
The Parliament in the time of coronavirus

Spain

The Spanish Parliament in the context of the Coronavirus pandemic.

A deep revision of Congress and Senate Standing Orders is needed

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1. Preliminary questions

The Spanish Constitution, in its art. 1, provides that *Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates as the highest values of its legal order, liberty, justice, equality and political pluralism*. Spain is a Parliamentary Monarchy, with a bicameral Parliament. Congress, nowadays, has 350 deputies and is the population's Camera of representation¹. The Senate, with around 265 Senators at present, is the Camera of territorial representation². Spain is an extremely decentralized country with 17 autonomous communities, each of them with its own regional Parliament.

The constitutional system establishes three different frameworks, that are regulated in art. 116 of the Constitution, and the Organic Law 4/1981, of June 1, 1981³:

i. The first situation is the state of alarm that is appropriate⁴ in cases of catastrophes, (earthquakes, floods, fires, and major accidents), health crises, like epidemics or serious environmental contamination situations, shortages of essential products, and the suspension of essential public services, (like in 2010, during the air traffic controllers strike), if this circumstance is concurrent with some of the other aforementioned cases. The COVID 19 crisis is a clear situation that falls under the scenario of a health crisis. A major aspect is that during the state of alarm, it is impossible to suspend fundamental rights. It is only possible to establish *some limits over some rights*, like the freedom of movement for instance.

The state of alarm is declared by the Government, by means of a Decree decided upon by the

¹ Art. 68 of the Spanish Constitution (SC) and art. 162 of the Organic Law 5/1985, of June 19, 1985.

² Art. 69 of the SC.

³ Official State Bulletin of June 6, 1981.

⁴ Art. 4 of the Organic Law 4/1981, of June 1, 1981.

Council of Ministers, for a maximum period of fifteen days. The Congress of Deputies is informed and must meet immediately for this purpose. Without their authorisation the said period cannot be extended. The Decree specifies the territorial area to which the effects of the proclamation apply⁵.

ii. The second framework is the state of emergency, (“*estado de excepción*”, properly speaking in Spanish), that pertinent when the exercise of fundamental rights is threatened, or if there is an alteration of public order, or an anomalous functioning of democratic institutions, and it is not possible to resolve the crisis with the State’s ordinary powers⁶. This was not the *de facto* circumstances that allow its declaration, because it was a *mere* health crisis, as we told.

A state of emergency is declared by the Government by means of a Decree decided upon by the Council of Ministers, after prior authorisation by the Congress of Deputies. The authorisation for and declaration of a state of emergency must specifically state the effects thereof, the territorial area to which it is to apply and its duration, which may not exceed thirty days, subject to extension for a further thirty-day period, with the same requirements⁷.

iii. The third case is the state of siege (martial law), which is pertinent in event of insurrection or act of force against sovereignty or territorial integrity. This was not the situation either

A state of siege (martial law) is declared by the absolute majority of the Congress of Deputies, exclusively on the Government’s proposal. Congress determines its territorial extension, duration and terms⁸.

In art. 116.5 of the Constitution special concern is given to the normal functioning of Parliament in all 3 of these situations. Congress may not be dissolved while any of the said states, remain in operation, and if the Houses are not in session, they must automatically be convened. Their functioning, as well as that of the other constitutional State authorities, may not be interrupted while any of these states are in operation. In the event Congress’s dissolution or the expiration of its term if a situation giving rise to any of these states should occur, the powers of Congress are assumed by its Standing Committee⁹, or “*Diputación Permanente*”, comprising at present 69 deputies, distributed proportionally between all Parliamentary Groups.

Proclamation of states of alarm, emergency and siege cannot modify the principle of the Government’s liability or that of its agents as acknowledged in the Constitution and the law¹⁰.

Because of the increased number of infected citizens by COVID 19, at the beginning of March, the Government passed the Royal Decree 463/2020 on March 14, 2020¹¹ declaring the state of alarm, initially for the maximum period of time allowed by the Constitution, i.e. 15 days, and

⁵ Art. 116.2 of the SC.

⁶ Art. 13 of the Organic Law 4/1981, of June 1, 1981.

⁷ Art. 116.3 of the SC.

⁸ Art. 116.4 of the SC.

⁹ Art. 116.5 of the SC.

¹⁰ Art. 116.6 of the SC.

¹¹ Official State Bulletin of March 14, 2020.

Congress was immediately informed on March 18, 2020, in application of art. 116.2 of the Constitution, and art. 97 of the Congress Standing Orders. The Congress authorized 6 extensions.

The Royal Decree of declaration, (a mere *administrative* norm), and the permits for the extensions given by the Congress, have *rank or value of Law*, according with the decision (“Auto”) of the Constitutional Court 7/2012, of January 13, 2012 and the decision 83/2016, of April 28, 2016, because the sphere of application of another norms with force of Law, is affected.

Extensions of the state of alarm authorized by the congress

Extension	Period	Congress Session	Casted Votes	YES	NO	ABS	Royal Decree
1	Until 00:00 AM, 12 April 2020	March 25, 2020	349	321	0	28	RD 476/2020, of March 27, 2020
2	Until 00:00 AM, 26 April 2020	April 9, 2020	349	270	54	25	RD 487/2020, of April 10, 2020
3	Until 00:00 AM, 10 May 2020	April 22, 2020	345	269	60	16	RD 492/2020, of April 24, 2020
4	Until 00:00 AM, 24 May 2020	May 6, 2020	350	178	75	97	RD 514/2020, of May 8, 2020
5	Until 00:00 AM, 7 June 2020	May 20, 2020	350	177	162	11	RD 537/2020, of May 22, 2020
6	Until 00:00 AM, 21 June 2020	June 3, 2020	350	177	155	18	RD 555/2020, of June 5, 2020

The plenary session of the Constitutional Court convened on May 6, 2020, acknowledged action for a declaration of unconstitutionality submitted by the political party VOX against the declaration of the state of alarm (Royal Decree 463 and 465) and the Royal Decree 476, 478 and 492 approving the 3 initial extensions, (paradoxically, even if any of its deputies voted against the first extension), and the Order of the Minister of Public Health number SND/298/2020, understanding that there was a violation of articles 10.1, 16, 17, 19, 21, 25, 27, 35, 38, 55 and 116 of the Constitution. The Constitutional Court decision is still pending, but we think that the declaration of the state of alarm was constitutionally appropriate because of the special gravity of the health crisis.

2. The political debate about the state of alarm’s extension

During the fourth extension, at the end of May, the Government wanted an additional extension, for a period surpassing 15 days. This led to great political debate and controversy. There is not any special constitutional or legal provision about how much long must be the extensions.

In Hungary Viktor Orban declared the emergency for an indefinite period, but we modestly think that it is not perhaps the best model of reference. It is very *risky*. With these extraordinary powers, the Government may operate with relaxed parliamentary controls, free from a periodical

renovation with a Congress permit.

The Constitution only provides that the authorisation for and declaration of a state of emergency may not exceed thirty days, subject to extension for a further thirty-day period, with the same requirements¹², but it does not say how long the additional extensions of the state of alarm may be.

When the state of alarm was declared in December 2010, during the traffic air controllers strike, by Royal Decree 1673/2010, of December 4, 2010¹³, the initial term of 15 days, was extended by the RD 1717/2010, of December 17, 2010¹⁴, until 12.00 PM of January 15, 2011, (4 weeks).

At the end of May of 2020, the Government was in a position of certain weakness in Parliament, and it was not clear how many additional extensions of the state of alarm Congress would be able to pass. The Government tried to obtain an extension for a longer period of time, because it was afraid of the political consequences of a *hypothetical*, (and *probable*, or at least, *possible*), defeat in Congress, that would have great political cost.

On the other hand, there was a serious risk of weaker oversight of the executive by Parliament, because the months of July and August are a period of parliamentary recess, and at that time, oversight of executive is only possible by the Congress Standing Committee, or through extraordinary plenary sessions of Congress.

A teleological interpretation was required, and it a clever solution was needed, because during the state of alarm, the executive power has extraordinary prerogatives, and Parliament's control is required in particular.

Some authors, like Banacloche¹⁵ and Ruiz Robledo¹⁶, pointed out that there is a *general rule of Law* establishing that any extension may be longer than the initial term. This is a rule that directly inspired the drafting of art. 91.2 of the Congress Standing Orders, and the same logic deduced from art. 116.3 of the Constitution, which states that the declaration of a state of emergency may not exceed thirty days, subject to an extension for a further thirty-day period. It is logical that, if the first declaration may be only made for a maximum period of 15 days, then, any additional extensions should not be longer of this period of time and must be renewed every 15 days by the Congress. This is also our opinion. The solution given in 2010 is said to have been an *isolated* case, and it would not have been a constitutional *precedent*, properly speaking. Finally, the Congress permitted allowed two more extensions of two weeks, until June 21, 2020.

Francesc de Carreras, [said that](#) the successive extensions were adjusted to criteria of requirement, adequation and proportionality, due to the serious danger for public health caused by the COVID 19. We also think this, and we believe that the conduct of the executive declaring the

¹² Art. 116.3 of the SC.

¹³ Official State Bulletin of December 4, 2010.

¹⁴ Official State Bulletin of December 18, 2010.

¹⁵ BANACLOCHE, (J.), "El debate abierto por la prórroga", *El Mundo*, 17 May 2020, pp. 8-9.

¹⁶ RUIZ ROBLED0, (A.), "Razones jurídicas para una prórroga corta", *El Español*, 19 May 2020.

state of alarm, and the Congress's decisions allowing its extension, were constitutionally justified.

3. Use and *abuse* of the Royal Decree Law

Another very sensitive issue was the recurrent use of a very particular Spanish type of norm, the so called, *Royal Decree Law*.

In the Spanish constitutional system, there are two types of norms with “force” of Law:

i. Ordinary and Organic Laws passed by Parliament.

ii. Royal Decrees Laws made by Government and formally *ratified* or *validated* by Congress in 30 days (the Senate has nothing to say on this topic). The use of this feature by the Government is possible only in cases of extraordinary and urgent necessity. These are temporary legislative provisions which cannot affect the regulation of the basic State institutions, the rights, duties and liberties contained in Title 1, the system of the Autonomous Communities, or the General Electoral Law¹⁷.

The Decree-Laws must be submitted immediately to the Congress of Deputies, which must be summoned for this purpose if not already in session. They must be debated and voted upon in their entirety within thirty days after their promulgation. Congress must expressly declare itself in favour of ratification or repeal within said period of time, for which purpose the Standing Orders shall establish a special summary procedure¹⁸. During that period of thirty days, their passage through the Parliament may be the same as for Government bills, by means of the emergency procedure¹⁹.

During the state of alarm, from March 14 until June 21, 2020, the Parliament did not pass any new Laws, but the Government made 14 Royal Decrees Laws. In fact, during the first half of 2020, the Government made 24 Royal Decrees Laws, and the Parliament did not pass any new *formal* Law, either *organic*, or *ordinary*.

The Government made *excessive* use of this feature. A clear example is the Royal Decree Law 8/2020, of March 17, 2020. This Royal Decree provides some urgent economic decisions because of the COVID 19 crisis. Nevertheless, its Final Disposition number 2 establish that the Second Vice-President of the Government, Mr. Pablo Iglesias, will be member of the National Commission for the National Center of Intelligence. This raises several questions: Has it any economic relation with COVID? We think that there is none. Was it of extraordinary urgency and need? Not at all. It was only “urgent” and “necessary” for Mr. Iglesias, and there were many possible explanations for his possible “created interests” that we would not like to comment. That reminds us slightly, of, the absolutist principle: *Rex facit legem*, as Ruiz Robledo cleverly described²⁰. Aragón Reyes understood

¹⁷ Art. 86.1 of the SC.

¹⁸ Art. 86.2 of the SC.

¹⁹ Art. 86.3 of the SC.

²⁰ RUIZ ROBLEDO, (A.), “Debemos vigilar al Capitán Sánchez”, *El Español*, 25 March 2020.

that it is impossible to see the *extraordinary* and *urgent* need of this measure²¹. On May 6, 2020, the Constitutional Court acknowledged two constitutional appeals of the conservative Popular Party, and the radical-right party VOX, and the decision is still pending.

A fragmented, heterogeneous and disconnected legislation has been introduced, without a previous roadmap, that apparently aims to give a response to an emergency, but it was undertaken with great improvisation. A clear example of this criticism, is the Royal Decree Law 6/2020, of March 10, 2020²², published several days before the declaration of the state of alarm, that includes provisions regarding the distribution of medicines, but also about mortgages, or the Asset Management Company from Bank Restructuring, which have no direct connection with the health crisis. This is also the case for the Royal Decree Law 15/2020, of April 21, 2020²³, which comprises a true mix of measures. This way of proceeding is a source of legal insecurity, because often it is not easy to know what norms are in force, and their contents.

It is the Government's responsibility to prepare the State Budget and that of the *Cortes Generales*, (the Parliament), to examine, amend and approve it²⁴. The State Budget is prepared annually and includes all spending and income of the State public sector and in it shall be recorded the amount of the fiscal benefits affecting State taxes²⁵. The Government must submit the State Budget to the Congress of Deputies at least three months before the expiration of that of the previous year²⁶.

After the state of alarm, the public authorities had to resolve new cases of citizens infected by COVID 19. One of the most problematic cases was in the South of the province of Lérida, in Catalonia. The first legal remedy came with the regional government Resolution SLT/1608/2020, of July 4, 2020, limiting the freedom of movement, but a judge of first instance of Lérida did not ratify this on July 12, 2020. The judge said that the only solution was a new declaration of the state of alarm, because in his opinion, this Resolution was surpassing the State's competences.

The answer to this judicial resolution, on the part of the *Generalitat*, the Regional Government of Catalonia, was the [regional Decree Law 27/2020](#), of July 13, 2020, that modified the regional Law 18/2009, of October 22, 2009, of public health. Its art. 1, added a new section, letter k) in the art. 55 of that regional Law, giving permission to regional health authorities to introduce restrictions regarding social activities, and citizens' mobility. Some authors like Flores Juberías and Sánchez Navarro [immediately recalled](#) that art. 86.1 of the Constitution, forbids the introduction of limits in fundamental rights and public liberties by means of Decree Law.

²¹ ARAGÓN REYES, (M.), "COVID-19: Aproximación constitucional a una crisis", *Revista General de Derecho Constitucional*, n° 32, April 2020.

²² Official State Bulletin of 11 March 2020.

²³ Official State Bulletin of 22 April 2020.

²⁴ Art. 134.1 of the SC.

²⁵ Art. 134.2 of the SC.

²⁶ Art. 134.2 of the SC.

We must acknowledge that the regional Decree Law 27/2020, of July 13, 2020, has had *disturbing* consequences, because it allows regional health authorities to limit citizens' regular activity and their mobility.

The use of the Decree Law as a limitative instrument of fundamental rights is clearly unconstitutional. It is incompatible with art. 86.1 of the Constitution, as Carmona Contreras²⁷, pointed out. In all democratic States, the regulation of fundamental rights, and the possible introduction of limits over them, is an exclusive competence of the Laws, made by the representatives of the people assembled in Parliament. In these circumstances of the health crisis, in which limitations affecting a general and indefinite collectivity of citizens, living in a particular territorial area had to be introduced, the formal declaration of the state of alarm in this area is required, especially if it is impossible to counter the crisis with ordinary administrative powers and instruments. The formal activation of this state of alarm is possible on the initiative of the regional President, who may ask to the national Government, for the formal declaration of the state of alarm. We must not forget, that the central Government may delegate later the regular management of the state of alarm to the regional authorities. The direct use of the Decree Law by regional authorities is a clear case of *spurious* use of this feature. The rule of Law is based in the full respect of procedures and guarantees. The *purpose* does not always *justify* the *means*. And the formal declaration of the state of alarm is linked to major political control exercised by the Congress that must be immediately informed, and which must authorize any additional extensions.

4. The political oversight of the executive by Parliament

Parliament exercises the legislative power of State, approving its Budget, controlling Government action and holding all the other powers vested in them by the Constitution²⁸.

At the beginning of March, several deputies were infected, and from February 26th until April 15th, 2020, there was not one session of questions and parliamentary control to the Government in Congress's Plenary. The function of control was in hibernation. The Congress only gave its Ok to the initial declaration of the state of alarm, and its 6 extensions of 15 days each, and validated the Royal Decrees Laws.

The use of videoconference was possible only in Presidium sessions, but no interventions were allowed by videoconference in Plenary sessions, (in which it was only permitted the telematic vote). There was a decision made by the Constitutional Court, of February 12, 2019, that established that the exercise of representative duties had to be developed, as a general rule, in a personal and face to face way. Is this a Parliament of the 21st Century? Is it possibly a situation closer to the 19th Century?

The Minister of Public Health appeared several times in the Congress's Commission of Public

²⁷ CARMENA CONTRERAS, (A.), "El fin no justifica los medios", *El País*, 16 July 2020.

²⁸ Art. 66.2 of the SC.

Health.

The Senate did not hold any Plenary Sessions for one month. On March 17th, a Plenary Session was held to pass the Protocol of Incorporation of North Macedonia to NATO. There were no further Plenary Sessions until April 21th.

What about regional Parliaments? Some of them were extremely inactive, like the Regional Parliament of Madrid, which was practically closed for one month. Greciet García wrote a paper describing the situation with a meaningful title: *What should never have happened*²⁹ and Presno Linera³⁰ cleverly asked if this was an *appropriate* kind of parliamentary *control*.

This extraordinary situation should not be a *carte blanche* for the Government³¹. Aragón Reyes pointed out the importance of the Parliamentary function of oversight, and that the Congress's Standing Orders cannot provide for all situations, and that COVID 19 was not a *letter of marque*. He defended a flexible interpretation of Congress's Standing Orders by its Speaker. Arnaldo said that democracy cannot *hibernate*, because democracy consists in the control of executive by Parliament. García Roca added that parliamentary control should not be interrupted by the state of alarm, and political control must be continued. Canosa defended the use of telematic sessions of control, and Garrido recalled that the fundamental right of political participation was under threat³². The same opinion was shown by Fuertes, when she said that this situation was an arbitrary limitation of Congress's activity³³.

As a conclusion, we must say that a deep revision of Congress and Senate Standing Orders, and their update is required³⁴.

5. Impact on the regional electoral process of Basque Country and Galicia: Postposition of the election day, and the right to vote of infected citizens

On April 5, 2020, there was a double call for regional elections in Basque Country and Galicia. There was no ad hoc legal provision, but it required *common sense* in terms of thinking about a possible suspension. Nevertheless, the rule of law does not only consist in *common sense*, and requires also *legal security*, that is pragmatically based in legal provisions. A clear, detailed and urgent regulation is extremely necessary in this aspect. Art. 4 of the Organic Law 4/1981, of June 1, 1981

²⁹ GRECIET GARCÍA, (E.), “La Asamblea de Madrid y el COVID-19: Lo que nunca debió suceder”, *Cuadernos Manuel Giménez Abad, El Parlamento ante el Covid-19*, June 2020, pp. 115-146.

³⁰ PRESNO LINERA, (M.A.), “Coronavirus SARS-CoV-2 y derechos fundamentales (7): control parlamentario del Gobierno durante el estado de alarma”, *El derecho y el revés*, 9 April 2020.

³¹ See the editorial article of *El País*, 1 April 2020, entitled *Poder y liderazgo*. Also: ZARZALEJOS, (J.A.), “El Gobierno, fuera de control, (10 ejemplos)”, *El Confidencial*, 2 April 2020.

³² PERAL, (M.), “Tarjeta roja al Gobierno y a Batet: juristas afirman que los diputados deben poder controlar a Sánchez”, *El Español*, 4 April 2020.

³³ FUERTES, (M.), “Estado de excepción, no de alarma”, *Revista de Prensa*, 20 April 2020, (accessed 16 July 2020).

³⁴ ABELLÁN ARTACHO, (P.), “Sobre el control parlamentario al Gobierno central y a los Gobiernos autonómicos, durante la crisis del coronavirus”, *Cuadernos Manuel Giménez Abad*, n° 19, June of 2020, p. 133.

only provides that it is not possible to convene a referendum under the state of emergency (“*estado de excepción*”, properly speaking in Spanish) and the state of siege (martial law). But it does not say anything about what would happen in the event of a state of alarm if a referendum, or an election had been called. In France, the opportunity of the convening the first round of local elections on 15 March 2020 was the cause of controversy.

Both regional elections were finally convened on July 12, 2020, in a very complicated context, because there were two areas where the disease was particularly rife in the North of the province of Lugo in Galicia, and in the city of Ordicia, in the province of Gipuzkoa, in Basque Country. A resolution (“Auto”) formulated by the Supreme Court on July 11, 2020, dismissed the appeal presented by the Galician political party *Galicia en Común-Anova Mareas (Podemos Esquerda Unida Anova)* against the decision of the Central Electoral Board of July 9, 2020, allowing the regional election to take place, even if the sanitary situation in the district of A Mariña, in the North of Lugo was particularly delicate. The dismissal was founded by the Supreme Court in the delay of the petitioners presenting the appeal beyond 24 hours, which was considered a *too long* period of time for an alleged case of *emergency*, and because they did not specify the cautionary measures that had to be adopted by the Court³⁵.

An additional question emerged as election day grew closer, and the number of infected citizens was rising: Should infected citizens be allowed to go to vote in the ballot?

The attitude of regional authorities in Basque Country and Galicia can be summarized as *too late, too furious*. Even if this situation was possible, and foreseeable, any legal or administrative provision was adopted to enable these citizens’ right to vote. The response on the part of the authorities consisted in [a serious warning](#) to those who were infected, stating that if they did turn out to ballot they would be *committing a crime against public health (sic)*.

There is no doubt that all fundamental rights must be exercised in a responsible manner, and that all citizens subject to the fulfillment of a quarantine, must respect it, and they must not put the health and life of others at risk.

But the main issue is whether public authorities gave an *adequate answer* to the problem. Art. 3.1 of the Organic Law 5/1985 only forbids the vote of those sentenced to the main or accessory penalty of deprivation of the right to vote during the time of its compliance. And its art. 3.2 says that any person may exercise their right to vote *actively, consciously, freely and voluntarily, whatever their way of communicating it may be and with the required means of support*.

What kind of *means of support* were provided by public authorities to those infected citizens under quarantine?

The answer is *none*, and its inadequacy is particularly serious because it was clear from mid-March that the *health environment* was going to be very complicated in the not too distant future. It

³⁵ Resolution (“Auto”), of the Spanish Supreme Court July 11, 2020.

was perfectly foreseeable that the exercise of the fundamental right to vote might be difficult.

But the lack of administrative and legal foresight had its consequences, because many infected citizens could not go to vote.

The responsible exercise of fundamental rights, and the observation of quarantine should not be synonymous to the loss of voting rights. In the general elections of 2019, the decision (“Auto”) of the Supreme Court of November 8, 2019, made voting more flexible for policemen who had recently been sent to Catalonia on professional grounds, allowing them to vote by mail until that Sunday, November 10, 2019.

Nevertheless, with [an astonishing resolution](#) of July 9, 2020, the Central Electoral Board, it was declared that in this case *the concurrent circumstance were not the same (sic)*.

Many alternative measures could have been adopted to make the voting rights more flexible using the national mail service or by providing a house to house process to collect votes, in a sufficiently safe way, as [some of pointed out](#).

An additional legislative and administrative solution would have been to enable the vote via the intervention of a notary, and the preparation of a special schedule for voting by these citizens during election day, [or via the creation of an ad hoc electoral poll](#). None of these measures were adopted, and *apathy* and *indifference* were the final attitude adopted by public authorities. It was a loss of precious time, and many citizens could not vote. Some clever authors like Carmona Contreras³⁶, were especially critical of this situation, when she said that the *new normality* cannot lie in the *erosion* of fundamental rights such as the right to vote, and the abusive use of the Decree Law.

³⁶ CARMENA CONTRERAS, (A.), “El fin no justifica los medios”, *El País*, 16 July 2020.