'Law Reform' in Spain. An Overview

Ignacio Durbán Martín[*], Pablo Riquelme Vázquez[**], Gabriel Moreno González[***] & Pau Sanchís Matoses[****]

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1. Introduction to the Spanish legal system

Spain is a social and democratic State, subject to the rule of law, whose political form is that of a parliamentary monarchy (art. 1 Spanish Constitution-SC[1]). Voters elect their representatives in a Parliament (*i.e.* the *Cortes Generales*) which consist of two houses: the Congress of Deputies (*Congreso de los Diputados*) and the Senate (*Senado*) of Spain (art. 66.1 SC). The *Cortes Generales* exercise the legislative power of the State, but also approve its budget, control the executive branch and hold all the other powers vested in them by the Constitution (art. 66.2 SC). The Spanish bicameral system is a rationalized, but unequal one, the most common sort of bicameralism among the European Western countries. According to this inequality, the two houses do not perform exactly the same tasks. Legislative powers are exercised disparately by them (*see*, *inter alia*, arts. 81.2 or 90.2 SC), as will be explained in the next section of this commentary. In this regard, for instance, the government is only required to have the confidence of the Congress of Deputies (arts. 99, 108, 112 and 113 SC). The second house should, for its part, give an institutional expression to the specific interest of the different regions with a view to enriching political pluralism.

The rationalized nature of the Spanish parliamentarism – a result of the German influence over the Spanish constitutional drafters[2] – is quite clear from the preponderance of the executive power and its administration in the law-making process[3]. Thus, for example, the governmental initiative[4] amounts in general terms to 80 percent of the legislative initiatives handled by the *Cortes Generales* and benefits from priority in the legislative procedure. Moreover, the Government has the right of amendment during the parliamentary passage of legislation and controls the most significant part of the political agenda.

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[*] Ignacio Durbán Martín is Doctor in Law (Universitat de València, 2018) and researcher at the Universitat de València.

[**] Pablo Riquelme is doctoral student and researcher at the University of Vigo.

[***] Gabriel Moreno González is a doctoral student and researcher at the University of Valencia

[****] Pau Sanchís Matoses has graduated from University of Valencia, holds a master's from College of Europe and is currently working for the European Commission.

[1] The Spanish Constitution was passed by the *Cortes Generales* in Plenary Meetings on October 31, 1978. It was then ratified by the Spanish people in the referendum of December 6, 1978 and sanctioned by the King on December 27, 1978. Its text can be accessed at: http://www.congreso.es/constitucion/ficheros/c78/cons_ingl.pdf.

[2] Following the German model (art. 67 German Constitution), for instance, the Spanish Constitution (art. 113 and 114) requires a 'constructive' motion of censure (*moción de censura*) to force the Government down. That means that the challenging deputies must present their own candidate to the presidency and that this candidacy needs, moreover, an absolute majority to be approved. This entails a clear asymmetry in favour of governmental stability.

[3] E. Jiménez Aparicio, El procedimiento de elaboración de los anteproyectos de ley: la fase gubernamental, in A. Menéndez Menéndez (Ed.), La proliferación legislativa: un desafío para el Estado de Derecho, Thomson-Civitas, Madrid, 2004, pp. 279-374, pp. 315 *et seq*.

[4] In accordance with the Constitution (art. 87), the competence to propose legislation lies with the Government, the Congress and the Senate, the Assemblies of the Autonomous Communities and a certain number of citizens.

In Spain there are no law reform agencies either at the national level (*e.g.* Law Commission for England and Wales) or at the regional level (*e.g.* Canadian Provinces LRAs). Similarly, there are no other law reform agencies such as the Australian statutory agencies that provide law reform advice only on particular subjects.

2. The Spanish 'Law Reform' System

For the purposes of this commentary, we may distinguish between programme legislation (designed to deliver government manifesto commitments or to effect politically-inspired policy change) and legislation designed to update or improve upon or restate existing legislative provisions. Although in the Spanish civil law jurisdiction we are not really familiar with the concept of law reform, this commentary aims to briefly describe the mechanisms used in Spain to review existing legislation. These mechanisms are, in essence: codification, consolidation and simplification. We have carried out a description of the relevant tools and procedures in that sense. The overview has finally been complemented with a condensed outline of the main research questions which emerged from the surveyed literature.

2.1. Tools

Within the Spanish legal order, there are neither repeal, nor legal restatement, nor special *parliamentary* procedures for law revision or codification. Precisely in this respect, the *Comisión General de Codificación* is the body tasked with carrying out the specific mission of codification and revision, although it ultimately depends upon the Ministry of Justice[5]. Since there are no special formal or informal processes to introduce the usual activities for such a body into the executive's priorities[6], the *Comisión General de Codificación* cannot act as an outright law reform agency. When promoting legislative decisions, that situation almost always results in the sole identification of political (not legal) needs[7]. Hence it is hardly surprising that repeal and law revision, for instance, simply appear in most cases as a concomitance of programme legislation or the implementation of a simplification or consolidation tool.

The body specifically tasked with carrying out legal simplification and consolidation is also the Government through an instrument called Legislative Decree (art. 85 SC). The *Cortes Generales* in these cases delegate to the government the power to issue rules with the force of law on specific matters (arts. 82.1 and 81.1 SC). Legislative delegation must be granted by means of a basic law when it aims to draw up texts comprising various articles, or by an ordinary law when it seeks to consolidate several legal texts into one (art. 82.2. SC). The Legislative Decree can be also used at the regional level. Interestingly, the elaboration of such norms follows the same procedure as the other legal rules, as described hereafter.

[5] This state of affairs has been regarded as an obstacle to address a proper «second codification» after the fragmentation process of the legal order experimented in the 20th century. *See* P. Pau Pedrón, La recodificación como remedio, in A. Menéndez Menéndez (Ed.), *La proliferación legislativa: un desafío para el Estado de Derecho*, Thomson-Civitas, Madrid, 2004, pp. 457-472, pp. 469 *et seq*.

[6] *E. g.*, there is no such a thing as both the reports to the Parliament of the Justice Secretary on the implementation of Law Commission proposals and the protocol between the Lord Chancellor and the Law Commission on how to select law reform projects as exist in the United Kingdom.

[7] Jiménez Aparicio 2004, p. 358.

2.2. Procedures

As far as 'law reform' is concerned, special attention should still be given to the governmental preparation and approval of draft laws (art. 26 GL[8]). As is usual within the continental system, government bills are drafted by the lawyers of the relevant Department who are expert in that field of law (ministerial or departmental principle); that is why the drafting procedure normally begins within the competent ministry or ministries after as many studies and consultations as might be needed in order to ensure the success and the lawfulness of the future norm (art. 26.1 GL). The competent ministerial body must carry out a legal impact assessment (*memoria del análisis del impacto normativo*) which shall contain, among other information, a legal analysis justifying the need for a new regulation, the expediency and the alternatives for it, and include a detailed list of derogated norms [art. 26.3. a) and b) GL].

The head of the proposing Department shall then submit the preliminary draft law to the Council of Ministers so that it can decide on the subsequent procedures and, in particular, on the consultations, legal opinions and reports that may be appropriate, over and above the legal requirements. Except for those that have a mandatory nature, the preceding procedures could be waived when urgent circumstances would make it advisable. The corresponding law draft will usually be accompanied by studies or reports on the need and convenience of the law, as well as by an economic report which contains an estimate of the rising costs (art. 26.5 GL). Once the abovementioned procedures are completed, the head of the proposing Department shall submit again to the Council of Ministers, for its approval, the preliminary draft law.

For present purposes, it should still be underlined the that the Ministry of the Presidency is to ensure coordination and quality in the law-making and 'law reform' activity. For this reason, it must be ascertained that the legislative proposal meet the technical standards set out in art. 26.9. a), c) and d) GL, and is consistent with the rest of the legal order.

2.3. The role of the *Comisión General de Codificación*

As a consequence of the above, it should be noted that other actors and elements may play a significant role in the 'law reform' process. Among others, the government might have the support of the *Comisión General de Codificación*, which is described in the *Real Decreto 845/2015*, of 28 September, as the highest collegiate body for advice to the Justice Minister.

From an organic perspective, the *Comisión General de Codificación* only interacts with the government, *i.e.*, it does not provide any services to the Parliament, nor to other State power different from the executive. What is more, the *Comisión General de Codificación*, as has already been said, completely depends upon the Ministry of Justice; that is why it does not act autonomously, but only at the request of the government, which sometimes demands its involvement as a specialized drafting body. Finally, the *Comisión General de Codificación* is configured as a specialized body divided into five sections: the first one is the Civil Law section; the second one, the Commercial Law section; the third one, Public Law section; the fourth one, the Criminal Law section; and the fifth one, the Procedural Law section.

From a functional perspective, the *Comisión General de Codificación* is in charge of legislative drafting within the Ministry of Justice and of the other tasks eventually allocated to it. In particular, this body

[8] *Ley 50/1997, de 27 de noviembre, del Gobierno* (BOE n. 285, 28 November 1997, p. 35.082 - 35.088). This norm has been significantly amended by the *Ley 39/2015, de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas* (BOE n. 236, 2 October 2015, pp. 89.343 - 89.410). Hereinafter, we will refer to the consolidated version of the legal norm as GL.

carries out the specific tasks of codification, revision and any other assigned to it by the government for the best orientation, preservation and protection of the legal system. It is competent for drafting new legislative proposals or for the study and proposal of 'law reform' to the current legal provisions, at the request of the government and on instructions from it. It follows from the above that the *Comisión General de Codificación* does not provide general advice to the government in legal matters; this is the task of the *Consejo de Estado*. For all these reasons, the *Comisión General de Codificación* is commonly seen as a narrowly configured pre-legislative institution.

For its part, this outline reflects the position at the level of the Autonomous Community. All legislative assemblies are assisted by political advisors and legal advisers who take over an important function in the preparation of laws. In some Autonomous Communities there are also bodies tasked with carrying out the conservation and development of the traditional private law in matters relating to neighbourhood, family, hereditary, business and civil society issues. These bodies are the:

- *Comisión Asesora sobre Derecho Civil Aragonés*.
- *Comisión Asesora de Derecho Civil de las Islas Baleares*.
- *Comisión superior para el estudio y desarrollo del Derecho Civil gallego*.
- *Comisión de Codificación Civil Valenciana*.
- *Comisión de Derecho Civil Vasco*.

Their tasks include those of drafting 'law reform' bills (*e. g.* Comisión Asesora de Derecho Civil de las Islas Baleares) and giving advice to the Executive on 'law reform' issues[9].

To conclude, we would like to point out that standards, in the form of legislative technique guidelines, have been approved both at the national and the regional level to steer the work of the different actors involved in the legislative and regulatory procedure[10].

3. Main research questions in the surveyed literature

As a result of a consciousness-raising among some European legal scholars in the mid-eighties, the «legal certainty (*seguridad jurídica*)» has been a permanent and deliberate endeavour in Spain since the end of this decade[11]. This endeavour can be understood as a reaction to the «normative pollution (*polución jurídica* or *contaminación juridica*)»[12], a legal phenomenon already anticipated by Manuel García Pelayo, the first President of the Spanish Constitutional Court. According to this author, a *social* and democratic State, subject to the rule of law, entails a drastic increase not only in the amount of enacted legal provisions, but also in the typology of laws. This in turn leads to a constant need to

[9] This is the case of almost all of them: the *Comisión Asesora sobre Derecho Civil Aragonés*, the *Comisión Asesora de Derecho Civil de las Islas Baleares*, the *Comisión superior para el estudio y desarrollo del Derecho Civil gallego*, the *Comisión de Codificación Civil Valenciana* and the *Comisión de Derecho Civil Vasco*.

[10] At the state level, one may find an example in the *Resolución de 28 de julio de 2005, de la Subsecretaría, por la que se da publicidad al Acuerdo del Consejo de Ministros, de 22 de julio de 2005, por el que se aprueban las Directrices de técnica normativa.*

[11] I am referring specifically to the experience of the *Grupo de Estudios de Técnica Legislativa (GRETEL)*, which was established in the heart of the *Centro de Estudios Constitucionales* and whose main work was the publication in 1989 of a course of legislative technique.

[12] Francisco Laporta has based the term «normative pollution (*polución jurídica* or *contaminación juridica*)» on the ecology definition of an uncontrolled growth of an environment component without the possibility of eliminating it [F. Laporta, Teoría y realidad de la legislación: una introducción general, in A. Menéndez Menéndez (Ed.), *La proliferación legislativa: un desafío para el Estado de Derecho*, Thomson-Civitas, Madrid, 2004, pp. 457-472, pp. 67 *et seq*.].

legislate, or rather review existing legislation, to ensure that it continues to be satisfactory for both the State and society[13].

3.1. *Different Manifestations of the Proliferation of Legislation*

Despite the lack of law reform culture among Spanish legal scholars, they have become more sensitive to the fact that the entry into force of every new norm affects to some extent the previous legislation, either in the sense of repealing it (totally or partially) or of modifying it. The impact of the new legal rules on the preceding norms is particularly important because the legal certainty (art. 9.3 SC) directly depends on the possibility of a correct knowledge of the valid rules and their consequences. Thus, *continuous legislative reforms* complicate and hinder the knowledge of the valid law, and reduce legal certainty. The modifications that new laws introduce in their predecessors has been seen by the Spanish legal scholars as the biggest cause of normative entanglement[14]. An additional concern is the problem of the *hidden modifications* or of those difficult to identify. This problem occurs when norms which were not designed to address reform of pre-existing laws actually modify them without any record in the new legal text, thereby seriously damaging legal certainty[15].

Be that as it may, the greatest danger is represented by those rules which can be classed as *omnibus laws*, namely, those whose object is the modification of a large number of laws which can be linked because of economic policy reasons or their belonging to the same legal field. The most characteristic examples of them are the fiscal, administrative and social measures which year after year have been changing dozens of laws. In Rubio Llorente's view the omnibus laws, "which neither respect any limits nor are inspired by homogeneous criteria, are only a compulsive and comfortable response, not without opportunism, to an alleged pressing regulatory demand on the part of public institutions and/or social groups"[16]. Eduardo García de Enterría[17] or Luis María Cazorla Prieto[18], among others, have also sharply criticized such fiscal, administrative and social measures (*i.e.*, the *omnibus laws*) on the basis of their pernicious effects on the legal system and, therefore, on legal certainty.

Last but not least, the proliferation of legislation has not only been studied from the perspective of the reduction in the quality of laws, but also of its *economic and social costs*. An unreasonable increase in laws might lead to an increase in litigation and, correspondingly, in delays in providing a solution to administrative and jurisdictional conflicts[19].

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[13] M. García-Pelayo, *Las transformaciones del Estado contemporáneo*, 2nd ed., Alianza Editorial, Madrid, 1996 (10th reprint of the 2nd ed.), p. 175.

[14] P. García-Escudero Márquez, *Técnica legislativa y seguridad jurídica: ¿hacia el control constitucional de la calidad de las leyes?* Cizur Menor, Aranzadi, Navarra, 2010, p. 145.

[15] García-Escudero 2010, p. 143.

[16] F. Rubio Llorente, El papel del Consejo de Estado en el control de la calidad técnica de las normas, *Revista española de la función consultiva*, 6, 2006, pp. 27-40, p. 36.

[17] E. García de Enterría, Justicia y seguridad jurídicas en un mundo de leyes desbocadas, Civitas, Madrid, 1999, pp. 80 *et seq*.

[18] *See* L. M. Cazorla Prieto, *Codificación contemporánea y técnica legislativa*, Aranzadi, Pamplona, 1999.

[19] A. Menéndez, Introducción, in A. Menéndez Menéndez (Ed.), *La proliferación legislativa: un desafío para el Estado de Derecho*, Thomson-Civitas, Madrid, 2004, pp. 15-23, p. 20. *See* also P. Mercado Pacheco, Análisis económico del derecho y teoría de la legislación. Coste del derecho y mejora regulatoria, in E. García Arana (Dir.), *algunos problemas de técnica legislativa*, Thomson Reuters: Aranzadi, Navarra, pp.65-87.

3.2. *Proposed Remedies*

Before explaining the proposed remedies for the proliferation of legislation, it should be stressed that, due to the fact that law reform does not seem to be part of the legal culture of the Spanish civil law jurisdiction, the effort to 'clear out' the legal system has been inspired by a heterogeneous multitude of factors. This has sometimes led to a blurring of the original borders between the different legal tools and notions. In any case, it is to be welcomed that the issues which law reform typically deals with have been perceived as urgent from a doctrinal perspective, for this has given rise to the legal doctrine making several proposals for coping with those needs.

Firstly, some authors have asserted that laws should be modified as little as possible, and only in those cases where there is a real need for reform[20]. Having established that need, these authors have further recommended following the *Guidelines of Normative Technique* approved in 2005. According to this idea, it would be preferable to elaborate a new law in order to replace the previous one rather than leaving in place the original norm together with its subsequent modifications[21].

Another branch of the Spanish scholars has advocated an extension of the Constitutional Court's competences to the effect that this organ can *control the quality of* lawmaking and '*law reform*'[22]. However, such a proposal might pose additional problems, since the lack of a legislative technique culture in Spain makes it difficult to identify the «law-image derived from the Constitution»; besides, that kind of control would require some functional modifications within the constitutional system[23].

There is a third trend represented, among others, by Piedad García-Escudero which has insisted on the advisability of more frequently authorising the government to *issue consolidated texts*. Provided the proper parliamentary control (art. 82.6 CE) is respected, this technique may contribute to the clarification of the legal order by reducing law dispersion. Similarly, *codification* seems to be a trend again in vogue which would contribute to the direction advocated by Piedad García-Escudero[24], José María López Jiménez[25] or Luis María Cazorla Prieto[26].

Finally, a small strand of the legal doctrine has explored the benefits of introducing computing systems[27]. The concept of *indexation* deserves in this respect a special attention, *i.e.*, the permanent integration of the new legal norms in a public application designed to automatically sort and order them: this instrument would be the *Index*[28].

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[20] García-Escudero Márquez 2010, p. 141. *See also* B. Pendás, Crisis en la ciudad sin ley, *ABC*, 11 de enero de 2009.

[21] García-Escudero 2010, p. 145.

[22] *See* P. García-Escudero Márquez, *Técnica legislativa y seguridad jurídica: ¿hacia el control constitucional de la calidad de las leyes?* Cizur Menor, Aranzadi, Navarra, 2010; and E. Arana García, Dos manifestaciones de la confusión de poderes de nuestro tiempo convertidos en problemas de técnica legislativa: abuso de decretos-leyes y leyes singulares, in E. Arana García, (Ed.), *Algunos problemas actuales de técnica legislativa*, Cizur Menor, Aranzadi, Navarra, 2015, pp. 121-180.

[23] P. Cruz Villalón, Control de la calidad de la ley y calidad del control de la ley, in A. Menéndez Menéndez (Ed.), *La proliferación legislativa: un desafío para el Estado de Derecho*, Thomson-Civitas, Madrid, 2004, pp. 113-133, p. 132 *et seq.*

[24] García-Escudero 2010, p. 161.

[25] J. Mª. López Jiménez, 'Algún criterio para mitigar la hiperabundancia normativa' STS (Sala 1ª) de 23 de febrero de 2009 , *Diario La Ley*, No. 7.212, 2009. 1 y ss.

[26] Cazorla Prieto 1999, p. 58.

[27] M. G. Losano, *La informática y el análisis de los procedimientos jurídicos*, Centro de Estudios Políticos y Constitucionales, Madrid, 1991.

[28] C. Jerez Delgado, La indexación: una técnica al servicio de la seguridad jurídica, in A. Menéndez Menéndez (Ed.), *La proliferación legislativa: un desafío para el Estado de Derecho*, Thomson-Civitas, Madrid, 2004, pp. 575-588, p. 578.

Literature review on 'Law Reform' in Spain

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