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“Soft law, legal norms and sources of law”

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Sources of law in the Spanish legal System

D) Spanish legal order follows the *roman-canon continental system*. It is based essentially by the *principle of legality* [article 9.3 of the Spanish Constitution (SC)] due to the French Revolution, that gives preeminence to the law dictated by the Cortes Generales (Parliament) *“as an expression of the general will”* (Preamble of the Constitution de 1978).

The *European Union Law* and the State of Autonomies (*“Estado de las Autonomías”*) (whose principles and organization are very close to a federal state) challenge in Spain the traditional constitutional law, after the Constitution of 1978.

We have, nowadays, a *very complex law system*, in which laws of 17 Autonomous Communities coexist with the law of the State and are under the supremacy and direct effect of rules of the European Union, who challenge the legal monopoly of State and clearly the supremacy of the Constitution itself (*see Declaration 1/2004, 13th December, of the Spanish Constitutional Court*).

Our Constitution guarantees the ranking of legal provisions (art. 9.3 SC) but the 17 Autonomous Communities gave birth to the constitutional **principle of competence** that with the kelsenian **principle of hierarchy** and, in certain cases, the **federal principle of prevalence** of the law of central State (article 149.3 SP) rule the organisation of the sources of law in Spain.

I. Norms comprising the Spanish legal system (Overview)

1- Constitutional norms

The Constitution of 1978 constitutes the “*constitutional corpus*” in Spain. We have not additional constitutional laws (Const Court Decision (STC) 76/1983, 5th August).

- As having the force of constitutional norms we can include case-law principles established by the Spanish Constitutional Court decisions (STC).
- According to the Spanish Constitutional Court Primary EU regulation prevails, in certain situations, even over the Spanish Constitution (*Declaration 1/2004, 13th December*)
- Regarding fundamental rights article 10.2 of the Constitution give force into our legal order to the interpretation of European Convention Human Rights, as declared by the Strasbourg Court. The ECHR decisions are binding the interpretation of our constitutional fundamental rights (STC 245/1991, 16th October)

2- International law

Spain follows the **kelsenian monistic approach** with regard to international law, due to the old universalist tradition of our legal system. International norms -other than those of the EU law- emanating from international treaties, prevail **as such** over national norms, except those of constitutional order.

So, norms “*self-executing*” existing in the international treaties are automatically adopted **as such** into the Spanish legal system, once they have been entered into force in the international legal order, and are enforced by Courts.

No transformation into municipal law by the legislative or by any other body of the State is necessary to confer binding force to the norms self executing of a international treaty.

If an international -or European rule- is incompatible with the Constitution, the Constitutional Court declares it (art. 95.1 SP) and a constitutional reform is due before the treaty is formally agreed by the Kingdom of Spain.

Afterwards international treaties are submitted to the control of the Constitutional Court and they can be declared unconstitutional by the Constitutional Court (article 27.2 de the Law of the Constitutional Court) (see, STC 155/2005 9th June).

3- Parliamentary laws

3.1 Organic laws (leyes orgánicas).

Organic laws are a specific type of statute.

They are regulated by article 81 of SC and are different from ordinary laws in two ways

-*The matter of the regulation*: These matters are, and must be, exhaustively listed only in the Constitution: Exercise of fundamental rights and public liberties, Statutes of Autonomy (*Estatutos de Autonomía*), the general electoral system and the regulation of certain constitutional organs (Constitutional Court, Judiciary, Council of State, Ombudsman, Court of Audit and others) are provided by the Constitution as matters of a *ley orgánica* (article 81.1 SP)

- *The procedure of elaboration*. Organic laws require an absolute majority of Congress in a final vote of the entire bill for their approval, modification or repeal (article 81.2 SP).

According to the jurisprudence of the Constitutional Court the *leyes orgánicas* are related to *leyes ordinarias* by the ***principle of competence*** (in the sense due to Italian prof. Vezio Crisafulli). Whether a matter should, or should not, be regulated by a *ley orgánica* depends on whether that matter is specified, or not, in article 81 SC as reserved to that form of statute. If the matter is not specified to a *ley orgánica* the ordinary legislator can regulate it. The relationship between *leyes orgánicas* and *leyes ordinarias* is a question of *competence* (matter duly, or unduly, regulated in it) and not of *hierarchy* (preference of the *ley orgánica* over the *ley ordinaria*, following Kelsen's *Stufenbau* doctrine). The Constitutional Court declares unconstitutional a *ley ordinaria* which modifies or derogates a *ley orgánica* in matters reserved to it.

3.2. Ordinary laws

Ordinary laws are all those whose subject is not reserved to organic laws by the Constitution. The SC reserves to the ordinary laws (*reserva formal de ley*) certain matters.

They require a simple majority of the Congress of Deputies and of the Senate, with the Congress of Deputies adopting the final decision.

3.2 Decree-Law (*Decreto-Ley*) (article 86 SP). These are provisional legislative decisions that Government may issue only in cases of urgent and extreme need. They rank as laws.

They must not affect the organisation of the basic institutions of the State, fundamental rights, organisation of powers and Autonomous Communities. They must be submitted to Congress for approval and ratification in a period of thirty days.

3.3) Legislative Decrees (*Decretos Legislativos*)

Legislative Decrees are dispositions of the Government containing delegated legislation (article 85 SC) and also rank as laws. This legislative delegation must be granted by a basic law (*Ley de Bases*) when the objective is the formation of articulated texts or by an ordinary law when it is a matter of arranging several legal texts into a single one (article 82. SP). In both cases (*Ley de Bases or ordinary law*) delegation must be granted to the Government a) in an express form, b) for a concrete matter and c) establishing a period of time for its exercise (article 82.3 SC).

4- Regulations (Reglamentos)

Regulations are legislation of lower status, *secundum legem or praeter legem*, dictated by Government or Public Administrations. They are *hierarchically ordered* and follow the rank of the authority from which they emanate.

There are no matters reserved to them in the SC. The term *regulation* refers to any general rule dictated generally by the Government (article 97 SC)

Types of regulations are *Decrees* (from the Council of Ministers) Orders (*Orden*) from Ministers or Delegate Commissions Instructions (*Instrucciones*) and Orders of Regulation (*Circulares*) from inferior authorities and members of public administration.

A consultative previous opinion of the *Council of State* is necessary for all regulations that execute laws.

Certain constitutional organs (Constitutional Court, General Council of Judiciary) enjoy regulatory power in matters of internal organization, personnel and services). Both Chambers of Parliament (*Congress* and *Senate*) have regulatory power. Their “*Reglamentos*” are immediately subject to the Constitution.

5 Autonomous Communities

Each Autonomous Community issues their own legal provisions in order to organize their institutions and regulates the domains attributed to them by SC. The system is based on the basis of a distribution of matters to the State and to each Autonomous Community, according to his Statute of Autonomy (see STC 31/2010, 28th June)

These legal provisions are only applicable in the own Autonomous Community

The Autonomous Community has its own legal order whose rank, in matters of its competence is, in hierarchical order:

- a) Statute of Autonomy: The basic institutional rule approved by the procedure of “*ley orgánica*”
- b) Laws, promulgated and published by the President of the Autonomous Community
- c) Decrees-laws
- d) Legislative Decrees
- e) Decrees and other administrative regulations

II. Hierarchy of norms in Spain

According to the *principle of legality*, every legal norm must comply with all norms in force that have higher status in the hierarchy of norms. Hence, in Spain, European law and constitutional norms stand at the top of the national legal order and are followed by international law.

The legislative bloc (organic and ordinary laws), government ordinances, general principles of law and the regulatory bloc (decrees, orders) must therefore respect all these superior norms.

In the Spanish “*State of Autonomies*”, like in all federal systems, there are two levels of legislation, both under the superior hierarchy of the Constitution of 1978: a) The *law of the State* which rules (in matters within its competence) have effect in the whole country and b) the *autonomic legal order* which rules (in matters within the competence of the Autonomous Community) have effect in the territory of each Community. In certain cases of conflict (art 149.3 SC) the law of the State *prevails* over the law of the Autonomous Communities (see STC 1/2003, 16th January and *dissenting opinion*)

See: Jorge Rodríguez-Zapata “*Teoría y práctica del Derecho constitucional*” 2^a ed., Madrid, Tecnos, 2011