Are There No Material Intangibility Clauses in the Spanish Constitution?[1]

¿No hay cláusulas de intangibilidad material en la Constitución española?

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Resumen: El profesor Sauca Cano parte en su trabajo de una premisa comúnmente admitida por la doctrina constitucionalista de nuestro país: la Constitución Española de 1978 no recoge ninguna cláusula de intangibilidad material de carácter expreso. En el presente texto se intenta justificar, desde la óptica del Derecho Constitucional, por qué el artículo 2 de la Constitución sí establece ese tipo de cláusula expresa cuando prescribe la condición indisoluble e indivisible del sujeto titular de la soberanía.
Palabras clave: Cláusulas de intangibilidad, límite expreso, indisolubilidad, indivisibilidad, soberanía, reforma constitucional.

Abstract: Professor Sauca Cano starts in his work from a premise commonly accepted by the constitutionalist doctrine of our country: the Spanish Constitution of 1978 does not contain any explicit clause of material intangibility. This text attempts to justify, from the perspective of Constitutional Law, why Article 2 of the Constitution does establish this type of explicit clause when it prescribes the indissoluble and indivisible condition of the holder of sovereignty.
Keywords: Intangibility clauses, express limit, indissolubility, indivisibility, sovereignty, constitutional reform.

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comprehensive review of the Constitution and its hermeneutic scope. V. Irrelevance of the category of non-militant democracy on these effects VI. Summary VII. Reference

I. Introduction: doctrinal agreement on the non-existence of express intangibility clauses in the Spanish Constitution (SC)

In the first part of his work, Professor Sauca brilliantly addresses the question of the incorporation of intangibility clauses into constitutional texts. He offers stimulating and useful insights from the Theory of Law perspective providing interesting remarks and categories for constitutional theorists. He concludes that the Constitution in force that we have does not contain intangibility clauses rather than that of fortuity nature provided by Article 169 SC. In other words, there would be no express limitations to constitutional reform. This is one of the arguments on which he based his claims regarding the possibility that the Spanish Constitution does provide, conversely, some *constitutional liquidity clauses* that would operate within opposite logic.

Therefore, it joins to what has always been the unanimous opinion of the constitutional doctrine of our country, backed by the jurisprudence of the Constitutional Court.[2] This consensus includes those who argue for the absence of absolute material limitations of any kind (Pérez Royo, 2015; Aláez Corral, 2000; García-Escudero Márquez, 2007), and those who advocate the existence of material limits of an implicit nature (Ruipérez Alamillo, 2014, 145-146; De Vega García, 1985; Fondevila Marón, 2015, p.

[2] See Constitutional Court Judgment (CCJ) of September 11: "El procedimiento que se quiere abrir, con el alcance que le es propio, no puede dejar de afectar al conjunto de los ciudadanos españoles, pues en el mismo se abordaría la redefinición del orden constituido por la voluntad soberana de la Nación, cuyo cauce constitucionalmente no es otro que el de la revisión total de la Constitución por la vía del artículo 168 CE. […] La cuestión que ha querido someterse a consulta de los ciudadanos del País Vasco afecta (art. 2 CE) al fundamento del orden constitucional vigente (en la medida en que supone una reconsideración de la identidad y unidad del sujeto soberano […]) y por ello sólo puede ser objeto de consulta popular por vía del referéndum de revisión constitucional. (The procedure that is requested to be issued herein, with the appropriate scope, would affect Spanish citizens because it would imply the redefinition of the legal system by the sovereign will of the Nation, whose constitutional course is none other than the constitutional review provided in art. 168 SC. [...] The question that has been submitted to the citizens of the Basque Country for consultation affects (art. 2 SC) the foundation of the current constitutional system (insofar it entails pondering the identity and and unity of the sovereign subject) and, thus, it can only be asked through popular consultation by means of a referendum on constitutional review. Is a matter whose institutional treatment is reserved to the procedure of art. 168 SC)."

249-260). They all agree that, without any doubt, our current Constitution has not expressly provided any clause of material intangibility.

M y contribution to this debate lies in questioning, at least, the general premise shared by all, particularly, from the perspective of Constitutional Law rather than Theory of Law. Concretely, could we not understand that the constituent assembly set an express material limitation to constitutional reform when it established the *indissoluble* and *indivisible* character of the Spanish Nation, of the holder of sovereignty, in art. 2 SC of 1978?

However, we should distance ourselves from this thesis by refuting the main arguments of the doctrine that justify it. Hence, my objective is to justify: the legal viability of the express intangibility clauses and their possible formulations, the condition of foundation but also of positive decree of the indissolubility and indivisibility enshrined in constitutional art. 2, the absence of hermeneutic value in the provision of a procedure for the comprehensive review of the Constitution (art. 168.1), and, finally, the irrelevance of the non-militant democracy condition of our model on these effects. Let´s take a view.

II. Intangibility clauses: their specific wording and placement

Since its beginnings, constitutionalism has studied both the legality of including clauses of material intangibility to Constitutional Texts and the pertaining and potentially effectiveness from a political standpoint, or even sociological (See the overview of critical schools in García-Atance García, 2002, p. 182-187). Although there are plenty of discussions regarding the former —the strictly legal sphere (Hernández Valle, 1993, p. 151-153)—, it is true that, as Jiménez Campo has rightly pointed out, most of the arguments claimed by the constitutionalist doctrine criticizing the incorporation of these clauses into Constitutions have focused on the latter, that is, the effectiveness in political terms.[3] Let us consider the example of Loewenstein:

[3] Jiménez Campo, 1980, p. 94: "Más interés tiene para la interpretación de nuestra Constitución el problema de los límites expresos -*textuales*, como, con mayor precisión, los identifica Cicconetti- a la revisión constitucional. Como habrá ocasión de apuntar, la cuestión de la existencia de tales límites no puede, sin más, resolverse negativamente a propósito del texto fundamental español, y ello pese a que no pueda ignorarse la importancia de la previsión de una revisión total del mismo. Como es de sobra conocido, el recurso a las cláusulas de intangibilidad no escasea en el Derecho comparado, por más que dicha práctica siga siendo objeto de una aguda polémica doctrinal. Como es de sobra conocido, el recurso a las cláusulas de intangibilidad no escasea en el Derecho comparado, por más que dicha práctica siga siendo objeto de una aguda polémica doctrinal. No se trata ya de la argumentación

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> En general, sería de señalar que las disposiciones de intangibilidad incorporadas a una Constitución pueden suponer en tiempos normales una luz roja útil frente a mayorías parlamentarias deseosas de enmiendas constitucionales -y según la experiencia tampoco existe para esto una garantía completa-, pero con ello en absoluto se puede decir que dichos preceptos se hallen inmunizados contra toda revisión. En un desarrollo normal de la dinámica política puede ser que hasta cierto punto se mantengan firmes, pero en épocas de crisis son tan sólo pedazos de papel barridos por el viento de la realidad política (In general, it should be noted that the provisions of intangibility incorporated into a constitution may, in ordinary times, be a useful red light before parliamentary majorities seeking constitutional amendments —which experience has proved is not guarantee—, but they, by no means, may be deemed as except from any review. Under an ordinary development of political dynamics, they may sustain without changes, but in times of crisis they shall just be pieces of paper swept by the wind of political reality. Transl. Mariana Esparza Castilla) (2018, p. 192).

However, these arguments, which can be addressed from different perspectives, cannot deprive these clauses from legal value, as evidenced by the fact that they have been incorporated and effectively applied by the Constitutional Courts of many constitutional systems, particularly in Italy, as we shall see below.[4]

según la cual los límites en cuestión nunca tendrían carácter absoluto y sí sólo relativo, siendo removible el procedimiento más agravado, al modo como lo ha expuesto Biscaretti y como en España sostuvo Ruiz del Castillo. Desde un punto de vista más sociológico que jurídico, se ha afirmado la inutilidad de semejantes cautelas incapaces, se argumenta, de enfrentarse al cambio político-, cuando no su potencial *revolucionario*, en la medida en que contribuirían a obstaculizar la juridificación de determinadas demandas políticas que, desprovistas de cauce constitucional adecuado, devendrían fatalmente anti-sistema (It is more relevant to the interpretation of our Constitution the problem of express —written— limitations, as Cicconetti identifyes more clearly —to constitutional review. As I will stress herein, the question about the existence of such limitations cannot, without further ado, be resolved negatively with regard to the Spanish fundamental text, even though the importance of the provision for a comprehensive review of the text cannot be ignored. As is well known, the use of intangibility clauses is common in Comparative Law, although this practice continues to be the subject of strong doctrinal controversy. It is no longer about arguing that such limitations would only be relative and never absolute, with the most aggravated procedure being removable, as Biscaretti argued and as Ruiz del Castillo stated in Spain. From a sociological rather than legal point of view, the futility of such precautions incapable, it is argued, of confronting political change, if not its revolutionary potential, insofar as they would contribute to hindering the legal procedure of certain political actions which, deprived of an adequate constitutional channel, would become fatally anti-system)".

[4] In this sense, García-Atance García, 2002, p. 204, claims that: "Claiming that those circumstances are useless is not enough reason to deny them of character and legal value, due to the revolutionary potential they assume, and thus hindering the legalization of certain political demands that, with no legal foresight therein, would lead to a possible revolution."

I quote for this point what Vera Santos has argued, among other authors, to justify the origin of the clauses herein as long as "expresan la identificación de toda la Constitución con determinado régimen político, aclaran de alguna manera las posibles concomitancias y diferencias entre el poder constituyente y el poder de revisión y determina contundentemente el significado y el alcance de las funciones de la Justicia Constitucional (they express the identification of the entire Constitution with a certain political regime, clarify in some way the possible concomitances and differences between constituent and review power, and strongly determines the meaning and scope of the functions of Constitutional Justice. Transl. Mariana Esparza Castilla) (Vera Santos, 2007, p. 261)." Under the understanding that the absolute limitations to the Constitution would not mean limitations on the constituent power, since what is limited is the power of constitutional revision, which is a constituted and necessarily limited power. This led us to suggest, as Tajadura Tejada has firmly stated, that Constitutional Courts should be empowered to control those reforms that may violate both formal and material limitations that the Constitution itself imposes:

> Es preciso afrontar la principal objeción que suele formularse al establecimiento de cláusulas de intangibilidad: su inoperancia. Se afirma que estas cláusulas resultan jurídicamente inútiles puesto que carecen de mecanismos o procedimientos para garantizar su efectividad. A mi juicio, la objeción deja de tener sentido en el momento mismo en que se faculta al órgano de defensa para controlar la reforma constitucional. El Tribunal Constitucional debe estar facultado para anular una reforma constitucional que no respete los límites materiales finados por la propia Constitución. En estos casos, y para evitar un enfrentamiento directo con la voluntad popular es preciso defender la necesidad de que el control de constitucionalidad de la reforma se verifique, en todo caso, siempre, antes de que ésta sea sometida a referéndum. La atribución de esta decisiva función o facultad al Tribunal refuerza su posición de supremo órgano de defensa del Texto Constitucional, y nos exige, a su vez, replantearnos el complejo y delicado diseño de esta institución como auténtica clave de bóveda del edificio constitucional (The main objection that is often raised against the establishment of intangibility clauses must be addressed: their inoperability. The argument claims that such clauses are legally useless since they lack mechanisms or procedures to guarantee their effectiveness. However, the foregoing is no longer valid when the defense agency is empowered to control constitutional reform. Constitutional Courts shall be empowered to annul a constitutional reform contravening the material limitations set forth by the Constitution. In such cases, and to avoid a direct confrontation with the popular will, the need to verify the control over constitutional reform shall be defended, always before it is submitted to a referendum. The attribution of this decisive function or power to the

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> Court reinforces its position as the supreme agency for the defense of the Constitutional Text requires us, in turn, to rethink the complex and delicate design of this institution as an authentic key to the vault of the constitutional building. Transl. Mariana Esparza Castilla) (Tajadura Tejada, 2016, p. 277).

The difference between what I claim hereby, and the almost unanimous criterion of the doctrine is the understanding that material intangibility clauses, which obviously should be clear and explicit therein, shall be in Title X regarding constitutional reform and shall be formulated by the wording *provision X is unchangeable/ beyond reform*.[5] Thus is the case of the Italian Constitution, since, as ours, establishes a decentralized unitary state, rather than a federal State:[6] there is no typical clause of immutability of the indivisibility of the Republic in the proper Title about constitutional reform therein, but the Constitutional Court (Judgments 1146/1988 and 118/2015) has understood that the wording of Article 5 therein: "La República, una e indivisible, […] (The Republic, one and indivisible, [...]. Transl. Spanish Constitution of 1978)", refers to a constituent power's decision that is "removed even from the power of constitutional revision", that is, it establishes an express material limitation to constitutional reform, which does not require other formulations or greater or more explicit reinforcements in other areas of the Constitutional.

Although the standpoint of our Constitutional Court has been quite different from the Italian's, I deemed more than reasonable to draw this potential parallel between the scope of Article 5 of the Italian Constitution and that of the even more resounding Article 2 of the Spanish Constitution. Due to the reasons hereinbelow.

III. The indissolubility and indivisibility of the State: positive normative order

Article 2 SC is categorical in stating that the Constitution, that is, the set of all the decisions of the constituent assembly, is "based" on the indissoluble unity of the Spanish Nation, to then add that that Nation is the "common and indivisible homeland" of all Spaniards. We can only but conclude

[5] Carreras Serra, 2014, p. 86-87: "If this item —*the indissoluble unity of the Spanish Nation*— were beyond reform, the Constitution should provide so, as other constitutions do with other dispositions (i.e., the German, Italian or French)."

[6] Perhaps we could find ourselves in a different situation in the case of having a Federal Constitution arise from the constituent power from the States of the Federation. See Solozábal Echavarría, 2018, p. 68. See also the very suggestive reflections of Vera Santos, 2014, p.157-172.

after considering the foregoing with the provision of Article 1.2 SC, about Spanish people as the holder of sovereignty, that the constituent power, the sovereign, and its unitary condition precede the constitutional decision, as the logic may lead.

But, although it is thus unquestionable that the indissoluble unity of the Nation is a precondition and foundation of the Constitution itself, this does not mean that such a quality remains exclusively in the prior legal, the meta or the supra-positive world. Article 2 of the Constitution does not only recognize a prior reality whereby it is stated the constituent will, but also acquires, precisely by the incorporation into the constitutional text, the character of a positive constitutional decision. In other words, the Spanish Nation and its indissoluble nature precede the Constitution in time, but sovereign shall decide as well whether *constitute* this extralegal reality and transform it into a positive mandate of the Fundamental Norm. Within its pre-existence, it is also the will of the Constituent Assembly of 1978 to endow the Spanish Nation with the status of indissoluble. To put it in Schmitt's words, the indissoluble unity would be, at once, *foundation* and *political will* of the *political being*:

> Una Constitución no se apoya en una norma cuya justicia sea fundamento de su validez. Se apoya en una decisión política surgida de un *ser* político, acerca del modo y forma del propio ser. La palabra *voluntad* denuncia —en contraste con toda dependencia respecto de una justicia normativa o abstracta— lo esencialmente *existencial* de ese fundamento de validez. El poder constituyente es voluntad política: ser político concreto (A constitution is not based on a norm whose justice is the foundation of its validity. It is based on a political decision by a political *being* political on the way and form of one's own being. The term *will* denounce —contrary to relying on a normative or abstract justice— the fundamentally *existential* of this validity basis. Constituent power is political will: being a concrete politician. Transl. Mariana Esparza Castilla) (Schmitt, 2019, p. 124).

Thus, my claim that the condition of prior foundation is in no way incompatible with the first normative decision of the constituent assembly seems reasonable[7], with the consequences derived therefrom, i.e., the abolishment of the arguments claiming that Article 2 SC does not es-

[7] De Carreras Serra, also understands that it is a normative decision of the constituent assembly, although he denies, precisely for this reason, its condition as prior to constitutional decision and, therefore, its condition as an implicit limit to constitutional reform: "The Unity of Spain is not a presupposition of the Constitution, although a literal interpretation of Article 2 SC may confuse us.

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tablishes a limitation to constitutional reform based on self-referentiality and positivity of the Constitution.

But, contrary to what is defended by a large part of the doctrine of our country, the author has understood that the subsequent allusion to the also "indivisible" character of the Nation adds nothing new, different, or complementary to the first statement. For example, Alzaga Villaamil understands that indissoluble and indivisible are used by the constituent as "sinónimos; califica la afirmación patria común e indivisible de todos los españoles como 'retórica redundancia' (synonyms; the author deems the expression of common and indivisible homeland of all Spaniards as 'redundant rhetoric'. Transl. Mariana Esparza Castilla)" (1978, p. 970); and Herrero de Miñón goes so far as to affirm that this addition "no introduce en la Constitución ningún nuevo elemento normativo […]. Sirvió y sirve, en el plano afectivo, para compensar los sentimientos, en este caso de recelo, que el propio legislador constituyente abrigaba al introducir en el mismo artículo la expresión nacionalidades. El lenguaje catárquico, en consecuencia, pretende, tan sólo, ser enunciado. Su finalidad se agota en sí mismo (does not introduce any new normative element into the Constitution [...]. The wording served and still serves on the affective level, to compensate the feelings, in this case of suspicion, that the constituent legislator harbored when introducing the expression nationalities in the same Article. Thus, cathartic language aims only to be enunciated. Its purpose is self-exhausted. Tranls. Mariana Esparza Castilla)" (2008, p. 6-7). The *indivisibility* postulated by the same Article 2 SC 78 is not an alien assertion, but a separate and distinct one from that regarding the *indissolubility*.[8] Consequently, we may conclude that only the indissolubility is the foundation of the Constitution, and that the indivisibility of the sovereign is not a prior and extra-legal reality, but a full normative decision, now unequivocally, of the constituent assembly, which establish —self-referentiality and positivity— an explicit limit to constitutional review. In other words, the Spanish Nation, besides being originally indissoluble, would also be indivisible because the constituent has provided so and only because the constituent has provided so.

Inevitably, it is thus essential to justify that we are dealing with two perfectly differentiable and not equivalent categories. The first to stress this distinction, or at least its usefulness, although with an intention different from ours and despite initially sharing the opposite prevailing thesis, was Torres del Moral:

[8] A whole different scenario would be if the wording therein would had been, for example, the one proposed by Cámara Villar: "The Constitution is based on the unity and indivisibility of the Spanish Nation [...]" (2018, p. 53).

> En un principio se interpretó como un desliz del constituyente el hablar de *indisoluble* unidad de la nación española. Acaso un prurito literario le hizo utilizar este término por no repetir dos veces *indivisible* en el mismo precepto. Al cabo del tiempo ha resultado un acierto. La desaparición de la URSS ha puesto de relieve que una cosa es la división de un Estado y otra su disolución. La URSS no se ha dividido: se ha disuelto. Así, pues, el término indisoluble ha resultado ser mucho más preciso de lo que acaso pretendió el constituyente (The *indissoluble* unity of the Spanish Nation was deemed at first s a slip of the constituent assembly. A literary pruritus led using this term to avoid repeating *indivisible* twice in the same Article. After a while it turned out to be a wise decision. The disappearance of the USSR has highlighted the distinction between the State's division and its dissolution. The USSR was not divided: it was dissolved. Thus, the term indissoluble has turned out to be much more precise than what the constituent assembly intended. Transl. Mariana Esparza Castilla) (Torres del Moral, 1992, p. 23).

Already in the Report from the State's Council of 2006 on the government proposal to modify some parts of the Constitution, it was underlying the idea that there is no repetition when the Constitution speaks of indissolubility and indivisibility, to the point of advising to keep the current wording of that first part of Article 2 SC 78:

> La referencia al derecho a la autonomía de nacionalidades y regiones sirvió a los constituyentes de vía para introducir en la Constitución la idea de lo que se ha llamado la España plural, una Nación única e indivisible, pero integrada por partes diferenciadas. A juicio del Consejo de Estado es imprescindible mantener incólume esta idea […]. Las modificaciones que han de introducirse en el artículo 2 no afectan en modo alguno a la primera parte del precepto; es decir, a la afirmación de que *la Constitución se fundamenta en la indisoluble unidad de la Nación española, patria común e indivisible de todos los españoles* (The reference to the right to autonomy of nationalities and regions helped the constituent assembly to introduce into the Constitution the idea of what has been called plural Spain, a single and indivisible Nation integrated by differentiated parts. In the opinion of the Council of State, it is essential to keep this idea intact [...]. The foreseen amendments to Article 2 do not affect the first part thereof in any way; that is, the statement that *the Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible country of all Spaniards.* Transl. Mariana Esparza Castilla) (Rubio Llorente, and Álvarez Junco, 2006, p. 150-151).

It also should be noted that the Constituent Cortes rejected all the amendments submitted during the parliamentary work on this Article 2 SC aimed to eliminating the alleged repetition of these two synonyms.

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More recently, Vírgala Foruria has accurately pointed out that indivisibility would fail with a hypothetical secession, but not necessarily the indissolubility, although she does not see therein a limit, express nor implicit, to constitutional reform:

> Se mantiene la unidad de lo previo y la unidad de lo posterior [en caso de secesión de una parte del territorio]. La soberanía sigue perteneciendo al conjunto del pueblo español que permite en un momento dado, y por los procedimientos constitucionales establecidos, que los ciudadanos de un determinado territorio decidan la separación, reestructurándose en ese momento la unidad del Estado a la nueva situación (Hence, the unity of the former and the latter is maintained [in case of the secession of a part of the territory]. Sovereignty still belongs to the Spanish people which enables the citizens of a certain territory, at a given moment and by the established constitutional procedures, decide the separation, restructuring at that moment the unity of the State to the new situation. Transl. Mariana Esparza Castilla) (Vírgala Foruria, 2017, p. 393).

An eventual constitutional recognition of the right to self-determination would indeed be incompatible with the provision of the indissoluble unity of the Nation, but not when a constitutional reform would decide the direct secession of a specific territory. Such secession would be prohibited not by the indissolubility but by the indivisibility of the Nation established therein. It is then a decision of the constituent assembly, a normative order of constitutional rank, which goes one step further in restricting the possibilities of altering the integrity of the national territory. It is a prohibition adopted as an express and absolute limitation to the reform of the Constitution of 1978. The least —the division of the sovereign subject— is thus expressly prohibited, so that, regardless of the legal value that we may give to indissolubility as the foundation of the Constitution, it is certain that, in this way, we can hardly understand the most —the dissolution of the Nation— as permitted.

Moreover, it is formulated not only as a limit, but as a first or major premise of other constitutional decisions following, also of those provided in Part X for constitutional review. Without any doubt, the right to political autonomy, thus the entire Part VIII of the Constitution, is established and regulated under the provisions known because is based on an indispensability: the indivisibility of the Nation.[9] However, as explained here-

[9] See in this regard Blanco Valdés, 2003, p. 111: "And autonomy exists because there is unity, without which autonomy is simply inconceivable: unity is the logical and political presupposition of an autonomy that has been the point of arrival of the decentralization process in Spain and not, as has happened in most federal States, the starting point that has led, after

inbelow, Article 168 SC provides a procedure for the *entire* review of the Constitution, not *despite* that Article 2 establishes the indivisibility of the Nation, but *once that* this provision has shielded the unity of the sovereign subject from any subsequent reform that may sought to alter it.

IV. Procedure for a comprehensive review of the Constitution and its hermeneutic scope

A particularly important doctrinal majority has justified the lack of any material limitation to constitutional reform, both implicit and express, exclusively because Article 168 SC has provided a procedure for the *total review* of the Constitution. This has led, beyond my understanding, to an isolated and very literal interpretation of the first paragraph thereof,[10] by which some of the most relevant constitutional decisions within the Preliminary Part of the Constitution are interpreted restrictively, or simply are ignored. Aláez Corral provides a clear example of this understanding on the issue:

> Si el límite material se ha podido definir como aquella disposición constitucional de estructura normativa abierta que, a través de un mandato o de una prohibición, clausura la capacidad de conocimiento de la forma jurídica suprema, resulta meridiano que tanto el artículo 169 como el artículo 168 CE establecen límites materiales respecto al procedimiento de reforma constitucional del artículo 167 CE. […]. En el caso del artículo 168 CE, la norma adopta la forma de un mandato, obligando a seguir un determinado procedimiento agravado para proceder a esta modificación. No es posible, pues, acudir a otras disposiciones constitucionales cuyo objeto no es la regulación de la reforma constitucional, ni a disposiciones heterorreferentes de otros sistemas jurídicos, con pretendida validez autónoma, para hallar en nuestro ordenamiento

the due process of territorial structuring, to the construction of a state political unit formed by previously sovereign territories."

[10] Jiménez Campo, 1980, p. 87, 88 and 90 puts it eloquently: "From the isolated reading of article 168.1, our fundamental text has opted for a total ideological indifferentism that leads to the same foresight of its comprehensive review, rather its *destruction*. While there are plenty of precedents in other legal systems in the past or nowadays, such decision implies forgetting that, from the legal standpoint, and as De Vega recently recalled, the revision is fundamentally a problem of defending, not subverting, the Constitution, as well as of excessive confidence in the usefulness of legal channels for the abrogation of the Constitution. [...] And it is precisely the idea of law present in our Constitution what shall be considered herein. Because, as has been stated, the tension between Title X, mainly Article 168, and other provisions of the Constitution is, first of all, the tension between an apparent ideological indifferentism, which goes as far as questioning the text in its entirety, and a will of the constituent assembly, whereby crucial stances, institutional and ideological, of political coexistence organization seemed resolutely adopted.

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> jurídico nuevos límites materiales (If the material limitation was defined as that constitutional provision with an open normative structure that, by an order or prohibition, deprives the capacity of knowledge of the Constitution, it is imperative that Articles 169 and 168 SC establish material limitations on the procedures for the constitutional reform of Article 167 SC. […]. In Article 168 SC, the norm takes the form of an order, compelling to follow a certain aggravated procedure to proceed with this modification. It is not possible, therefore, to resort to other constitutional provisions whose object is not the regulation of constitutional reform, nor to provisions with references to other legal systems, with alleged autonomous validity, to find new material limitations in our legal system. Transl. Mariana Esparza Castilla) (2000, p. 306).

However, a doctrinal minority, although very authoritative, has conversely understood that, even from an isolated reading of Article 168.1 SC, the provision of a procedure for total review does not imply the elaboration, by that means, of a new Constitution to replace the previous one. In the words of Solozábal Echavarría, one could "cambiar la Constitución, pero no cambiar de Constitución (change the Constitution but not change of Constitution. Transl. Mariana Esparza Castilla)" (1998, p. 475). For some reason Article 28 of the Declaration of the Rights of Man and of the Citizen of 1793, often quoted by defenders of the illegality of absolute material limitations to constitutional reforms, expressly referred to three differentiable categories: reviewing, reforming, and changing the Constitution.[11] An example of this line of thought can be found in the perspectives of Ugartemendía Eceizabarrena and Donaire Villa:

> Los términos *reforma* y *revisión* aparecen, concretamente, en la rúbrica y el varios preceptos del Título X del texto fundamental español de 1978 con el significado de la realización de cambios en la redacción de todo o parte de los preceptos constitucionales. Pero no con el significado de poder hacer una Constitución nueva a su amparo, o, lo que es lo mismo, de poder hacer mediante él un cambio de Constitución. Incluso la revisión total que el artículo 168 permite realizar, con observancia del procedimiento en él establecido, supone hacer cambios en determinadas partes de la Constitución o en toda ella, pero no hacer otra nueva, pues eso no sería hacer cambios en la Constitución, algo que presupone su permanencia, sino hacer otra nueva, lo cual iría más allá de la idea de revisión, incluso total (The terms *reform* and *review* appear, specifically, in the rubric and several Articles of Title X within the Spanish Constitution of 1978 with the meaning of changing the wording of all or part

[11] Article 28 of the Declaration of the Rights of Man and of the Citizen of 1793, voted by the National Convention of June 23, 1793, and incorporated as a preamble to the French Constitution of June 24, 1793, establishes: "The people always have the right to review, reform and change the Constitution. The laws of one generation cannot compromise the generations to come."

of the constitutional provisions. But they do not have the meaning of making a new Constitution under their protection, or what is the same, of being able to change the Constitution by means of them. Even the total review that Article 168 enables, in compliance with the procedure set forth therein, implies making changes in certain parts, or throughout, of the Constitution, but does not entail making a new one since that would not be making changes to the Constitution, which presupposes its permanence, but making a new Constitution, which would exceed the idea of review, even of total review . Transl. Mariana Esparza Castilla) (Ugartemendía Eceizabarrena, and Donaire Villa, 2019, p. 122).

We can quote García-Atance García in this same sense:

> Ni aun en el supuesto de que, en el propio texto constitucional, como el presente caso -aunque no falten precedentes en el Derecho comparado-, se mencione específicamente la posibilidad de la reforma total, habrá que interpretarse literalmente porque ello supondría olvidar […] que el instituto de revisión configura un instrumento de defensa del orden constitucional y no la vía para la destrucción. Lo cual nos autoriza a rechazar la literalidad prevista en el artículo 168 CE relativa a la reforma total, en base al argumento que se fundamenta en el carácter de defensa que el instituto de reforma asume (Even if the constitutional text itself, as the case herein —although there are plenty of precedents in comparative law—, expressly holds the possibility of total reform, it nevertheless shall be interpreted literally because this would mean forgetting [...] that the institution of review configures a defense instrument of the constitutional order and not the way to destruction. This authorizes us to reject the literal interpretation of Article 168 SC regarding total reform, due to the argument based on the defense character that the institution of reform assumes. Transl. Mariana Esparza Castilla) (2002, p. 277).

In fact, deducing that the provision of a procedure for *total* reforms of the Constitution necessarily means the prohibition of the potential clauses of intangibility that may be included throughout the Constitution would be as absurd as to understand *conversely* that the reforms deemed as *total* would affect inexcusably all Articles of the SC of 1978 and that, by doing so, it would also substantially affect the normative mandate(s) contained in each of them.

But, beyond those isolated readings of Article 168.1 SE, it is clear that, as the Constitutional Court has repeatedly recalled, the Constitution "no es la suma y el agregado de una multiplicidad de mandatos inconexos (is not the sum and aggregate of a multiplicity of unconnected mandates. Transl. Mariana Esparza Castilla.)", and should result in "un sistema coherente en el que todos sus contenidos encuentren el espacio y la eficacia que el constituyente quiso otorgarles (a coherent system in which all its

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contents find the space and effectiveness that the constituent assembly wanted to grant them. Transl. Mariana Esparza Castilla)"[12] The best doctrine has also stressed the foregoing in very similar terms. By all, Ruipérez Alamillo:

> La Constitución no puede ser concebida como una serie de preceptos que se superponen y yuxtaponen los unos a los otros, de suerte tal que pueden contener soluciones contrapuestas. Por el contrario, la misma se presenta, o se ha de presentar, como un conjunto armónico de decisiones que, al ser positivizadas, conformas una norma equilibrada y coherente. Es por ello por lo que su interpretación, si pretende ser ponderada y cabal, no pueda llevarse a cabo tomando de manera aislada e individualizada cada uno de sus artículos, sino poniendo en relación unos mandatos con otros (The Constitution cannot be conceived as a series of precepts that overlap and juxtapose each other, that they may contain conflicting solutions. On the contrary, it is presented, or should be presented, as a harmonious set of decisions that, when positivized, form a balanced and coherent norm. That is why its interpretation, if it intends to be pondered and comprehensive, cannot be performed by isolating the Articles, but by relating one order with others. Transl. Mariana Esparza Castilla) (2003, p. 335).

Therefore, our Constitutional Court has also clearly stated that it is possible to separate from a strictly grammatical interpretation of constitutional articles when "exista ambigüedad o cuando la ambigüedad pueda derivar de conexión o coherencia sistemática entre preceptos constitucionales (there is ambiguity or when ambiguity may derive from connection or systematic coherence between constitutional precepts. Transl. Mariana Esparza Castilla)",[13] hence, in view of the usual content and structure of Constitutional Texts, as Díaz Revorio has rightly warned, "el criterio literal o gramatical se muestra manifiestamente insuficiente en esta labor interpretativa [de la Constitución], y sólo en contados casos puede resultar decisivo (the literal or grammatical criterion is manifestly insufficient in this interpretative work [of the Constitution], and only in a few cases can it prove decisive. Transl. Mariana Esparza Castilla)" (2004, p. 44). However, this is not the case at hand.

In this way the relevance of the systematic interpretation of the entire Constitution has been emphasized, which is "un todo en el que cada precepto adquiere su pleno valor y sentido en función del conjunto (a whole in which each precept acquires its full value and meaning within the whole.

[12] CCJ 206/1992 of December 27.
[13] CCJ 10/1984 of June 14.

Transl. Mariana Esparza Castilla)"[14] and, of course, by the ultimate criterion as the cornerstone thereof, as Torres del Moral argues:

> Las reflexiones siguientes quieren ceñirse a la interpretación finalista o teleológica de la Constitución, que tantas veces nos orienta sobre el verdadero sentido de un precepto cuando, perplejos ante su dicción literal, sus antecedentes históricos y su inserción sistemática en un capítulo o un título de la norma suprema, nos preguntamos qué es lo que en realidad se pretende con tal precepto. No se trata tanto, aunque también, de las clásicas preguntas sobre la *voluntas constitutionis* o la *voluntas constituentis*, sino, más radicalmente, cuál es el cometido o función de tal precepto en el conjunto normativo en el que se instala o en la institución que contribuye a regular jurídicamente (The next reflections want to follow the finalist or teleological interpretation of the Constitution, which so often guide us to find the true meaning of an Article when, perplexed by its literal diction, we ask ourselves what a certain precept truly aims based on the historical antecedents and its systematic insertion in a chapter or a title thereof. It is not about the classic questions on the *voluntas constitutionis* or the *voluntas constituentis* but, more radically, is about the role or function of such Articles within its set of laws and regulations or within the institution that helps to legally regulate. Transl. Mariana Esparza Castilla) (2005, p. 13).

Logically, in this context plays a key role what Garrorena Morales called "el núcleo en el que queda anudada la coherencia última del sistema constitucional (the nucleus in which the ultimate coherence of the constitutional system is knotted. Transl. Mariana Esparza Castilla)", that is, the fundamental constitutional decisions of the Preliminary Part, or the "Constitución de la Constitución (Constitution of the Constitution. Transl. Mariana Esparza Castilla)" They are essential premises that "devienen presupuesto inexcusable -netamente privilegiable- a la hora de interpretar el sentido de cualquier norma inmersa dentro del ordenamiento que presiden (become an inexcusable, clearly privileged, presupposition when interpreting the meaning of any norm within the system they preside over. Transl. Mariana Esparza Castilla)," both *ad extra* as *ad intra* of the Constitutional Text itself (Garrorena Morales, 1980, p. 14-15 and 17).

Of course, not all the normative orders within the Preliminary Part of the Constitution have such status, but without any doubt Articles 1.2 and 2 SC share this nature. I would rather say: among all Article within the Preliminary Part that constitutes the foundation of the constitutional building, these two are the most relevant. In particular, Article 2 is one of the capital decisions regarding the political form that the Spanish peo-

[14] CCJ 101/1983 of November 18.

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ple have given themselves and, therefore, as Zábal Echavarría warned us, it is projected "en el resto de la Constitución, a la que informa en congruencia con su contenido (in the rest of the Constitution, which it informs in congruence with its content. Transl. Mariana Esparza Castilla)", and this basic and founding condition is "no sólo un tributo que le reconoce el intérprete, sino que ha querido el constituyente (not only a tribute recognized by the interpreter, but also desired by the constituent. Transl. Mariana Esparza Castilla)". Thus, Article 2, along with others of the Preliminary Part, "encabeza la Constitución, cuyas parte dogmática y orgánica no sólo antecede, sino que, en el sentido que hemos expresado, preside (leads the Constitution, whose dogmatic and organic element not only precedes but, in the sense that we have expressed, presides. Transl. Mariana Esparza Castilla) (Solozábal Echavarría, 2018, p. 61-62)." It is also revealing that, precisely on this issue of the territorial organization of power, an "compromiso apócrifo (apocryphal compromise. Transl. Mariana Esparza Castilla)" (Tajadura Tejada, 2017, p. 272-273)[15] could be hardly reached during the constituent process, leaving the final configuration of the model extraordinarily open, notably deconstitutionalized, this first premise was formulated in an uncontroversial way. Consequently, when faced with the apparent contradiction between the resounding, clear, and explicit statement that the Spanish Nation is indissoluble and indivisible of the Preliminary Part and the provision of a procedure for the total review of the Constitution in Title X, we can only start from the inescapable reflection herein.

Therefore, despite that our Constitutional Court seems to have ruled otherwise, one cannot argue in any way that Article 2 SC should be interpreted based on Article 168.1 SC. The institution of reform, like the rest of the organic decisions of the Constitution, serves its permanence and, more particularly, the permanence of its foundations and fundamental decisions. It is not so much a question of giving supra/meta constitutional value to a historical reality prior to the decision of the constituent, as of understanding what were the first premises of that fundamental decision, on which, without any doubt, the development of the rest of the precepts of the Constitutional Text was based, including those relating to the procedures for its reform.

An essential source of material when carrying out this hermeneutic work is the set of works on the elaboration of both precepts during the constituent period, which although they "no determinan (do not necessarily determine. Transl. Mariana Esparza Castilla)" their meaning in all cases,

[15] See also Díaz Revorio (2014, pp. 104-112).

they are always, as herein, an "importante elemento de interpretación (important element of interpretation. Transl. Mariana Esparza Castilla)".[16] And, in fact, the doctrine has referred to them for supporting the thesis herein reviewed. Specifically, it has become popular, among authors of all tendencies,[17] because the inclusion of an intangibility clause relating to the indivisibility of the Nation was expressly rejected during the constituent debates when the amendments and private votes that sought to do so were unsuccessful. Particularly eloquent, and even challenging, is the claim of Caamaño Domínguez:

> Interesa recordar que la vía de la revisión total había sido descartada en el Anteproyecto de Constitución dando lugar a dos votos particulares del grupo parlamentario de Alianza Popular que abogaba por su inclusión siempre que se acompañase de una cláusula de intangibilidad en garantía de *la integridad del territorio* y *la unidad política del Estado*. La ponencia rechazó expresamente la segunda parte de estas enmiendas retomando, sin embargo, la posibilidad de la revisión total y, en el ulterior Dictamen de la Comisión de Asuntos Constitucionales, se dio forma al texto actual. En consecuencia, quien sostenga que la *unidad política del Estado* es un límite implícito al poder de enmienda, deberá fundamentar su posición no sólo mediante una interpretación del texto constitucional, sino que, además, deberá explicar por qué se debe incorporar tácitamente a la Constitución un *límite* que expresamente fue rechazado por el constituyente (We should recall that procedure for the total review was discarded in the Preliminary Draft of the Constitution with two votes within the parliamentary group of Popular Alliance (Alianza Popular) that advocated its inclusion along with an intangibility clause to guarantee *the integrity of the territory* and *the political unity of the State*. The second part of these amendments was expressly rejected by the drafting committee, but the possibility of a total review was taken up again and, in the subsequent opinion of the Constitutional Affairs Committee, the current text was shaped. Consequently, whoever claims that the *political unity of the State* is an implicit limitation to the power of amendment, shall justified the argument not only through an interpretation of the constitutional text, but, in addition, shall explain why a *limitation* shall be tacitly incorporated into the Constitution, which was expressly rejected by the constituent assembly. Transl. Mariana Esparza Castilla) (2020, p. 164).

[16] CCJ 5/1981 of February 13.

[17] This has been seen even by the most prominent defenders of the existence of an implicit limitation to the constitutional reform in Article 2. By all, Ruipérez Alamillo, 2005, p. 199. "The forces in the Constituent Assembly wanted to avoid the introduction of intangibility clauses. The enemy of the express limits was explained because the same recalled the emphatic declarations of the founding normative of Francoism on the Principles of the National Movement, which *they are by nature permanent and unalterable* (art. 3 of the Organic Law of the State, of January 1, 1967)".

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Of course, it is an unquestionable fact that there were amendments aimed at expressly including in Title X an intangibility clause declaring the integrity of the territory or the political unity of the State immutable, not even changeable by a constitutional reform. However, relying on that fact is insufficient. The interpretative key of the parliamentary works on the draft of this Articles does not relies in the fact that these amendments were not finally incorporated into the Constitution as a counterweight to the provision of the total reform's procedure, but on the reason that did not happen.

Let us begin by recalling that it is not true that the rejection of such amendments was clear and reiterated throughout the *iter* parliamentarian, as has been portrayed. In the Senate, no such amendment was debated or voted on because its proponent, Mr. Cacharro Pardo, allowed it to lapse as he did not appear to defend it either in the Committee or in the Plenary.[18] In the Congress of Deputies, Amendment No. 157 filed by Mr. Carro Martínez was indeed debated, which sought to add a new paragraph to the last Article of Title X establishing the following: "La unidad política de España y su integridad territorial son inmodificables (The political unity of Spain and its territorial integrity are unchangeable. Transl. Mariana Esparza Castilla)". Certainly, in his turn of defense, the Deputy implied that merely with the wording of Article 2 there would not be a full guarantee that, once the procedure for constitutional *total* review has been incorporated, the national unity or the territorial integrity of the country may not be altered.[19] And it is also true that, both in Committee and in Plenary Assembly, the amendment was rejected. In both cases, abstention played a decisive role, which indicates that the Congress thought the clause not only unwanted but also unnecessary.[20]

But we shall hear the arguments: both the Socialist Parliamentary Group and the Communist Parliamentary Group, which accounted for almost all the negative votes, openly claimed that their rejection of the amendment was solely because it was unnecessary since the indissolubility and indivisibility of the Nation was already fully guaranteed by Article 2 SC, not by the subjection to a very aggravated reform procedure *former* article 168.1 SC, as has been said. And, of course, by rejecting the amendment, in no way did they intend to leave this essential decision open to further reconsideration by the power of reform. The reasoning of the votes

[18] Official Communications Report (OCR), Senate, No. 157, of October 6, 1978.

[19] Sessions' Newsletter, Congress of Deputies, Plenary Assembly, No. 115, of July 20, pp. 2504-2507.

[20] On plenary Assembly: 129 votes against, 25 in favor, 112 abstentions, and 1 null vote.

of Deputies Peces-Barba and Solé Tura were explained in a straightforward way. The former stated the following:

> Nosotros entendemos que esta enmienda es absolutamente *innecesaria* y que las preocupaciones, muy justas, que se manifiestan en la enmienda están *ya resueltas en el artículo 2*. Creemos que es malo que exista expresamente una cláusula de intangibilidad porque fija una preocupación que no existe […]. Nosotros, por consiguiente, considerando que *no añade nada* al tema, sino que introduce una heterogeneidad en relación con el conjunto del título sobre la reforma nos oponemos a que esta enmienda prospere (We understand this amendment is unnecessary and that the concerns expressed in the amendment herein are already resolved in Article 2. We deemed inconvenient the existence of an expressly intangibility clause since it establishes a concern that does not exist [...]. We thus consider that this *clause does not add anything to the topic*, but rather introduces a heterogeneity in relation to the whole of the title on the reform we oppose to the approvement of this amendment. Transl. Mariana Esparza Castilla)."[21]

He not only confirmed the same argument, but also made it explicit that for his Parliamentary Group the unity of Spain was *intangible* in view of the provisions of Article 2 SC, and that what was intended by the rejection of the amendment —so it was claimed— was nothing more than not closing the door to future incorporation into the national territory of areas under foreign sovereignty, thus confusing very different legal categories:

> Creo que la enmienda que propone el Grupo de Alianza Popular tiene el defecto de que es *absolutamente innecesaria* y precisamente por serlo tiene una connotación que nos parece preocupante, por decirlo de manera suave. Si esta enmienda se somete a votación, parece que va a provocar una divisoria entre los que *somos partidarios de mantener intangible la unidad de España* y los que no lo son, lo que constituye un falso planteamiento del asunto, porque la realidad no pasa por ahí. Hemos aprobado *un artículo 2 que creo que es claro y específico al respecto* […]. Introducir, pues, ahora el problema de esa irreformabilidad absoluta nos parece innecesario […]. Si establecemos la irreformabilidad de la integridad de España, ¿cómo va a resolverse constitucionalmente en el futuro el problema de la recuperación de Gibraltar? (I believe that the amendment proposed by the People's Alliance Group has the defect that it is unnecessary and precisely due to his connotation that seems worrying to us, to put it mildly. If this amendment is put to a vote, it will divide those who are in favor of keeping the unity of Spain intangible and those

[21] Journal of Sessions of the Congress of Deputies, Committee of Constitutional Affairs and Public Freedoms, Session No. 24, of June 20, 1978, OCR, No. 93, of the same date. The turn is mine.

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> who are not, which constitutes a false approach to the issue, because the reality does not pass through there. We have approved *an article 2 that I think is clear and specific about the matter at hand* […]. Thus, introducing the problem of this absolute irreformability now seems unnecessary to us [...]. If we establish the irreformability of Spain's integrity, how will the problem of the recovery of Gibraltar be constitutionally solved in the future? Transl. Mariana Esparza Castilla).[22]

So, a correct reading of what happened during the *iter* constituent assembly should lead us to conclude that the absence of an intangibility clause on national unity in Title X of the Constitution is not an obstacle, on the contrary, we should understand that is already expressed in Article 2 SC itself.

V. Irrelevance of the category of non-militant democracy on these effects

There is a second argument —apparently connected with the former— that the best doctrine of our country has been using to justify the non-existence of material limitations to constitutional reform: our system is a model of non-militant democracy, which means that pro-independence parties are perfectly licit; and that legitimate political aspiration must necessarily have a legal channel for its eventual articulation, even though the aggravated constitutional reform of article 168 CE. Aragon Reyes explained quite eloquent in the following:

> En nuestro ordenamiento jurídico (como ha reconocido el Tribunal Constitucional en múltiples sentencias) son lícitos los partidos independentistas porque la Constitución ofrece vías para esa independencia. Si así no fuera (esto es, si la independencia de parte del territorio mediante una reforma constitucional estuviese radicalmente prohibida como sucede en Alemania, Francia o Italia) los partidos independentistas no podrían ser jurídicamente reconocidos, salvo que se incurriese en una contradicción insalvable, pues el Derecho no puede considerar lícita una pretensión cuya consecución es ilícita. Hay que insistir: en España los partidos independentistas son lícitos precisamente porque la consecución de la secesión territorial (eso sí, aprobada por el procedimiento del artículo 168 CE) también lo es (In our legal system [as the Constitutional Court has recognized in multiple judgments] pro-independence parties are legal because the Constitution offers ways for that inde-

[22] The word is again mine. J ournal of Sessions of the Congress of Deputies, Committee of Constitutional Affairs and Public Freedoms, Session No. 24, of June 20, 1978, OCR, No. 93, of the same date.

pendence. If this were not the case [that is, if the independence of part of the territory by means of a constitutional reform was radically forbidden, as it happens in Germany, France or Italy], the pro-independence parties could not be legally recognized, unless they incurred in an insurmountable contradiction, since the Law cannot consider lawful a pretension whose achievement is unlawful. It must be insisted: in Spain, pro-independence parties are lawful precisely because the pursuit of territorial secession [albeit approved by the procedure of Article 168 SC] is also lawful. Transl. Mariana Esparza Castilla) (2019, p. 200).

In a similar sense, Zábal Echavarría has also argued that:

Lo mismo ocurre con el tema de la inclusión de la autodeterminación como objeto de un programa político. Aunque aquí hay alguna cuestión un poco más difícil: el artículo 6 de nuestra Constitución exige que los partidos políticos sean democráticos en su organización y en su funcionamiento, y que no sean contrarios a la Constitución. Esa conformidad constitucional de los partidos políticos me parece que hay que entenderla en el sentido de que los partidos políticos han de respetar las exigencias procedimentales de la Constitución -de una Constitución que prevé su propia reforma-, con lo cual no se puede prohibir a los partidos políticos que propongan cosas contrarias a la propia Constitución. Lo que no pueden los partidos políticos es ser enemigos de la Constitución, defender la violencia o la comisión de delitos en la consecución de sus objetivos. Pero no cabe prohibir a los partidos políticos la consecución de procedimientos pacíficos de determinados objetivos. Yo creo, naturalmente, que la autodeterminación sería una tesis absolutamente lícita (The same applies to the inclusion of self-determination as the object of a political program. Although there is a slightly more complicated issue here: Article 6 of the Spanish Constitution requires that political parties be democratic in their organization and functioning, and not contravene to the Constitution. This compliance of political parties with the Constitution shall be understood in the sense that political parties must respect the procedural requirements of the Constitution, which provides its own reform, which means that political parties cannot be prohibited from proposing things contrary to the Constitution itself. What political parties cannot do is to be enemies of the Constitution, advocate violence or the commission of crimes in pursuit of their objectives. However, political parties shall not be prohibited to follow their objective by a peaceful procedure. I naturally believe self-determination would be a legitimate thesis. Transl. Mariana Esparza Castilla) (2014, p. 202).

Our Constitutional Court seems to have followed this same line both in its pronouncements on the Basque sovereignty process and in the most recent rulings on the Catalan institutional coup. Thus, we must stress briefly that CCJ 103/2008, of September 11, 2008, already provided that for articulating processes that affect the "redefinición del orden constitui-

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do por la voluntad soberana de la Nación (redefinition of the order constituted by the sovereign will of the Nation. Transl. Mariana Esparza Castilla)" the constitutionally foreseen channel "no es otro que el de la revisión total de la Constitución por la vía del artículo 168 CE (is none other than that of the total review of the Constitution pursuant Article 168 SC. Transl. Mariana Esparza Castilla)". This idea is comprised by the relevant CCJ 31/2010, of June 28, which recalled that any initiative seeking to "modificar el fundamento mismo del orden constitucional tiene cabida en nuestro ordenamiento jurídico (modify the very foundation of the constitutional order has a place in our legal system. Transl. Mariana Esparza Castilla)", if "su consecución efectiva se realice en el marco de los procedimientos de reforma de la Constitución (its effective achievement is carried out within the framework of the procedures for reforming the Constitution. Transl. Mariana Esparza Castilla)", whose respect is "inexcusable". And continues to claim that this possibility of effectively achieving objectives aimed at overcoming the indissolubility or indivisibility of the Nation has its justification precisely in the conception of the system as a non-militant democracy:

> En el contexto del Estado democrático instaurado por la Constitución, es obvio que, como tenemos reiterado, caben cuantas ideas quieran defenderse sin recurrir a la infracción de los procedimientos instaurados […] Y cabe, en particular, la defensa de concepciones ideológicas que, basadas en un determinado entendimiento de la realidad social, cultural y política, pretendan para una determinada colectividad la condición de comunidad nacional, incluso como principio desde el que procurar la conformación de una voluntad constitucionalmente legitimada para, mediando la oportuna e inexcusable reforma de la Constitución, traducir ese entendimiento en una realidad jurídica. En tanto, sin embargo, ello no ocurra, las normas del Ordenamiento no pueden desconocer ni inducir al equívoco en punto a la *indisoluble unidad de la Nación española* proclamada en el art. 2 CE. (In the context of the democratic State established by the Constitution, it is obvious that, as we have reiterated, there is room for any idea that wishes to be defended without resorting to the infringement of the established procedures [...]. And there is room, in particular, for the defense of ideological conceptions which, based on a certain understanding of the social, cultural and political reality, claim for a certain collectivity the condition of national community, even as a principle whereby to procure the conformation of a constitutionally legitimized will in order to translate that understanding into a legal reality, by means of the appropriate and inexcusable reform of the Constitution. Nevertheless, otherwise the rules of the legal system cannot ignore or mislead the *indissoluble unity of the Spanish Nation* set forth in art. 2 SC. Transl. Mariana Esparza Castilla).

This idea is already made fully explicit in the CCJ 42/2014, of March 25, in which it would seem that the lack of material limitations to constitutional reform is not a cause but a consequence of the legal system being a non-militant democracy:

> La primacía de la Constitución no debe confundirse con una exigencia de adhesión positiva a la norma fundamental, porque en nuestro ordenamiento constitucional no tiene cabida un modelo de democracia militante, esto es, un modelo en el que se imponga, no a el respeto, sino la adhesión positiva al ordenamiento y, en primer lugar, a la Constitución […]. Este Tribunal ha reconocido que tienen cabida en nuestro ordenamiento constitucional cuantas ideas quieran defenderse y que no existe un núcleo normativo inaccesible a los procedimientos de reforma constitucional (The precedence of the Constitution should not be confused with the requirement of positive compliance thereto, because in our constitutional system there is no room for a model of militant democracy, that is, a model that imposes not respect for, but positive compliance to the system and, first and foremost, to the Constitution [...]. This Court has recognized that there is room in our constitutional system for as many ideas that wish to be defended and that there is no normative core inaccessible to constitutional reform procedures. Transl. Mariana Esparza Castilla).

This perspective express material limitation to constitutional reform regarding the indivisibility of the Republic (art. 5), without any illicitness derived from the incorporation of objectives expressly contrary thereto in the Statutes of the political parties.[23] Likewise, as is logical, a small part of the doctrine has pointed out —in my opinion, correctly— that there is not necessarily a relation between the category of non-militant democracy and the absence of material limitations to constitutional reform.

Thus, Fondevila Marón has warned that intangibility clauses "no forman parte del concepto de Democracia militante (are not part of the concept of militant democracy. Transl. Mariana Esparza Castilla. Transl. Mariana Esparza Castilla)" since they "hacen referencia a objetos que son protegidos de la acción del poder de revisión y no son un medio de defensa de la Democracia a través de la Constitución (refer to objects that are protected from the action of the power to review and are no means of defense for democracy through the Constitution. Transl. Mariana Esparza Castilla. Transl.

[23] Among others, the National Party of Veneto, the Independence of the Republic of Sardinia or the Northern League itself have included in their Statutes clear references to the political goal of secession. Take, for example, Article 1 of the Statutes of the latter party: "This confederal political movement [...] aims to achieve the independence of Padania by democratic methods and its international recognition as an independent and sovereign Federal Republic". See: Calamandrei, 2013; and Pegoraro, 2013.

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Mariana Esparza Castilla)". Hence, the concept of intangibility clause "supera el concepto de Democracia militante porque excede el concepto de *Democracia* (exceeds the concept of militant democracy because it exceeds the concept of Democracy. Transl. Mariana Esparza Castilla)". According to the author, one thing would be "las medidas establecidas a nivel constitucional o legal para combatir la propagación de ideologías que inciten al odio y/o a la violencia, o que supongan un atentado contra los valores establecidos en la Constitución (the measures set forth in the Constitution or by law to fight against the dissemination of ideologies that encourage hatred and/or violence, or that threaten the values therein. Transl. Mariana Esparza Castilla)" and quite another "aquellos elementos que el Poder Constituyente quiso excluir de la acción potencial del poder de reforma […], como puedan se la forma de Estado, la forma de gobierno, etc. (those elements that the Constituent Power wished to exclude from the possible action of the reform power [...], such as reforms by the State, government, etc. Transl. Mariana Esparza Castilla)". We would then be dealing with related or complementary categories, but "sin conexión directa entre ellas (without direct connection between them. Transl. Mariana Esparza Castilla)" (Fondevila Marón, 2016, p. 115-117).

De Miguel Bárcena has also distinguished between the material limitations to constitutional reform, which "aportan identidad institucional a la comunidad política (provide institutional identity to the political community. Transl. Mariana Esparza Castilla)" and undoubtedly entail "una limitación al pluralismo político desde el punto de vista de la reforma constitucional, que puede ser calificada de intolerable si nos atenemos a una idea de conversación pública sin exclusiones temáticas (a limitation to political pluralism from the standpoint of constitutional reform, which can be deemed as intolerable if we abide by an idea of public conversation without thematic exclusions. Transl. Mariana Esparza Castilla), and militant democracy which, on the contrary, is "un dispositivo que busca expulsar de la legalidad a aquellos grupos que tienen como objetivo destruir la democracia representativa y el régimen de libertades que la sostiene (a mechanism aimed at expelling from legality those groups seeking to destroy representative democracy and the regime of freedoms that sustains it Transl. Mariana Esparza Castilla)" (De Miguel Bárcena, 2022, p. 17-43). The author believes that we would be dealing with a category, that of militant democracy, inseparable from the German historical circumstances, which has been misinterpreted in the Spanish Constitutional Court by linking it to the alleged absence of material limitations to constitutional reform:

> La vinculación entre la inexistencia de una democracia militante y la ausencia de límites materiales a la reforma es un viejo error en el que sigue persistiendo contumazmente la jurisprudencia del Tribunal Constitucional, que hizo suya sin mayor reflexión la jurisprudencia del Tribunal de Karlsruhe, sin caer en la cuenta de la peculiaridad histórica alemana. En pura hipótesis, este error puede provenir de la interpretación inicial realizada por de Otto o de una vieja introducción a la primera traducción de *Legalidad y legitimidad*, donde Schmitt pretende hacer suya -de manera oportunista- la paternidad del vínculo entre la legalidad de un partido y el límite a la facultad de reformar la Constitución (The link between the non-existence of a militant democracy and the absence of material limitations to reform is an old error stubbornly maintained by the Constitutional Court's jurisprudence, which adopted the jurisprudence of the Karlsruhe Court without further reflection and, thus, without considering the German historical peculiarity. Hypothetically, this error may come either from the first interpretation made by de Otto or an old introduction to the first translation of *Legalidad y legitimidad (Legality and Legitimacy)*, whereby Schmitt pretends to make his own, opportunistically, the link between the legality of a party and the limitation to the power to reform the Constitution. Transl. Mariana Esparza Castilla) (De Miguel Bárcena, 2019, p. 83).[24]

[24] By Miguel Bárcena, 2020, p. 216. The author goes on to highlight therein that "toda democracia es una democracia militante. Esta acepción no está sustancialmente emparentada con la reforma constitucional y sus límites, cuestión que alude a la identidad institucional, sino con el abuso de derecho tal y como lo pensó inicialmente Karl Loewestein (1937) y que está expresado en la Ley Fundamental de Bonn (art. 18) y en el CEDH (art. 17). Este es el camino que ha adoptado el Tribunal Europeo de Derechos Humanos en su abundante jurisprudencia: no se exige una adhesión positiva a la *ideología* de cualquier constitución -si pudiéramos inferir tal cosa una vez proclamado como valor el pluralismo político-, pero sí se exige una adhesión a aquella parte de la Constitución que consagra el régimen democrático y las libertades públicas. En su versión minimalista, la Constitución española tiene un límite intangible -o inviolable- de la democracia: la dignidad de la persona y los derechos que le son inherentes, fundamento del orden político y de la paz social (art. 10.1 SC) (every democracy is a militant democracy. This meaning is not substantially related to that of constitutional reform and its limitations, a matter of institutional identity, but rather to the violation of rights as was originally conceived by Karl Loewestein (1937) and which is expressed in the Basic Law of Bonn (art. 18) and in the ECHR (art. 17). The European Court of Human Rights has taken this approach throughout its extensive jurisprudence: it is not required a positive allegiance to the ideology of any constitution -if we may infer that once political pluralism is proclaimed as a value-, but it is required an allegiance to the Constitution whereby the democratic regime and civil liberties are enshrined. In its simplest version, the Spanish Constitution has an intangible, or inviolable, limitation to democracy: the human dignity and the inherent rights, the foundation of political order and social peace) (art. 10.1 SC)". Torres del Moral (2006, p. 223) has already developed furthermore the idea that every democracy is a militant one in a severe criticism of both the jurisprudence of the Constitutional Court and the Supreme Court as well as the stance of the mainstream doctrine: "Ambos tribunales niegan que la española sea una democracia militante, con lo que asumen y dan por bueno el sentido que esta expresión ha recibido de un sector de la doctrina, que dócil y acríticamente ha sido seguido por casi todos los autores, sobre todo por la pereza que siempre produce pensar por cuenta propia. Con lo cual (es decir, asumiendo este sentido, más bien esta descalificación de la democ-

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Nevertheless, this is an interesting, ongoing and complex debate, for instance, Aragón Reyes himself has been refining his original stance in recent years:

> Ahora bien, esta tesis de que la nuestra no es una democracia militante encuentra, sin embargo, ciertos reparos, fundados en la idea misma de Constitución, lo que me conduce ahora a matizar aquella tesis, que tanto tiempo mantuve, aunque ya en los últimos años fui señalando algunos de sus inconvenientes. Si, como ha de admitirse, no hay otra Constitución auténtica que la democrática, los posibles cambios en la misma han de permitir reformarla, pero no destruirla, es decir, cambiar "de" Constitución, pero no abandonar "la" Constitución como sistema de organización política (lo que significa que el cambio, incluso total de la Constitución, habilitado por el art. 168, podría dar lugar a "otra" Constitución, siempre democrática, pero nunca, válidamente, a una dictadura, esto es, a una "no Constitución"). Cabría encontrar así una especie de límite "ontológico" a la reforma constitucional (However, the thesis that our democracy is not militant has, nevertheless, certain reservations based on the very idea of constitution, which now leads me to refine the thesis that I hold for so long, although in recent years I have pointed out some of its disadvantages. If, as it shall be admitted, no other authentic Constitution exists than the democratic one, the possible changes therein shall allow its reform, but not its destruction, that is, changing "of" Constitution, but not abandoning "the" Constitution as political organization system [which means, as provided by art. 168, that changing, even totally, the Constitution may lead to "another" Constitution, always democratic, but never validly to a dictatorship, a "non-Constitution"]. Thus, a kind of "ontological" limitation to constitutional reform may be observed. Transl. Mariana Esparza Castilla). (2022, p. 150).

racia militante), nuestros más altos tribunales rechazan una línea argumentativa que en este caso -y en otros similares- habría sido determinante. ¿Democracia militante española? Claro que sí, como cualquier otra democracia que se precie. Así, pues, el Preámbulo, el artículo 1, el 9.2, el 10, etcétera, configuran la idea del constituyente como una democracia avanzada, que propugna unos valores; en una palabra: el constituyente configura una democracia militante, que se fundamente en la dignidad personal y en los derechos de la persona, que se propone una política de igualdad y la libertad reales y efectivas (Both courts deny that the Spanish democracy is militant, thus they assume and approve the meaning given to this expression by a certain sector of the doctrine, which has been followed docilely and uncritically by most authors, mainly due to the usual idleness of thinking on one's own account. Thus, assuming the disqualification of militant democracy, our highest courts reject a reasoning that in this case, and others like it, would have been decisive. Spanish militant democracy? But of course, like any other self-respecting democracy. Thus, the Preamble, Articles 1, 9.2, 10, etc., configure the idea of the constituent power as an advanced democracy, which advocates certain values; in a word: the constituent power configures a militant democracy, based on personal dignity and human rights, and aimed at political equality and real and effective freedom. Transl. Mariana Esparza Castilla)". See also Torres del Moral, 2005, p. 105-124.

The debate will require new developments on doctrine and jurisprudence after the recent approval of Act 20/2022, of October 19, on Democratic Heritage, which provides, among other things, an exhaustive sanctioning regime for certain activities and expressions hitherto perfectly lawful within a legal framework of non-militant democracy. It will be interesting to know the decision of the Constitutional Court on this matter.

However, there is a key issue that we must highlight to place the matter in its rightful terms, for the purposes of interest hereof. However, there is a key issue that we must highlight to place the matter in its rightful terms, for the purposes of interest hereof. Notwithstanding the confusing wording of some relevant passages of the Constitutional Court judgments herein, the constitutional jurisprudence that reiterates that our system is a non-militant democracy is based on a single argument: the absence of intangibility clauses in the Constitution. In other words, while this stance may be ground in another type of grounding[25], Spain's Constitutional Court has based its posture exclusively on this circumstance: there are no intangibility clauses, and there are none because Article 168 SC provides a procedure for the entire revision of the Constitution. The High Court thus explained, not quite clearly, in its judgment STC 48/2003, of March 12, whose doctrine should guide the interpretation of its subsequent rulings:

[25] Caamaño Domínguez 2020: 139-140 has rightly remarked that "en los primeros años de la década de los ochenta del pasado siglo, autores como de Otto o Jiménez Campo ofrecieron fundadas razones para entender que la Constitución española de 1978 no contenía, a diferencia de la Ley Fundamental de Bonn, un principio de democracia militante y que, por tanto, *la sujeción a la Constitución y al resto del ordenamiento jurídico* de ciudadanos y poderes públicos (art. 9.1 CE) solo se traducía en un deber de obediencia al derecho. Una interpretación jurídica arriesgada y valiente, en términos de libertad, pues conviene recordar que la Constitución de 1978 contempla en su artículo 55.2 la nada común posibilidad de suspender individualmente ciertos derechos fundamentales que pudieran verse concernidos por investigaciones policiales y judiciales relativas a la actuación de bandas armadas o elementos terroristas. Previsión normativa que, fácilmente, podría haber servido, para excluir de lo constitucionalmente tolerable a quienes, sin usar la violencia, defendiesen posturas ideológicas que justificasen o diesen cobertura social a alguna de las conductas ilícitas allí referidas (in the early eighties of the last century, authors as de Otto or Jiménez Campo offered well-founded reasons to understand that the Spanish Constitution of 1978 did not set forth, unlike the Fundamental Law of Bonn, a principle of militant democracy and that, therefore, compliance with the Constitution and the legal system of citizens and public authorities [art. 9.1 SC] only meant a duty of obedience to the law. A bold and brave legal interpretation, in terms of freedom, since we should recall that the Constitution of 1978 provides in Article 55.2 the uncommon possibility of suspending certain fundamental rights of an individual that could be affected by criminal investigations concerning the actions of armed gangs or terrorist groups. Which was a normative provision that could easily have served to exclude from what is constitutionally tolerable those who, without using violence, defended ideological stances that justify or give social cover to any of the illicit conducts referred to therein. Transl. Mariana Esparza Castilla)".

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En nuestro ordenamiento constitucional *no tiene cabida un modelo de democracia militante* […], esto es, un modelo en el que se imponga, no ya el respeto, sino la adhesión positiva al ordenamiento y, en primer lugar, a la Constitución. *Falta para ello el presupuesto inexcusable de la existencia de un núcleo normativo inaccesible a los procedimientos de reforma constitucional* que, por su intangibilidad misma, pudiera erigirse en parámetro autónomo de corrección jurídica, de manera que la sola pretensión de afectarlo convirtiera en antijurídica la conducta que, sin embargo, se atuviera escrupulosamente a los procedimientos normativos […]. *La Constitución española, a diferencia de la francesa o la alemana, no excluye de la posibilidad de reforma ninguno de sus preceptos ni somete el poder de revisión constitucional a más límites expresos que los estrictamente formales y de procedimiento*. Ciertamente, nuestra Constitución también proclama principios, debidamente acogidos en su articulado, que dan fundamento y razón de ser a sus normas concretas. Son los principios constitucionales, principios todos que vinculan y obligan, como la Constitución entera, a los ciudadanos y a los poderes públicos (art. 9.1 CE), incluso cuando se postule su reforma o revisión y hasta tanto ésta no se verifique con éxito a través de los procedimientos establecidos en su Título X. Esto sentado, desde el respeto a esos principios […] *cualquier proyecto es compatible con la Constitución, siempre y cuando no se defienda a través de una actividad que vulnere los principios democráticos o los derechos fundamentales* (There is *no place in our constitutional order for a model of militant democracy* [...], a model that demands not only respect for, but also positive adherence to the legal system and, first and foremost, to the Constitution. *Therefore, it is necessary a normative nucleus inaccessible to constitutional reform procedures* which, by its very intangibility, might be established as an autonomous parameter of legal correctness, so that the mere attempt to affect it would make the conduct, otherwise strictly complied with the normative procedures, unlawful [...]. *The Spanish Constitution, unlike the French or German, does not exclude any of its precepts from the possibility of reform, nor does it subject the power of constitutional review to any express limitations other than those strictly formal and procedural*. Certainly, our Constitution also proclaims principles, duly included in its articles, upon which its concrete norms are grounded and justified. They are constitutional principles, all binding and mandatory, like the entire Constitution, to citizens and public authorities [art. 9.1 SC], even when their reform or review is proposed and until it is successfully verified through the procedures established in Part X of the Constitution. In this sense, while respecting these principles [...] *any project is compatible with the Constitution, as long as it is not advocated by an activity that violates democratic principles or fundamental rights*. Transl. Mariana Esparza Castilla).[26]

[26] The underlining is personal. See in this regard, García-Escudero Márquez, 2007, p. 18.

Logically, if the thesis of non-militant democracy is based on the interpretation hereinabove of Part X of the Constitution, particularly Article 168, any further reflections derived from this category for the purpose herein are invalidated due to statements made to nullify the major premise of the absence of intangibility clauses in the Spanish Constitution. Regardless that we agree, in essence, with the objections raised by De Miguel Bárcena and Fondevila Marón, the decisive point for our purposes is that the argument of non-militant democracy, however it is understood, is not tenable because it is based on a major premise that we do not accept.

In other words, even if we accept the mainstream opinion that, since our system is a model of non-militant democracy, the material limitations to constitutional reform should be excluded, this thesis only makes sense within the discussion of implicit material limitations, which is the framework of the current doctrinal debate. However, since we have chosen to understand that Article 2 SC contains an express material limitation to constitutional reform, which cannot be opposed by the procedure of Article 168 SC, there is no added or different obstacle for considering the model as a non-militant democracy, as the Constitutional Court has argued.

Therefore, in my opinion, it is perfectly compatible that the indivisibility of the Nation has been shaped in Article 2 SC as an absolute and express material limitation to constitutional reform with the legality of political parties whose objective is the secession or recognition of the right to self-determination. But, even if we assume the opposite thesis, the incompatibility between the existence of this material limitation and the legality of pro-independence political parties, we cannot conclude the nonexistence of such limitation, but, on the contrary, that perhaps the legislator, compelled by this constitutional prevision, should have established the prohibition of political parties whose statutes contain objectives incompatible with the decision of the constituent assembly.

VI. Overview

In my opinion, despite the jurisprudence of the Constitutional Court and the whole of the doctrine in undoubtedly contrary stances, we can claim that Article 2 SC clearly and expressly establishes the indivisibility of the Nation as material limitation to constitutional reform, with all the consequences that may or should derive therefrom, regardless of whether they may be politically uncomfortable or even inconvenient.

Thus, according to this understanding of the Constitution, there would be no possibility of reforming it, by any of the procedures provided

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for therein, neither of incorporating the right to secession of certain territories, nor of directly deciding the segregation thereof. Does this mean that there is no other way to achieve such claims than constitutional revolution, the appeal to an original and radical constituent power that would lead us to the extra-legal field, *res facti, non iuris*[27]? Indeed. Indivisibility is both a principle and an end of the constituent agreement of 1978. It is more than just the standard recognition of a general norm of Constitutional Law, that of the unity of the sovereign subject, it is a specific end of our constituent process: the establishment of the intangibility of the unity of the Nation.

For those who sustain this approach, the fact that it could prove more convenient to channel a possible secession through constitutional reform, thus providing an orderly solution to the political conflict, does not make it legally feasible but only perhaps desirable.

What Aragón Reyes reminds us is quite true: how discouraging it can be to leave future generations " la triste obligación de expresar la voluntad al margen de la norma (the sad obligation to express their will outside the norm. Transl. Mariana Esparza Castilla)", thus leaving the margins of the constitutional State to make Constitution; but also what a "vana ilusión de juristas (vain illusion of jurist. Transl. Mariana Esparza Castilla)" it can be attempting the "utopia" of providing full stability to democracy by leaving "permanentemente abiertas las vías para que el pueblo, pacíficamente, decida (permanently open the ways for the people to peacefully decide. Transl. Mariana Esparza Castilla)" anything (Aragón Reyes, 2002, p.19).

Those who warn that rupture, which is by definition revolutionary, cannot be legalized, are probably right. What is certain is that our Constitution, of course, has not done so, nor, and this is my modest contribution to the debate, does it leave any door open for doing so.

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[27] De Vega García, 1985, p. 29.

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