signed by the monarch, published in the Official Gazette of the *Cortes*; as when he announces the royal appointment of the President of the Government, once invested in Congress, in the Official State Gazette. On all these occasions, the participation of the President of the Chamber implies a kind of verification of the correctness of the royal acts, in relation to the provisions of art. 99 SC and the conventions that determine their interpretation and implementation.

3. *Is it necessary to reform the constitutional statute of the Crown? The contemporary debate about royal inviolability*

The discussion about the eventual need to introduce changes in the constitutional statute of the Crown was originated in the last years of the reign of Juan Carlos I, motivating the abdication of the monarch.[32] The *"crisis of exemplarity"* that in those years came to tarnish the historical significance of a hitherto indisputable political figure, led to questioning the inviolability attributed by the Consti-

[31] G. de Vergottini, *Diritto constituzionale comparato*, Wolters Kluwer/Cedam, Milano, 2022, 496.

[32] Organic Law 3/2014, June 18, by which the abdication of His Majesty King Don Juan Carlos I of Borbón becomes effective.

tution to the King in art. 56.3 SC, which provides emphatically: *"The person of the King of Spain is inviolable and is not subject to liability"*. Therefore, such a rule proclaims the principle of royal irresponsibility, both in its political and legal dimensions. A principle that must be considered distinctive of the monarchical institution as a peculiar form of the Head of State, as it results, together with that of hereditary succession, consubstantial to the nature of the Crown and today, from a political perspective, a direct consequence of its condition as a non-elective body, which is deprived of *potestas*, but rich in *auctoritas*, according to his neutral or *"supra partes"* position.[33]

In this sense, the political irresponsibility of the King offers no discussion, while the parliamentary monarch, since he is excluded from the representative relationship, lacks powers that allow him to innovate or modify the legal system, which exempts him from incurring liability. In addition, the general provision of endorsement of the acts of the King (arts. 56.3 and 64 SC) makes effective, with reference to them, the general requirement of the constitutional principle contained in art. 9.3 SC, which guarantees the responsibility and prohibition of the arbitrariness of public offices (art. 9.1 SC).

Therefore, the current discussion affects only to the legal inviolability of the King, a special protection that is related to the person and not to the functions that the holder of the Crown exercises. And there is no solution here by way of interpretation since art. 56.3 SC assigns to that inviolability, in a conclusive way, an absolute or full character, referring it to all the dimensions of his conduct, either public or private. The Constitutional Court has thus ratified this interpretation of the Constitution in its judgements n. 98/2019 and 111/2019.

There would be no other alternative, therefore, if so desired, that to promote an express reform of the Constitution, through the aggravated procedure provided for in art. 168 SC, in order to subtract and specify the acts not derived from the exercise of public powers of the monarch, for which he is not subject to political responsibility, to make possible their submission to judicial control.[34]

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[33] W. Bagehot, *The English Constitution* (1867), London. Fontana Press, 1993, 113.

[34] P. García Majado, *Significado y alcance de la inviolabilidad del Rey*, in *Teoría y Realidad Constitucional*, 47, 2021, 372.

Additionally, this would require the modification of art. 55-*bis* of the Organic Law regulating the Judicial Power (LOPJ), in order to empower the Civil and Criminal Chambers of the Supreme Court of Justice to process and prosecute civil and criminal actions directed against the King or Queen, since, at present, this is only allowed in relation to those acts committed by a monarch who has ceased to be in office.[35]

Nevertheless, in my opinion, such reform, sometimes proposed, is not consistent with the singular constitutional status of the monarch, not only a Head of State, but "a symbol of his unity and permanence" (art. 56.1 CE), a characteristic feature that assists the King and that goes beyond, granting him a special dignity.[36] So, it is interesting to indicate that the aforementioned proposal ignores the existence of a solution that the Fundamental Norm does offer, which is the only one that, I believe, is revealed to be consistent with that double condition aforementioned who personifies the monarch. A solution that, by the way, we have already experienced, not only in Spain and which consists in creating the political conditions to make *abdication of the King* inevitable (art. 57.5 SC). This would allow, from that moment now on, once stripped the monarch of his office, to demand him the corresponding legal responsibility, even knowing that such control could not affect the acts carried out during his reign, which enjoy permanent constitutional protection.

4. *The transparency of the Crown. Building a new symbolic-political narrative around the idea of exemplarity*

One of the main reasons that explain the survival of the monarchy in the constitutional state is its proven ability to adapt to the needs of a modern democracy thus demonstrating a renewed public usefulness. The loss of the King´s former discretionary powers, what in Spain has not been the result of conventions, as in other countries, but of a constitutional mandate, has undoubtedly benefited the Crown, who is no longer responsible for them, while

[35] Organic Law 4/2014, July 14, which modifies the Organic Law 6/1985, July 1, which regulates the Judicial Power.

[36] About the meaning of the legal expression *"The King can do no wrong"*, see F. Pollok and F. Maitland, *The History of English Law*, Cambridge, Cambridge University Press, 1968, vol. I, 511.

increasing its symbolic status thus allowing it to display, without obstacles, said quality as a visible sign that personifies and represents the unity and continuity of the national political community, and also its territorial diversity, along with its most genuine and characteristic political and cultural values. The integrating effect that this provokes among the population is, therefore, very appreciable, reinforcing across time national identity in an era of change and globalization.[37] The ability of the Crown to reduce to unity disintegrating factors, of centrifugal tendency, as a cohesive instance, explain its questioning and opposition from political anti-system sectors, who want to demolish the so-called "regime of 1978" and from the separatist parties, in Catalonia and Basque Land, who want to segregate their territories from the common State.

But to effectively develop these integrative qualities the Crown must be exemplary and transparent, if possible more than any other public institution, so the secrecy and mystery that was its own in the past is not compatible with current times. Today the monarchy is rightly subjected to constant public exposure and scrutiny by the media in the information society in which we live. That requires not offering grounds of criticism. The former King Juan Carlos I, with his disorderly private conduct, released by the press, squandered a good part of the symbolic heritage conquered with his extraordinary political work, as a guide in the process of peaceful transition from dictatorship to democracy and as promoter of the consolidation of the constitutional State in Spain.

This explains the continuous efforts made by the current monarch Felipe VI to improve the transparent operation, subject to control of the public funds made available to him in the State budget, in the management of his patrimony and in the organization of the staff of his House.[38] For this, Royal Decree 297/2022 restructures the Royal House, through a regulation adjusted to the times, while respecting the principle of self-organization established by the Constitution (art. 65.2), that deepens its modernization with faithful observance of the principles of transparency, accountability,

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[37] R. Hazell & B. Morris (Eds.), *The role of monarchy in modern democracy: European monarchies compared*, London, Hart publishing, 2020, 345.

[38] L.Mª Cazorla Prieto; M. Fernández-Fontecha, *¿Una ley de la Corona? (Ensayo sobre el desarrollo del Título II de la Constitución)*, Madrid, Thomson Reuters Aranzadi, 2021, 145.

efficiency and publicity, principles today demanded by a society justly aware of its value. In particular, the instruments of economic and financial control of the Royal House are improved.

Thus, normative support is provided to measures, some already in force, since they were being applied by order of the King, such as the one that has led to placing a State Comptroller at the head of the corresponding Office, who will act in accordance with the techniques and procedures used by Public Administration. In addition, the personnel at the service of the House will not only benefit from the regime of conflicts of interest and incompatibilities of the senior management personnel of the General State Administration, but, like said personnel of the Public Administration, they must present a declaration of assets and property rights after their appointment, having to abide by a Code of Conduct inspired by the principles of honesty, exemplary and austerity. Likewise, the Decree establishes a new regulation of the contracts of the House, which are thus subject to the principle of publicity; orders the approval of new contracting instructions and establishes the obligation to publish the regulation of the budgetary and accounting procedure. And also the Decree provides that an external audit of the annual accounts of the Royal House will be carried out by the Court of Auditors, as is the case with other State agencies.

In this way, the commitment acquired by the Royal House to act with transparency and publicity, assuming the provisions of the Transparency Law and the Law of Senior Officials of the State Administration, despite the fact that these regulations expressly exclude from their scope to the Head of State, has meant a considerable advance that strengthens, with its normalization, the exemplarity and credibility of the Crown, as a State institution. Of this it is testimony the obligation, expressed in the Royal Decree, that the Royal House assumes to publish on its website: the annual budget and its distribution; the quarterly statements of budget execution; the contracts entered into and the agreements signed; the remuneration received by the members of the Royal Family and by the senior officials of the House; the annual list of institutional gifts received by the Royal Family; the authorizations of compatibility for particular activities of the senior officials of the House; the compensation received by them on the occasion of their dismissal; the approved annual accounts together with the audit report; the ar

nual summary report of the Comptroller of the House and the annual report of institutional activities developed by the members of the Royal Family. To this is added the decision, unprecedented in Spain, voluntarily adopted by the King, in April 2022, to make his patrimony public. Such measures, not only strengthens the Institution but also improves the quality of democracy.

5. *Conclusions*

The Crown is an especially suitable institution to constitute an obligatory reference, a constant element of self-identification of the political community in its past and present. Thus, it has a special capacity to reduce to unity disintegrating factors inherent in the intrinsically dialectical nature of state life. Its character as a cohesive instance within the political community, above fragmented and particular interests of all kinds, allows it to transcend the different political options, showing itself as a factor of national integration, at the political, social and territorial levels. This has been demonstrated in both extraordinary situations (during the political transition from dictatorship to democracy and contributing to stop assaults against the constitutional regime in 1981 and 2017) as ordinary, impregnating the daily performance of the monarch. The Crown´s contemporary commitment to democratic principles is constantly renewed and updated, since the Crown appeals to their preservation, respect and promotion. This shows that the monarch is the one who best symbolizes and represents the Nation that, like the Spanish, is, at the same time, one and diverse. The crisis of exemplarity that affected and damaged the Crown so much in the last years of the previous reign seems to have been overcome thanks to the transparency efforts deployed by the current King. In this way, he has recovered the symbolic potentiality of the Crown for the benefit of the political community, thereby demonstrating the usefulness of a truly singular institution.

Abstract

Monarchy has demonstrated a great capacity for adaptation to the needs of democracy. The loss of the King´s discretionary powers has benefited the Crown while increasing its symbolic status, thus allowing it to display said quality as a visible sign that represents the unity and continu-

ity of the nation, and also its territorial diversity. This integrating effect requires exemplarity and transparency in order to be successful, adopting measures that not only strengthens the Institution but also improves the quality of democracy.

La Monarchia ha dimostrato una grande capacità di adattamento ai bisogni della democrazia. La perdita dei poteri discrezionali del Re ha giovato alla Corona aumentandone allo stesso tempo il suo status simbolico, consentendole così di mostrare tale qualità come segno visibile che rappresenta l'unità e la continuità della nazione, e anche la sua diversità territoriale. Tale effetto integrativo richiede un'effettiva esemplarità e trasparenza attraverso l'adozione di misure che non solo rafforzino l'Istituzione, ma migliorino anche la qualità della democrazia.