

## **Governing at a distance. The TC and the virtual meetings of the Council of Ministers.**

by [Rafa Rubio](#) | Mar 17, 2020 | [Transparency and Open Government](#)

Today a Council of Ministers meeting was held in which the majority of the members of the government, 17 out of 23, participated remotely, via videoconference. Some have asked whether this type of virtual meeting has a place in the Spanish system.

The holding of "virtual" meetings of the Council of Ministers is possible following the modification of the Government Law through [RDL 7/2020 from 12<sup>th</sup> March](#) which establishes that "in exceptional situations and when the nature of the crisis so requires" the head of the Executive may "decide with reason that the Council of Ministers (...) may hold meetings, adopt agreements and approve minutes remotely by electronic means".

Although, as some in the networks have pointed out, this regulatory change is reminiscent of the one made a couple of years ago by Article 2 of Law 2/2018, when it introduced four new paragraphs in Article 35 ("Telematic means") of Law 13/2008, and which was mostly declared unconstitutional in [STC 45/2019](#), these are not similar rules. The fundamental difference is the attempt in Catalan law to establish the telematic holding of meetings of the Governing Council as a general rule, as an ordinary alternative to holding them in person, as stated in section 3, which states that government meetings may be held "either in person or remotely, unless their internal regulations expressly and exceptionally provide otherwise".

The Constitutional Court's (TC) argument to declare this provision unconstitutional focuses on pointing out the extraordinary nature that the use of this type of media should have in the Spanish constitutional system.

The ruling recalls the collegial status of the Council of Ministers, which requires the participation of its members. "One and all must participate in the deliberations and take their decisions as a college, since they are (...) members of the Government concerned, as a collegial body". (FJ5)

It then points out the need for prior deliberation in this type of collegiate body, this being understood as "the exchange of opinions, views and approaches" (FJ 6) in government sessions whose "deliberative nature is consubstantial with the nature of the decisions adopted in those" (FJ 5) which otherwise could not "duly form their will".

The ruling follows the reasoning of another recent ruling 19/2019 which, when regarding the Parliament, established that only the direct and immediate interrelationship inherent in deliberation "guarantees that aspects can be taken into consideration that can only be perceived through personal contact" [FJ 4 A) b)], warning that the contrast of opinions and arguments between people who are in different places does not allow spontaneous interventions, gestures or reactions - so-called non-verbal communication - to be perceived in the same way as in a face-to-face meeting. The physical separation does not allow us to know everything that is happening in the other place, so the debate may not go in the same way and the decision may not be made in the same direction. No matter how advanced the technical means used, a telematic appearance cannot be considered equivalent to a face-to-face one [FJ 4 B) b)]."

In this way, "it is not indifferent whether the debate is face-to-face or remote" since "(i)f the previous debate was not essential for the adoption of collective decisions, the sessions of the collegiate body

could be replaced by the communication to the president of the individual criterion of each member on each item of the agenda, the final result then being calculated." (FJ 6)

Other more debatable arguments pointed out by the Court, apart from that of the correct formation of will, are that of guarantees and visibility. In the section on guarantees, the Court points out that "The exercise of their functions, without fear of external interference, the very safety of its members, the freedom with which they must face their participation in the debates and deliberations and the secrecy they must preserve regarding these may not be protected in a remote meeting with the same guarantees as in a face-to-face one", something that is debatable from a technical perspective. But the argument of visibility is even more debatable. It is curious to note that face-to-face meetings give decisions greater visibility, when both the law of government (art. 5.3) and the formula for taking office of ministers establish the secrecy of the deliberations of the Council of Ministers.

As a consequence, the Court concludes that collegiate decision-making by the government "is not compatible with a legal regime that may allow it, in general and according to its free decision, to hold its plenary sessions at a distance and by telematic means, without personal contact between all or some of its members". (FJ 3)

But it is the ruling itself that assumes the validity of these mechanisms "in circumstances of force majeure" that if "subject to strict rules that safeguard the proper exercise of the functions that correspond to it. Censuring the equalization of both mechanisms, but without excluding the "constitution", "conclusion" and "adoption of agreements" whenever it is something exceptional, justified and with the basic guarantees.

Another element of the ruling applicable to today's meeting is that, in addition to the constitutionality of this type of meeting when it is exceptional and justified, the text also declares the unconstitutionality of including electronic mail, included in Catalan law, among the valid electronic media for these meetings. Hence, according to the Constitutional Court, when electronic means are used for this type of meeting in exceptional circumstances, only audio and videoconferencing would be valid, as stated in the reform of the law of government that we are discussing.

Another problem raised by the ruling is that of the regulations in Andalusia and Aragon, which would seem to allow the use of these media on an ordinary basis for government meetings as well. According to article 33.1 of the first one "The Governing Council may use remote communication networks or telematic means for its operation. To this end, the necessary mechanisms shall be established to guarantee the identity of the communicators and the authenticity of the messages, information and verbal or written statements transmitted" (Law 6/2006, of 24 October, of the Government of the Autonomous Community of Andalusia). In the same line, art. 15.3 establishes that "The Government may be constituted and adopt agreements through the use of telematic means" (Law 2/2009, of 11 May, of the President and the Government of Aragon). After pointing out that it is impossible to judge the constitutionality of both articles (which have not been the object of an appeal), the TC states that the inclusion in the Catalan text of the expression "unless its internal regulations expressly and exceptionally state otherwise", would be a clear sign of the intention to establish "free discretion to opt for one or another form of action" as a general rule, which, as we have seen, would be the main reason for their unconstitutionality. Being true the argument of the TC, the fact that neither the Andalusian nor the Aragonese law mentions its exceptionality, as it does in the national law, is a sufficient sign to interpret that the telematic holding of these meetings, in both laws, would not require of exceptional justification, although after the ruling 45/2019, it would be necessary to begin to interpret it in another way.

Finally, there is an anecdotal aspect that escapes the law: the "why" of the Council of Ministers meeting on Saturday, 14<sup>th</sup> March, where both the President and the Vice-President attended despite the fact that their respective wives had contracted the virus, when it would have been possible to use the same formula. The abovementioned points to the complexity of the issues involved, although the topics of the Council of Ministers held on Tuesday, 17<sup>th</sup> March, do not seem much simpler, but that is another story.