

Spanish government as lawmaker

Rząd hiszpański jako prawodawca

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Abstract

The article presents constitutional law analysis of the Spanish government's role in the lawmaking process. The government's capacities in the following scopes are described: the initiation of legislative procedure, participation in the approval procedure (monarchical sanction), and the right to enact statutory legislative acts and regulatory (executive) acts. The role of the Council of State was depicted as an advisory body to the government in the lawmaking process, and the legal possibilities to initiate preventive and subsequent review by the Constitutional Tribunal.

Key words: Spain, government, legislative process

Abstrakt

W publikacji dokonano analizy prawno-konstytucyjnej roli rządu hiszpańskiego w procesie stanowienia prawa. Przedstawiono możliwości rządu w inicjowaniu procedury legislacyjnej, udział w postępowaniu zatwierdzającym (sankcja monarcha), prawo stanowienia aktów prawnych z mocą ustaw i aktów reglamentacyjnych (wykonawczych). Wskazano rolę Rady Stanu jako organu konsultacyjnego rządu w procesie prawotwórczym, a także prawne możliwości inicjowania kontroli prewencyjnej i następczej przed Trybunałem Konstytucyjnym.

Słowa kluczowe: Hiszpania, rząd, postępowanie ustawodawcze

The role of the Spanish government in the enactment of law does not, in its essence, differ from the one typical for the executive branch in a parliamentary

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democracy.¹ This function is carried out on several levels: initiating the legislative procedure in the parliament, participation in the sanctioning of statutes by the monarch (countersignature), adoption of regulatory (executive) legislative acts, and passing, under certain conditions, of statutory legislative acts. Beside these entitlements of direct character, one can encounter a number of others, which indirectly affect the process of enacting law and determining its contents. In particular, one can enumerate here the right to refer requests to the Constitutional Tribunal, to consult the Council of State, and the government's participation in the qualification of the initiatives submitted by Autonomous Communities, as well as popular initiatives, and the possibility to submit them to the parliamentary process. The legal basis for performance of the above function and tasks is, predominantly, the Constitution of 29 December 1978 (hereinafter: CE).² It should be reminded that its preparation, contents, the procedure of adoption and entry into force met the highest democratic standards. The Constitution was a fundamental element of the constitutional transformation of democratic Spain following the death (on 20 November 1975) of generalissimo, head of the state (*Jefe del Estado*), leader (*Caudillo*), regent and head of the government in the years 1939—1973 (self-appointed to all these positions) — Francisco Paulino Hermenegildo Teódulo Franco y Bahamonde Salgado Pardo. It was preceded by the Political Reform Law of 4 January 1977³ (adopted after its acceptance in the referendum of 15 December 1976). This highly important legislative act concluded not only the period of dictatorship but also the so-called controlled opening (*apertura*) of “enlightened” Franquists during the rule of the prime minister (*Presidente del Gobierno de España*) Carlos Arias Navarro, the last head of the government appointed by the *Caudillo*. The Political Reform Law – including only five articles, proclaimed the principle of sovereignty of the people, supremacy of statutory law, return to bicameral parliamentarianism, free elections, protection of fundamental rights (*habeas corpus*), referendum, and entrusted the government with the organization of the first free elections and the right to submit the draft version of the Constitution. It clearly introduced the principle of cooperation of the executive branch (the king and the government) with Cortes Generales, although it omitted the questions of political responsibility of the cabinet before the parliament, and did not refer directly to the principle

¹ Cf. Regarding the legislative process in Spain, in a holistic constitutional law perspective: J. IWANEK: “Postępowanie ustawodawcze w Hiszpanii.” In: *Postępowanie ustawodawcze*. Ed. E. ZWIERZCHOWSKI. Warszawa 1993, pp. 77—104; T. MOŁDAWA: “Procedura legislacyjna w Hiszpanii.” *Przegląd Sejmowy* 1997, no. 3, pp. 64—80; IDEM: *System konstytucyjny Hiszpanii*. Warszawa 2012, pp. 99—113.

² Constitución Española de 1978. *Boletín Oficial del Estado* (hereinafter BOE), núm. 311 de 29 de diciembre de 1978.

³ Ley 4 de enero 1977, núm. 1/77 (Jefatura del Estado) para la reforma política. BOE, núm. 4 de 5 de enero 1977.

of separation of powers. In accordance with the then applicable constitutional law of the state, the Law used the Franquist name of Spanish Cortes (*Cortes Españolas*), which was subsequently replaced in the Constitution for General Cortes (*Cortes Generales*). Nonetheless, it may be concluded that this was the first significant weakening of the weightiness of the constitutional position of the government in comparison to the Franquist era.

The constitutional regulations on the government, in the context of the issues of interest to the present article, were included in a number of provisions. Although the separate Chapter IV “On the Government and Administration” was introduced to cover questions relating to the government, apart from the stipulation in art. 97 that the government has the right to enact regulatory provisions (*potestad reglamentaria*) “in accordance of the Constitution and statutes,” there are no other rules in this regard. They have been included in other chapters, and especially in Chapter II “On the Crown” (art. 64), in Chapter III “On Cortes Generales” (art. 87.1—2, art. 88, art. 92.2, art. 95.2), in Chapter V “On the Relations Between the Government and Cortes Generales” (art. 116.3), in Chapter VII “On Economy and the Treasury” (art. 131.2, art. 134, art. 135), in Chapter VIII “On the Territorial Organization of the State” (art. 151.2, art. 153, art. 155), and in Chapter XI “On the Constitutional Tribunal” (art. 161.2, art. 162.1). Without a doubt, these are brief but crucially important provisions, which have been developed in the regulations of the Congress of Deputies and the Senate, and in a series of organic laws which make a direct expansion of the provisions of the Constitution.

Legislative initiative in Spain does not have the character of an individual personal entitlement. The informal concept of draft legislation does not fit well into the constitutional nomenclature. The Spanish Constitution restricts that term exclusively to the legislative initiative of the government (*proyecto*), which naturally does not mean and cannot mean that it is the only body entitled to exercise the right to initiate legislation. Other names, such as *borrador* (draft), *anteproyecto* (preliminary draft), or *proposición* (legislative proposal) may obviously, *in a wide sense of these expressions*, be translated into plain language as draft legislation or its non-final versions, but in fact such diversified lexicon translates into different legal consequences. If constitutional law criteria are to apply, only such form of legislative initiative obliges the authorized body to proceed which, from a formal perspective, is draft legislation, but under certain conditions also a proposal. The cited provision of art. 87.1 CE reads that “legislative initiative is vested in the government, the Congress and the Senate,” which means neither more nor less than that it has been assigned only to collegiate authorities (rather than individual deputies or senators).⁴ Besides, the

⁴ It was provided for differently in the preliminary draft of the Constitution where it was proposed to confer the right of initiative to deputies, and to deprive the Senate of the right to

right to initiate legislation has been conferred to the parliaments of Autonomous Communities (art. 87.2) and a group of citizens (popular initiative) of at least 500 thousand. However, in these situations a prior approval is needed before the proposal is submitted to the Congress, either by the government or presidium of the Congress (indirect initiative). Therefore, the government is not only entitled to submit its own draft legislation but may also express its opinion, that is influence the initiation of procedures in respect of the two indicated indirect initiatives.

The Constitution uses two terms while referring to the executive: the government (*Gobierno*) and the council of ministers (*Consejo de Ministros*). This distinction is not incidental because these two concepts are not synonymous. The government, as a collegiate body, must operate and make decisions in accordance with a specific procedure, which is the condition of effective exercise of the right to initiate draft legislation. The Constitution, on many occasions, also in the titles of individual chapters, uses the term *government*, whereas the concept of the *council of ministers* is used in specific provisions. For example, art. 88 sets out that “draft legislation shall be approved in the Council of Ministers, which shall submit them to the Congress.” Manuel Aragón writes that “the government and the Council of Ministers are not the same bodies. The government has the legislative initiative realized by the Council of Ministers.”⁵ Therefore, the government is recognized as a political body, since it derives from the parliamentary majority, whereas the Council of Ministers is a body normatively regulated in the Constitution that, according to Luis Sánchez Agesta, passes legal resolutions binding upon the administration and citizens. “The government, on the other hand, as a political body, has a peculiar characteristic of an informal organization.”⁶ Further differences relate to the personal composition, but also an important fact connected with the monarch’s right to preside over meetings of the Council of Ministers (art. 62.g). Although Eduardo Entrena Cuesta rightly points out that “it is enough to insist that the purpose of such presidency is only to obtain information, without participation in the decision-making process,”⁷ however, the monarch has been recognized as a moderator (art. 56.1) who is supposed to serve and contribute to “the regular operation of institutions.” This role of the monarch has been left indeterminate, and fre-

directly submit drafts. This was undoubtedly a reference to the German Constitution of 1949, which permitted to submit proposals through the government (so-called combined initiative). Cf. Anteproyecto de Constitución, *Boletín Oficial de las Cortes*, BOC, núm. 44, 5 de enero de 1978.

⁵ M. ARAGÓN: “La iniciativa legislativa.” *Revista de la Facultad de Derecho de la Universidad Complutense* 1986—1987, no. 72, p. 81.

⁶ L. SÁNCHEZ AGESTA: “El Gobierno, la función del Gobierno y de la Administración.” In: *Comentarios a las leyes políticas, Constitución Española de 1978*. Vol. 8. Ed. O. ALZAGA V. Madrid 1985, p. 10.

⁷ *Comentarios a la Constitución*. Ed. F. GARRIDO FALLA. Madrid 1985, p. 995.

quently it is even mocked in the literature of the subject.⁸ That is why its actual assessment must involve references to constitutional practice. The governmental procedure concerning preparation and submission of draft legislation is subject to specific rules. Although there is no general principle to formalize the organization of the government's work, this does not mean that no procedural rules apply. The applicable procedures are laid down in administrative law, which enables all ministers to familiarize themselves in due advance with the assumptions of a draft and its preliminary version, to hold consultations between various ministries, to introduce authorial corrections before its formal submission to a meeting of the Council of Ministers. To these purposes, within the structure of the government, the *Ministerio de la Presidencia* was established (the counterpart of the prime minister's office), which has been reorganized a couple of times. In 1986, it was transformed into the Ministry for Contacts with the Cortes and Secretariat of the Government (*Ministerio de las Relaciones con las Cortes y de la Secretaría del Gobierno*), only to restore the previous formula in 1993. During the rule of the People's Party (after 2011) *Ministerio de la Presidencia y para las Administraciones Territoriales* was created. Until the present date, its tasks include, among other responsibilities, coordination of legislative works undertaken by the government.

The government's prerogatives in this respect are not restricted to the power to submit draft versions of organic laws and ordinary statutes, but they extend also to the possibility to bring forward draft amendments to the Constitution (art. 166), that is, to initiatives in respect of constitutional reform. The government's role is typical of a government in parliamentary-cabinet systems. As the only constitutional authority, it is not restricted with regard to the subject matter of legislative drafts.

The exercise by the government of the right of legislative initiative, however, has a rational and justified limitation. It is the Council of State (*Consejo de Estado*).⁹ The Council is one of constitutional bodies, and has been succinctly provided for in art. 107 of the Constitution (in the chapter on the government and the administration), as an advisory authority to the government. It is, therefore, an administrative authority that does not fit into the hierarchical structure of administrative authorities. This was unambiguously decided by the Constitutional Tribunal, which found that "the Council of State does not form a part of active administration." Quite to the opposite, it is a body with organic and functional autonomy, which guarantees its objectivism and independence. "As a matter of fact, it has the status of a state authority of constitutional significance

⁸ Cf. J. DE ESTEBAN, L. LÓPEZ GUERRA: *El régimen constitucional español*. Vol. 1. Barcelona 1984, p. 35.

⁹ Further on the topic, see J. IWANEK: "Rada Stanu w Hiszpanii." In: *Ustrój polityczny państwa, Polska, Europa, świat*. Eds. S. SULOWSKI, J. SZYMANEK. Warszawa 2013, pp. 326—336.

operating at the service of the state, which was assigned by the Constitution itself.”¹⁰ As rightly commented by Ernesto García-Trevijano Garnica, “there is no genuinely independent advisory body if it has not been vested with appropriate autonomy, which allows for organizational distinctness in the performance of its tasks towards the consulted administration, whatever that administration might be.”¹¹ Such argumentation was developed by a former President of the Council (1985—1991), Tomás de la Quadra-Salcedo y Fernández del Castillo, who wrote that “the natural function of the Council of State follows from its direct connection to the Constitution. Naturally, all administrative bodies also have such connections, but for the most part they operate in a hierarchical structure with a system of dependencies, subordination and loyalty [...] such situation is not the case as far as the Council of State is concerned because it is an organ which guarantees legality and the government’s decision-making capacities in this area.”¹² José María Villar y Romero adds that the “Council assumes its procedure as an institution of the state. It does not identify with the rest of the administration.”¹³ These are comments of fundamental importance because, although the Council is an advisory authority to the government, the legal bases of the Council’s operation allow to include it in the group of constitutional organs with far-reaching autonomy. It is true that the government has a certain influence on the personal composition of this body but that influence is limited.

The composition of the Council, as defined in the Organic Council of State Law 3/1980,¹⁴ was expanded as a part of the reform introduced under the Organic Law 3/2004.¹⁵ The president of the Council is freely appointed by the government (formally, by a royal decree) from among lawyers with recognized experience and prestige, and the president’s term is unspecified. The members (advisors) have been divided into three categories: permanent advisors (*consejeros permanentes*) appointed without any term limitations, *ex officio* advisors (*consejeros natos*) and

¹⁰ STC 56/1990 de 29 de marzo, BOE, núm. 160 de 5 de julio de 1990.

¹¹ E. GARCÍA-TREVIJANO GARNICA: “Posición institucional del Consejo de Estado.” *Revista de Administración Pública* 1990, núm. 122, p. 325.

¹² T. DE LA QUADRA SALCEDO Y FERNÁNDEZ DEL CASTILLO: “El Consejo de Estado en un Estado social y democrático de derecho.” In: *Gobierno y administración en la Constitución*. Ed. J. ACOSTA SÁNCHEZ. Madrid 1988, p. 232.

¹³ J.M. VILLAR Y ROMERO: “El Consejo de Estado y su nueva regulación legal.” *Boletín del Ilustre Colegio de Abogados de Madrid* 1980, núm. 4, p. 7.

¹⁴ Ley Orgánica 3/1980 de 22 de abril de 1980 del Consejo de Estado. BOE, núm. 100 de 25 de abril de 1980.

¹⁵ As noted by Ángel Sánchez, this amendment was a consequence of changes to many institutions of the state and establishment of different offices and positions within their structures. This related not only to former prime ministers but, among others, also military commanders and the director of the Legal Service of the State (*Abogado General del Estado*). Á.J. SÁNCHEZ NAVARRO: *Consejo de Estado, función consultiva y reforma constitucional*. Madrid 2007, p. 213.

elected advisors — *consejeros electivos*. Their tenure is four years, and they are designated by way of governmental regulations (formally, monarchical). The *ex officio* advisors are presidents of the royal academies of science, the attorney general, the president of the Economic and Social Council, the head of the General Staff, the president of the Bar Council, the president of the Legislative Council, the head of the Center for Political and Constitutional Studies, the president of the Central Bank, the director of the legal service of the state (*Abogado General del Estado*). They hold their position for as long as they hold the offices listed above. Former prime ministers, if they wish to do so, become lifetime advisors of the Council (in literature, they are referred to as *ex officio* lifetime advisers (*consejeros vitalicos*)). It should be noted that such positions were not accepted by Leopoldo Adolfo Suárez (prime minister in the years 1976—1981), Leopoldo Calvo-Sotelo (1981—1982) and Felipe Gonzáles (1982—1996). On the other hand, the two following ones took their place in the Council: José María Aznar (prime minister in the years 1996—2004), who, however, resigned after one year.¹⁶ So did the prime minister from PSOE, José Luis Rodríguez Zapatero (2004—2011), who temporarily suspended his participation in the Council in 2015.

In art. 153 item (b) of the Constitution, one can find the formulation concerning the form of expression of will by the Council as the basic form of its decision-making. In that provision, the word “opinion” (*dictamen*) was used. After the reform, there arose the additional possibility to issue reports and studies. Literally, opinions by the Council can be divided according to two criteria: 1) obligatory — facultative, and 2) binding — non-binding. Nevertheless, in the literature one may also encounter the concept of a quasi-binding (partially binding) opinion. The above regulation gives rise to the Council’s position as an independent and self-directed authority. *Expressis verbis*, this is substantiated by the provision of art.1(2) of the above-mentioned Organic Law: “Performs the advisory function with the observance of organic and functional independence conferred to it so as to guarantee its objectivism and independence in accordance with the Constitution and statutes.” Opinion of the Council is expressed in a vote. After the 2004 reform, the Council issues as well its reports and information. Their character is research- and study-related. They are prepared at the request by the prime minister or members of the cabinet, but also on the Council’s own initiative. In particular, the Council, acting on its own initiative, may refer to the government conclusions deriving from its practice and experience. A given instance of the Council expressing its intention as a collegiate body allows to include it — in the words of Ernesto García-Trevijano — among so-called perfect advisory authorities, since it is proceeded within the framework of a specific administrative procedure, and it is the only manifestation of intention, that is, the final one. For the above reason, the Council may not

¹⁶ Á.J. SÁNCHEZ NAVARRO: *Consejo de Estado...*, pp. 211—212.

act like other advisory bodies, frequently encountered in governmental departments, which in a single matter deliver a number of often mutually competitive opinions allowing the decision-maker to pick one of them.¹⁷ The Council is often referred to as a controlling or controlling and advisory authority. “The subject of advisory review — writes Tomás de la Quadra Salcedo y Fernández del Castillo — is not the general policy of the authorities but particular decisions included in normative drafts and resolutions, and the difference between such review and parliamentary control or control by public opinion boils down to the fact that the former does not relate to questions of policy as such but to specific drafts, although these may comprise directions of governmental policy.”¹⁸

An opinion by the Council should take into consideration not only legal prerequisites but, as far as value-judgment is concerned, it should also account for “possibilities and utilities.” In other words, the Council should review the matter under analysis also from the point of view of usefulness and legitimacy (art. 2(1)). Gerardo García Álvarez puts very strong emphasis on that aspect: “When it comes to the legal procedure [in which an opinion is delivered — J.I.] it does not refer to either a strictly legal or exclusively technical opinion or report. Although the activities of the Council are predominantly of legal nature, it must take into consideration administrative usefulness, although only when the consulted authority so requests or when it concludes that the character of the matter at hand so requires.”¹⁹ In general, opinions given by the Council are not binding unless legal provisions provide otherwise.²⁰ In such cases, the consulted authority must hold the consultation. Facultative consultations, on the other hand, are held at the request by the prime minister, ministers and heads of governments of autonomous communities (art. 20(1)). The Constitution, in art. 153.b, provides for delivery of an obligatory opinion in matters of the government’s control over autonomous communities. However, the Organic Law 3/1980 significantly extends the above scope. Under art. 21 and art. 22 of the Law (as amended in 2004), the plenum of the Council or a standing committee must consult, specifically, preliminary drafts (*anteproyectos*)²¹ of a constitutional reform, drafts of

¹⁷ E. GARCÍA-TREVIJANO GARNICA: “La función consultiva de las administraciones públicas con especial referencia al Consejo de Estado y las Comunidades Autónomas.” *Revista de Administración Pública*, enero-abril 1994, núm. 113, pp. 134—135.

¹⁸ T. DE LA QUADRA SALCEDO Y FERNÁNDEZ DEL CASTILLO: “El Consejo de Estado en un Estado”..., p. 221.

¹⁹ G. GARCÍA ALVAREZ: *Función consultiva y procedimiento Régimen de los dictámenes del Consejo de Estado*. Valencia 1997, p. 38.

²⁰ Acceptance or non-acceptance of an opinion by the Council leads to the use of different formulas: 1) if the authority accepts the opinion (obligatorily or freely) the expression “in accordance with the Council of State” is used, 2) in the event of non-acceptance, the appropriate expression is “having obtained the opinion by the Council of State.”

²¹ For concepts concerning the Spanish legislative process, cf. J. IWANEK: “Postępowanie ustawodawcze...,” pp. 106 ff.

statutes relating to treaties, conventions or international agreements. The same refers to draft legislative decrees and drafts of regulatory legislation in respect of the Council of State itself.

The consequences of the passed opinions and reports of the Council are not easy to specify. In most cases, we do not have to do with *ex post* review. I already pointed to the expressions that the legislative authority should use, namely: “in accordance with the Council of State” or “having obtained the opinion by the Council of State.” It is true that legal provisions empower the Council to adopt *ex post* opinions, for example to justify the position of the government in the proceedings before the Constitutional Tribunal, however, *ex ante* opinions are prevalent. This division does not correspond either with the division into obligatory and facultative opinions or with the division into binding and non-binding ones. Even though, in principle, opinions of the Council are not binding, it may not be overlooked that “the Council’s opinion is arrived at in the course of proceedings which are enrooted in administrative procedure and, as autonomous, may no longer be challenged.”²² In other words, to follow an opinion at the enactment of a legislative act does not indeed preclude the possibility to contest it, however, it must be highlighted that the opinion is taken into consideration in the proceedings before the Constitutional Tribunal or the Supreme Court. This makes maintaining the contested legislative act in force significantly more probable. Such opinions are in fact antecedents to the development of case law of the Constitutional Tribunal and the Supreme Court. It is beyond any doubt that the participation of the Council of State in the creation of law on the initiative of the government has significant influence on the quality of legislation, maintenance of principles of the democratic state based on the rule of law, but — which is extremely important — it also shapes the administrative law doctrine, so crucial in the decision-making process of administrative authorities and judicature of administrative courts.

For obvious reasons, statutes adopted by Cortes are subject to promulgation. In the Spanish tradition, the monarch had the power to veto (for example in the Constitution of 1867). The Constitution of 1978 confers suspensive veto only to the Senate. In effect, the monarch’s participation in that procedure is merely formal and ceremonial. Art. 62.a of the Constitution provides that the monarch “sanctions and promulgates statutes,”²³ and art. 91 lays down a 15-day deadline for the granting of sanction and promulgation of statutes, and for ordering their immediate publication. It is interesting that the right of sanction and promulgation have been vested in the same authority. It is all the more the case that another element mentioned is the ordering of publication. It is probably for that

²² E. GARCÍA-TREVIJANO GARNICA: “La función consultiva...,” p. 140.

²³ The Constitution uses the verb *to sanction* (typical for a monarchy) instead of republican *to sign*.

reason that Jorge de Esteban and Luis López Guerra claim that in this situation sanction is equivalent to promulgation.²⁴ It clearly stems from the foregoing that participation of the executive power, the monarch and the government, which indeed must countersign the acts of sanction and promulgation, is purely formal. There is no possibility to refuse or to abstain from the procedure of ratification of an adopted statute. As a matter of fact, this opinion is dominant in the literature, however, one can also find different positions. This argumentation involves a reference to the contents of the oath taken by the monarch before ascending the throne²⁵ but also — which seems more serious — is based on the attestation by the act of sanction and promulgation of the fulfilment of the formal requirements of legislative procedure. The authors mentioned above, Jorge de Esteban and Luis López Guerra, are even of the opinion that the monarch may, in case of formal defects, abstain from granting a sanction to a statute. Nonetheless, Juan J. Solozabal justly argues that it is the government as the countersigning authority that assumes the entire responsibility for any possible irregularities²⁶ and, in the same way, the monarch is not in a position to question the legislative intention of the parliament if the procedures have been complied with.

In accordance with art. 97 of the Constitution, the government has the “regulatory power” (*potestad reglamentaria*). This means neither more nor less than that the government has a constitutional right to pass legislative acts, which have been conventionally named regulatory acts. In the Spanish official nomenclature, one may come across regulations (*decretos*) and orders (*ordenes*). It should be remembered that because of the monarch’s position as the head of state (*Jefe del Estado*) decrees are, by definition, royal decrees. Under art. 62.f of the Constitution, the monarch has the right to “pass decrees adopted by the Council of Ministers.” In Spain, just as in many other countries, there has been a debate between constitutionalists and administrative lawyers as to the scope of the government’s discretion in this respect. There is not enough room in this publication for a detailed recount of that scientific dispute,²⁷ however, one should indicate positions which seem to be dominant. Undoubtedly, the government has the right to enact regulatory provisions on the basis of statutory delegation, and due to the fact that it is the beneficiary of the principle of the presumption of competence to enact such provisions even in the absence of any express delegation. The foregoing

²⁴ Cf. J. DE ESTEBAN, L. LÓPEZ GUERRA: *El régimen constitucional...*, p. 38.

²⁵ At this point, it is worth recounting that Juan Carlos, when ascending to the throne and assuming the position of the head of the state, took an oath, swearing to the principles of the Franquist National Movement (*Movimiento Nacional*) before the Franquist Spanish Cortes, and not General Cortes.

²⁶ J.J. SOLOZABAL ECHAVARRÍA: “Sobre la sanción de la ley en el ordenamiento constitucional español.” *Revista Jurídica de Castilla-La Mancha* agosto 1987, núm. 1, p. 131.

²⁷ Cf. for example, J. GARCÍA FERNÁNDEZ: “El Gobierno en acción.” *Cuardenos y debates* 1995, núm. 57, pp. 226 ff.

is related to the implementation of the legislative intention of the parliamentary lawmaker so as to remedy *intra legem* conditions. Apart from such situations, there is an area of the *praeter legem*, not regulated in any prior statute, that is without the possibility to invoke any statutory provisions. The exercise of the regulatory function is a ramification of the right entrusted to the government to govern civil and military administration. Especially in matters of internal organization of these branches of administration. Therefore, the arguments are convincing that the government has an extra-statutory competence to enact such normative acts. Javier García Fernández, among other academic writers, refers to the above as “independent normative power” and the “regulatory power intended to develop statutory law.”²⁸ Juan José Solozábal Echavarría unequivocally refers to that extra-statutory competence of the government to enact regulatory acts with the view to determining internal organization of the administration by means of legislation external to a statute (*ad extra*) as the right to issue auto-regulatory acts by the head of the state in respect of the creation, modification, and liquidation of bodies within ministerial structures and their internal regulations.²⁹

“Decree legislation” is another highly important sphere of legislative activity of the government. Enacting statutory law in the substantive sense of the expression, in pursuance of the Constitution, consists in the exercise of two options. The first is the classical formula: framework statute — decree. The other may be resorted to in a situation of extraordinary and urgent need and is of temporary character. Articles 82 and 83 enable Cortes to adopt a framework statute (*ley de bases*) under which the government is assigned to pass a statutory normative act — legislative decree (*decreto legislativo*). The subject of such assignment may not be matters reserved to organic laws, and the framework statute ought to clearly pinpoint the subject, scope, terms and criteria of the future decree. This makes an extremely important reservation since it precludes constitutional amendments to be introduced in this form. The parliamentary delegation may not be assigned for an unspecified term or be assigned further (pursuant to the principle *delegata potestas non delegatur*). It is subject to judicial review and parliamentary control in respect of the decree’s conformity with the framework statute. Opinions in this matter may be given by the Council of State, not to mention that the decree may be contested before the Constitutional Tribunal.³⁰ However, the number of decrees adopted in accordance with in this procedure is not impressive.

²⁸ Cf. *Ibidem*, p. 230.

²⁹ *El Gobierno: problemas constitucionales*. Eds. M. ARAGÓN REYES, Á.J. GÓMEZ MONTORO. Madrid 2005, p. 97.

³⁰ The Constitutional Tribunal held that legislative decrees are a special form of ordinary legislation and above all should be a subject to the evaluation by common courts of law, including the Supreme Court (*Tribunal Supremo*). Cf. STC 29/1982 de 31 de mayo, BOE, núm. 153 de 28 de mayo de 1982 and STC 51/1982 de 19 de julio, BOE, núm. 197 de 18 de agosto de 1982.

The other option is to adopt decrees-statutes (*decreto-ley*). Just as in the case of legislative decrees, the prototypes of such legislative acts can be found in the Spanish constitutionalism in the mid-19th century. They were also provided for by the Constitution of the Second Republic of 1931, although only in situations when Cortes did not convene. In the Franquist period, they were a very popular form of lawmaking. Under art. 86 of the Constitution, the government is authorized, in the event of an extraordinary and urgent need, to adopt a decree-statute, however, such legislative act may not regulate basic institutions of the state, civic obligations, rights and freedoms, the electoral law and the legal system of autonomous communities. They are subject to *ex post* control. The Congress should start to proceed on them within 30 days of their enactment, and in a vote in respect of the entirety of such decrees, it may either confirm them, reject them or transform them into a legislative draft which may be adopted in a simplified procedure with a single reading.

Spanish governments have been eager to use that method of lawmaking. In the years 1977—1986, that is, in the period of transformation and stabilization of the new political regime, as many as 180 of such legislative acts were passed. In any case, this was recognized by the Constitutional Tribunal. In the opinion of the Tribunal, the evaluation whether the precondition of extraordinary and urgent character has been met makes a political judgment, and, consequently, it may not determine the criteria of legitimacy or illegitimacy to use that lawmaking opportunity.³¹ As noted by Francisco Rubio Llórente, president of the Council of State in the years 2004—2012, it depends on the support for the government in the parliament, and decrees-statutes are generally passed with the intention to avoid the simplified “single reading” procedure.³² However, the dangers of such practice have been signaled by Ignacio A. Huarte-Mendicoa, who claims that the procedure opens the way to unlimited possibilities of the government to enact statutory law, and, in turn, poses certain threats to the position of the parliament.³³ The governmental practice was criticized in the literature. For example, Joaguín García Morillo argues that the “Government does not assume any responsibility for the adoption of a decree-statute, and it is not affected by any possible negative consequences of control beside the fact that it has no opportunity to implement its political programme in practice.”³⁴ Hitherto,

³¹ Cf. STC 29/1982, de 31 de mayo, BOE, núm. 153 de 28 de mayo de 1982 and STC/1983 de 2 de diciembre, BOE, núm. 298 de 14 de diciembre de 1983.

³² F. RUBIO LLÓRENTE: “El procedimiento legislativo en España. El lugar de la ley entre las Fuentes de derecho.” *Revista Española de Derecho Constitucional* núm. 16 enero-abril 1986, p. 105.

³³ I.A. HUARTE-MENDICÓA: “Teoría y práctica del decreto-ley en el ordenamiento español.” *Revista de Administración Pública* núm. 106 enero-abril 1985, pp. 118, 122—123.

³⁴ J. GARCÍA MORILLO: *El control parlamentario del Gobierno en el ordenamiento español*. Madrid 1985, p. 219.

however, decrees were often challenged before the Constitutional Tribunal. They have also given rise to vigorous parliamentary debates.

The government and particularly the prime minister, have the right to submit applications to the Constitutional Tribunal for the declaration of unconstitutionality of statutes (and statutory legislative acts, that is, its own legislative decrees and decrees-statutes) as well as legislative acts and resolutions adopted by authorities of autonomous communities. Such review refers as well to regulations of parliamentary chambers and signed international agreements. In the first group, there are also statutes of autonomous communities (statutes are organic laws) and the remaining organic laws. This type of control may be either preventive or subsequent. The second group includes ordinary statutes and statutory legislative acts of the government (subsequent review). In the third one, one can find regulations of the chambers of parliament and regulations of community parliaments. The last one involves control of normative acts, including statutes, adopted by autonomous communities, and their regulations.³⁵ Most obviously, this opens to the government the possibilities to initiate review procedures, which, in effect, might result in amendments to the debated or already applicable legislative acts, and, in the same way, to play an important role in the lawmaking process. One must also bear in mind that Spanish governments, which are in practice one-party cabinets, have had limited influence on the election of the Tribunal's judges. Although the government is one of the bodies that may propose candidates for judges of the Constitutional Tribunal,³⁶ in practice, this entitlement is cumulated with the election of judges by both chambers of the parliament. It could be the case if governments had sufficient support of the majority of the chambers. However, in practice, the requirement of the three-fifths majority in the vote on the election of judges, both in the Congress of Deputies and in the Senate, is stringent enough to effectively disenable one party from filling most of the positions in the Tribunal. As a rule, this required agreements to be concluded between the parties represented in the parliament, which sometimes led to delays in the appointment of new judges.³⁷ In the same way, it has not been possible for a single party, that is, the political group currently in power, to fill 10 (4+4+2) in 12 judicial positions.

³⁵ Cf. E. ÁLVAREZ CONDE: *Curso de derecho constitucional*. Vol. 2. Madrid 2005, pp. 376—377.

³⁶ Judges of the Spanish Constitutional Court are appointed by the monarch (in a merely formal act) at the request of the Congress of Deputies (4 judges) and the Senate (4 judges) by the majority of three-fifths, the government (2 judges) and the Highest Council of the Judiciary (2 judges).

³⁷ This is indicated expressly by a former judge of the Tribunal and its vice-president Francisco Rubio Llórente. Cf. F. RUBIO LLÓRENTE: *La forma del poder, estudios sobre la Constitución*. Vol. 3. Madrid 2013, pp. 1397—1399.

The Spanish Constitutional Tribunal as well as the Council of State have the reputation of important constitutional and independent state authorities upholding observance of the principles and rules of the democratic state based on the rule of law, and one does not encounter any possible allegations of their political character, understood as subordination to the government in power at a given time.

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