

The Right to Information and Political Parties in Spain and Mexico

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In a 2002 ruling, the US Sixth Circuit Federal Court of Appeals affirmed that ‘democracies die beyond closed doors’. And in the famous ruling of the Superior Court of the Electoral Tribunal of the Mexican federal judicial branch dated June 25, 2004, which resolved the Zárate case, it was held, by the same logic, that the citizen’s right to be informed on public questions (in that particular case, the income of the national leaders of all the registered political parties) is linked to the idea of a democratic state in a dual sense: on the one hand, it is a supposition behind free civic participation (without information there is no real possibility of free choice) and, on the other hand, it is a control mechanism over those in power (“democracy — it is strongly affirmed in the ruling — is not only a mechanism to choose rulers, but also a system of accountability”).

The principle of transparency in the performance of public powers (a principle that, by the way, has been advancing amid significant obstacles and inertia), is, therefore, at the very heart of both the rule of law (because transparency means control and the subjecting of public powers to the law) as well as the democratic state (since a democracy involves well-informed citizens).

I will approach the issue of the right to information in relation to political parties in Spain, concretely, in relation to four key points: (1) how the principle of transparency in the performance of the public powers was codified in Spain; (2) to what extent that principle (and the correlative right of citizens to information) is related to the democratic principle at the concrete level of the political parties; (3) what one could term

the 'external' dimension of citizens' right to information concerning the parties and (4) the 'internal' dimension of the members' right to information on the activities of their own party.

1. The Principle of Public Transparency

Spanish jurisprudence contains different specific manifestations of the principle of public transparency (which, as I have said, on a broad level, I believe can be implicitly deduced from the general clause of the democratic rule of law enshrined in Article 1.1 of the Spanish Constitution). Article 105.b) of the Constitution recognizes, for example, the right to access administrative registries and files, whose normative regulatory scope encompasses both the prerogative of any interested party to know the content of any administrative procedure and action that could affect him or her, as well as the citizen's right to be informed of the ordinary and daily operations of government. The expressed limit of this right occurs when such information pertains to 'security and defense of the state, criminal investigations and people's privacy' (Article 105.b CE).

With this in mind, the Spanish Supreme Court declared that the country's Constitution has clearly established 'the image of an authentically democratic public administration', establishing for such purposes a common denominator in Article 105 that 'consists in civic participation and in transparency in government structure' (ruling of May 19, 1988). Article 120.1 of the Constitution establishes the principle that 'judicial decisions will be public, with the exceptions anticipated in procedural laws'. Article 63 of the congressional regulations and Article 72 of the Senate regulations stipulate that the full sessions of Spanish Parliament shall be public. Commission sessions are not public, but the communica-

tions media can attend, except when their proceedings are secret.

The Spanish Constitution specifies that the right to participate in public affairs directly or through freely elected representatives is a fundamental right (Article 23.1). The Constitutional Court has correctly interpreted this to mean that this right 'necessarily implies that all voters are considered equal', placing them 'in equal conditions to access knowledge on (public) affairs and to participate at the different levels of the decision-making process' (STC 32/1985). The general rule, therefore, governing the performance of all the public powers is disclosure, and secrecy is the exception (and, as such, subject to strict interpretation). Let us see how this principle of transparency plays out in relation to institutions, such as the political parties, that are not organs of the State, but associations of individuals, yet which at the same time fulfill important constitutional functions (selection of representatives, intermediation between the people and government agencies, organization of elections, establishment of the political agenda, etc.).

2. Transparency, Democracy and Political Parties

The *punctum ardens* is, therefore, does or should the above-mentioned principle of transparency play the same role in relation to the political parties, which are, in essence, associations of individuals and not public entities? It should be noted that this was an especially controversial question in the Zárata case, although it was not formally presented as such. Indeed, the minority opinion issued by Eloy Fuentes sustained that, in this matter, the general right to information was involved, but not the specific right to information on political-electoral questions (which would be only the right to vote and be voted for, to associate and to affiliate), and

therefore Zárate had not satisfactorily justified his contention that some of these previously mentioned rights would have been violated if the Federal Electoral Institute had not revealed data on the income of the national leaders of the political parties. On the contrary, most of the Mexican Electoral Tribunal understood, and I believe based on good criteria, that citizens' right to information on some relevant aspects of the political parties' functioning did indeed directly affect political-electoral rights (mainly, the right to vote).

I find the reasoning of the Electoral Tribunal to be impeccable: First, given that one of the aims that the Mexican Constitution confers upon the political parties is to promote citizen political participation, that objective would be hindered if people were misinformed. That is, information and democracy are concepts that become complicated and on this point, the parties are also involved because they are vital for democracy. At the same time, Article 11 of the Law on Transparency and Access to Public Government Information (2002) grants any citizen the right to request information from the Federal Electoral Institute on the use of the public resources received by the parties. The political parties, although they are associations of individuals, have numerous important public points of connection (among them, receiving important quantities of public funds, which is why they are obliged to provide transparent accounting data). Third: the arguments offered by the Federal Electoral Institute to deny the information requested by Zárate are not convincing, nor does its decision fall within the limits of the right to the information because the data requested do not place either the rights of third parties or the national or social interest at risk (rather, the opposite is the case).

I agree, then, with the majority decision in the Zárate case. The organization, function and internal policies of the political parties are relevant to democracy, since they con-

tribute to information for voters. The constitutional status of the parties is characterized by freedom (citizens should be able to determine, free from limitations from the public powers, the decisions of the state), equality (both among the parties in relation to one another as well as in the relationship between citizens and the parties), internal democracy (so that they can operate as instruments of popular sovereignty and not as tools at the hands of oligarchic leaderships) and disclosure, which is intimately related to the other three principles because secret accounts, to which only a few have access and knowledge of their existence, constitute a source of power that cannot be controlled democratically and therefore are an instrument of illegitimate power within the party.

In Spanish jurisprudence, the basic juridical definition of the political parties is contained in Article 6 of the Constitution, which states that the parties 'express political pluralism, assist in the formulation and manifestation of the popular will and are a basic instrument for political participation. Their creation and the exercise of their activity are free within the observance of the Constitution and the laws. Their internal structure and operation must be democratic.' This precept has been developed through Organic Law 6/2002, of June 27, 2002 on the political parties and Organic Law 3/1987, of July 2, 1987, on the financing of the political parties.

Different precepts also make the principle of transparency more explicit in relation to the political parties. The agreement to form a party (with the identification of those promoting the organization, its name, address and bylaws) must be formalized in a public document (Article 3.1 LP) and registered in the Party Registry in order for that party to obtain legal status (Article 3.2 LPLP). The Financing Law requires that political parties keep detailed accounting records that allow their financial situation to be known at any given mo-

ment and that comply with obligations anticipated in the Law (Article 10.1 LFP). The external audit of the parties' financial activity corresponds exclusively to the National Audit Office, known as the Tribunal de Cuentas (Article 12.1 LFP), which is the supreme audit agency for public sector accounts and responds directly to the General Courts, or Parliament, (Constitutional Article 136). Therefore, the right to information (or the principle of transparency) is applicable in connection with the political parties and has, in this context, two aspects: an external dimension, which corresponds to all citizens, and an internal dimension, which corresponds to the members of the organization.

3. External Dimension: Citizens' Right to Information in Relation to the Political Parties

It is clear that there is still an imbalance between the political importance of the parties in democratic states (which are, in fact, 'states of parties') and their precarious regulation. In this context, it does not appear logical that the internal functioning of parties, which, in fact, administer an important share of sovereignty (the real decision-making power is in the party leadership, although it formally resides in the country's constitutional bodies) is not subject to rules of transparency and democracy, the respect for which they demand from others. The parties are the real 'factory' of the popular will; they practically hold a monopoly on political participation, they 'occupy' the public institutions and are financed generously with public funds. For all these reasons, it would not make much sense if they could hide their functioning behind the legal status of a private entity, as if they were an ordinary association, a type of recreational club.

There are considerable problems in Spanish jurisprudence in relation to the political parties, including the exces-

sively active role that they play in political life, in assuming the exclusive representation for the electorate (they are, undoubtedly, the new Prince); this is a key issue. Of course, the parties preserve the democracy of demagoguery, but they are part of the problem and, at the same time, part of the solution to the problem. One issue that has been hotly debated in Spain has been the new law on political parties, designed especially to allow for the dissolution of Herri Batasuna, the party of Basque radical nationalism that provided political-institutional support to ETA (the Constitutional Court has declared the legislation, correctly so in my opinion, as being in full conformity with the Spanish Constitution). Of course, the issue of the elite oligarchy and the instruments of internal democracy is classic (for example, primary elections, although the experience of the PSOE in its day was traumatic. One electoral aspirant, Josep Borrell, incidentally the current president of the European Parliament, competed in and won the post of PSOE general secretary running against Joaquín Almunia, current European Commissioner for Economic and Monetary Affairs. The political cost of this race was very high: the PSOE spectacularly lost the general elections and the PP obtained an absolute majority in 2000, although all indications are that this will not be repeated again).

Internal democracy is habitually an unfavorable terrain for oligarchic behavior (Bastida). Also under discussion is the problem of women's parity representation on the electoral lists and in positions of leadership in the parties (the question of quotas). We should also not forget the widespread phenomenon of voters being tired with the parties... a symptom, perhaps, of a more serious ailment in our democracy. Information on the income of representatives is public and, in addition, they also have to file a property and asset declaration before a Chamber of Deputies' commission (such

data are accessible only to parliamentarians, not to the general public). Data on their professional and business activities are public. The information on income received by party leaders is not public, nor is there any mechanism in place to access such data. In fact, the issue has not even been raised, contrary to what occurred in the Zárate case in Mexico. Income received by elected officials is, however, public, and in some autonomous communities, presidents are required to present a declaration detailing their properties and business activities to the board of the respective local parliament when taking and leaving office (this is the case in Aragon, Asturias, Cantabria, Murcia, La Rioja and Castilla-La Mancha). In this latter autonomous community, the norms are very rigorous and meticulous and extend to all members of the local government. In La Rioja, the spouse and under-age children of the president must also file such statements. In Castilla-La Mancha members of Government Council are prohibited for two years after they have left office from carrying out private activities related to cases on which they had adopted decisions in carrying out their duties, or from having business relations with the Council. The Law of Madrid imposes a ceiling on the salary a mayor can draw (it cannot be higher than what is assigned to a secretary of state). These clauses, however, are not applicable to the central government or the rest of autonomous communities. Spain does not have a specific law regulating transparency as does Mexico, but as an extenuating circumstance, albeit not exculpatory, it is worth pointing out that in Spain the salaries of the political elite are not especially high.

Specifically in relation to the right of information, the most problematic scenario in Spain has unquestionably been with regard to data on the financing received by the political parties (which in Spain is mainly public funding, although it is insufficient). A number of scandals have emerged on questions of irregular financing involving practically all the

parties. This is a delicate question throughout the world. This should come as no surprise, since in the final analysis, it involves the question of power, and when assassination does not determine the struggle for power, as in the Shakespearean dramas, but merely hidden accounts or other nebulous financial machinations, it seems to us that some progress has been made. In a democracy, the struggle for power is channeled legally; there are legitimate and illegitimate means to contest power and there are bodies that exercise control over the process, etc. And accounting records are no less important in this jurisdiction of the political confrontation over power, but rather such financial ledgers have a substantial strategic value in this struggle (*pecunia nervus rerum*) — Martin Morlok. Disclosure in relation to funding should not only prevent corruption, but also the uncontrolled transformation of financial power into political power. Therefore, all the parties should make public where their income comes from. In this way, citizens will control possible party dependence.

In 2000, the National Audit Office itself presented a motion to modify the normative regulatory framework on the financing and auditing of political parties (which, thus far, has not been followed). The National Audit Office proposes the following modifications to the current system. There is not sufficient definition with regard to who within the party is responsible for providing the accounting records to the Commission nor of the consequences of failing to comply with the corresponding norms (the respective sanction policies have also not been determined). Furthermore, there is the problem that the public funding received by the parties is not earmarked for specific expenditures, which to a large extent hinders the identification of accounting responsibility. At least, the National Audit Office has considered each party as a separate economic-financial reality in which its entire terri-

torial and institutional organization is globally contemplated. Another point that makes it difficult to keep track of accounting and control data is the fact that almost all the parties have created different foundations, as well as business enterprises, which suggests the need for a specific regulatory framework of control that as yet does not exist. It is also cause for concern that no sanction policies are in place given the banks' and others' refusal to provide the financial and accounting information requested by the National Audit Office. In electoral regulatory norms, the National Audit Office is not endowed with the capacity to impose sanctions that demand compliance, but only as a technical body that formulates proposals (to reduce or not grant public subsidies, which are sent to parliament, the General Courts (where the most conspicuous members of the parties involved are to be found; it is like putting the wolf in charge of taking care of the sheep). The system of information and control fails miserably in Spanish jurisprudence and this situation is generally recognized as such.

4. Internal Dimension. Party Transparency in Relation to its Members

On this point, it should be recalled that Organic Law 6/2002 on Political Parties stipulates that members will have the right to be informed about the composition of the organization's leadership and administrative structures, and about the decisions adopted by the leadership bodies, the activities undertaken and its economic situation (article 8.2.CE). This right can, of course, be enforced through civil courts, but major problems have not been posed in practice on this level, given that the Spanish political parties are especially compact and oligarchic.