

Legal System of Spain

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This paper provides a brief look at three aspects of the Spanish legal system of interest to the international legal community. Beginning with the basics of Spain's civil law system under the Constitution of 1978, the emphasis then shifts to Spain's evolving system of federalism and a look at the primacy of European Union law over the national law of Spain.

Civil Law in a Modern Constitutional State

Spain's legal system falls solidly within the continental European tradition of the civil law. Over the past century, the most significant legal development has been the Constitution of 1978, which represented the culmination of Spain's transition to democracy after nearly 40 years under the authoritarian government of Francisco Franco.

In relation to Spain's civil law tradition, it is interesting to note that while the Constitution goes into detail regarding the organization of the State, as well as the fundamental rights and duties of individuals, it says nothing about the sources of law applicable in Spain. To find these, we must look to the Civil Code of 1889, which provides a hierarchy of law (in other words, statute), custom and general principles of law.¹ In accordance with this hierarchical order, custom cannot prevail over statute, and general principles of law only apply when neither statute nor custom is applicable to the case at hand.² Therefore, as in most civil law jurisdictions, statute is the primary source of law.

Caselaw ranks in far second place as a complement to the aforementioned three sources of law. There are two requirements for judge-made law in Spain: (i) the norm must form part of a judgment of the Spanish Supreme Court which interprets at least one of the foregoing three sources of law; and (ii) the norm must be reiterated.³ This latter point means that to create law on a particular issue, the Spanish Supreme Court must have decided the same issue in the same way on at least two occasions.

The role of equity in the Spanish legal system is somewhat surprising to a lawyer trained in the common law. Courts must take into account equity as a rule of interpretation and application of the law, though it cannot alone form the basis for the court's decision, unless expressly allowed by a rule of law.⁴ The common-law concept of equity as an alternate system for achieving justice is completely foreign to Spanish law.

¹ Civil Code [*Código Civil*], Article 1.1

² Civil Code, Article 1.3; 1.4

³ Civil Code, Article 1.6

⁴ Civil Code, Article 3.2

The role of international treaties in Spanish law is established by the Constitution, which sets forth three requirements for an international treaty to become part of the internal law of Spain: (i) the treaty must meet varying requirements of parliamentary authorization or notification, depending on its content;⁵ (ii) the text of the treaty itself must be published in full in the *Official State Gazette*;⁶ and most significantly (iii) if a treaty contains provisions that conflict with the Constitution, the Constitution must first be amended accordingly.⁷

In relation to international treaties, two articles of the Constitution contain interesting aspects. First, Article 95.2 provides a procedure by which the government or either house of parliament may seek an advisory opinion of the Constitutional Court as to whether a proposed treaty conflicts with the Constitution, thus requiring the amendment mentioned above. Article 93 is also interesting in that it was drafted in anticipation that Spain would at some future time become a member of what was then known as the European Communities, and authorized parliament to enter into “treaties by which powers derived from the Constitution shall be transferred to an international organization or institution.”⁸

Evolving Federalism under the Constitution of 1978

With its transition to democracy, Spain moved away from a highly centralized State and embraced the idea of regional governments, which were called autonomous or self-governing communities. The Constitution left the development of these regional governments, their number and degree of self-governance largely undefined, to be determined by subsequent legislative development, while recognizing multiple procedures for achieving self-governance depending on the characteristics of the various regions, including historic, cultural and economic factors.⁹ Among the first regions to make use of the procedure set forth for so-called historic nationalities were the Basque Country, Catalonia and Galicia. Other regions followed suit, thus leading to a total of 17 autonomous communities, plus the two autonomous cities of Ceuta and Melilla, located on the northern coast of Africa.

It is somewhat paradoxical that the Constitution makes no mention of the terms ‘federalism’ nor ‘federal state’, recites the ‘indissoluble unity of the Spanish nation’ and yet establishes an open-ended process for self-governance of an undetermined number of nationalities and regions.¹⁰ By doing so, the Constitution opened the door to a

⁵ CE [*Constitución Española*], Article 96.1

⁶ CE Article 96.1; Civil Code Article 1.5

⁷ CE Article 95.1

⁸ CE Article 93.

⁹ CE Articles 143, 144

¹⁰ CE, Article 2

situation of de facto federalism, in Stepan's "holding together" model,¹¹ and subject to the inevitable tension between the rights of the regional governments versus the powers of the central government itself.

The constitutional enumeration of powers corresponding to the central government and the regional governments is complicated by several factors. First, powers not expressly attributed to the central government may pertain to the regional governments, pursuant to their respective constituting Statutes.¹² Then, even in matters corresponding to the central government, parliament may give the regions the power to legislate within the framework set up by a law of the central government. And finally, the Constitution also provides for the transfer or delegation of central government powers to the regions, so long as *by their own nature* these powers are transferable or delegable.¹³ This last phrase effectively sets no limit on the extent of powers that can be claimed by the regions. As Spain's two major political parties¹⁴ each have about the same level of voter support in national elections, they often need the support of regional parties to form coalition governments. As may be expected, the regional parties have become quite adept at obtaining concessions of both powers and resources as a condition of such support.

Primacy of European Union Law

At levels below the Constitution, the principle that European Union law prevails over Spanish national law has been accepted in Spain with no great fanfare. When Spain adhered to the European Communities in 1985, over twenty years had passed since the European Court of Justice first enunciated this principle in its historic decision in *Costa v. ENEL*.¹⁵ The Spanish judiciary, from the courts of first instance up to the Supreme Court, began to apply rules of European law in prevalence over domestic rules.¹⁶

At the constitutional level, however, there has been greater discussion concerning the primacy (or supremacy) of European Union law over principles of the Constitution, leading to two advisory opinions of the Constitutional Court and the only amendment so far of the Constitution of 1978.

As mentioned above, Article 95.2 of the Constitution provides for advisory opinions of the Constitutional Court prior to ratification of an international treaty, as to whether the treaty conflicts with the Constitution.¹⁷

¹¹ Stepan, Alfred C. *Federalism and Democracy: Beyond the U.S. Model*, Journal of Democracy - Volume 10, No. 4, Oct. 1999, pp. 19-34.

¹² CE, Article 149.3

¹³ CE, Article 150 (*italics added*)

¹⁴ The conservative *Partido Popular* and socialist *Partido Socialista Obrero Español*.

¹⁵ Case 6/64, *Costa v. E.N.E.L.*, [1964] ECR 585.

¹⁶ See Martínez-Lage, Santiago, *Por la primacía, desde luego no*, *El País*, 4 November 2004

¹⁷ CE, Article 95.2

This procedure was used initially in 1992, when certain provisions of the Maastricht Treaty were held to require amendment of the Constitution, to allow EU citizens resident in Spain the right to vote and to stand as candidates in municipal elections.¹⁸

The more recent advisory opinion was issued in 2004, in the context of Spain's approval and ratification of the ultimately unsuccessful Treaty establishing a Constitution for Europe (TCE).¹⁹ This treaty contained a provision that reflected EU caselaw regarding the primacy of European Union law: "*The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.*"²⁰

On referral to the Constitutional Court by Spain's government, it was held that the foregoing provision was not in violation of the supremacy of Spain's Constitution, though three dissents reflected a level of debate which has been absent at other levels of the legal system.

The majority opinion was based on a finding that the TCE is inspired by and based on principles similar to the constitutional principles of the Member States; the limited scope of the primacy clause, which was found to be limited to the competences conferred on the European Union; and a distinction between the concepts of supremacy and primacy, even though these two terms were used as synonyms in the court's 1992 advisory opinion. Specifically, the majority held that supremacy is a question of hierarchical order, while primacy means that one rule is not applied in preference of another rule, although the latter need not be hierarchically superior.²¹

In contrast, the common thread running through the three dissenting opinions is that there is an evident conflict between TCE Article I-6 and Article 9.1 of the Spanish Constitution, which latter article establishes the supremacy of the Constitution within Spanish law, and therefore ratification of the TCE should require amendment of the Constitution. The dissents coincide that the procedure authorized under Article 93 of the Spanish Constitution is insufficient to allow ratification of a treaty containing such a provision. The dissenting magistrates also reject as ingenuous and unrealistic the argument that common values in both the TCE and national constitutions will make conflict between the two impossible, and consider the distinction between primacy and supremacy to be a mere matter of semantics, far removed from the practical application of the law.²²

As the TCE is on standby following its rejection in referendums held in France and the

¹⁸ DTC 1/1992, 1 July 1992

¹⁹ DTC 1/2004, 13 December 2004

²⁰ Treaty establishing a Constitution for Europe, Article I-6.

²¹ DTC 1/2004, 13 December 2004

²² Ibid.

Netherlands, the issue may very well be moot, at least in terms of this particular treaty. However, one Spanish commentator points out that the concerns about constitutional supremacy pale in significance when compared to the actual acceptance of primacy of European Union law by the Spanish judiciary: “...in fewer Member-States has there been such a unanimous acceptance as in Spain of the principle of primacy of EU law, by courts and tribunals, of all levels and jurisdictions... If this is not primacy of European law over domestic law, then Schuman, Monnet and Pescatore should come and see this.”²³

²³ Martinez-Lage, Santiago, *Por la primacía, desde luego no*, *El País*, 4 November 2004.