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THE NON-EXISTENT CONSULTATIVE FUNCTION OF THE JURISDICTIONAL BODIES OF THE SPANISH JURISDICTION FOR JUDICIAL REVIEW

Previously it should be kept in mind, unlike what happens in other legal systems of our surroundings, the Spanish courts and single-judges haven't commandeered any consultative function or advisory role.

Article 117 of the Spanish Constitution of 1978 foresees the exercise of judicial authority in every type of action, both in passing judgment and having judgments executed, lies exclusively within the competence of the Courts and Tribunals established by the law, in accordance with the rules of jurisdiction and procedure which may be established therein. Therefore, its function is strictly jurisdictional.

Conversely, consultative function is conferred to the Council of State by article 107 of the Constitution, as supreme consultative body of the Government, which, in accordance with its regulatory law (Organic Act 3/1980, 22 of April 22) shall give an opinion on all matters submitted for consultation by the Government or its Ministers, as maximum responsible of their Departments.

This consultative function for the Spanish Government is carried out without prejudice to advisory function attributed to the Autonomous Communities in their respective Statutes of Autonomy. At present, all the Autonomous Communities, except for Cantabria and including Madrid with nuances, have their own bodies or consultative board, which perform similar functions as the Council of State.

Thus, when a sectorial law determines the requirement that an opinion should be sought from the Council of State, it should be understood that inform must be issued by the corresponding advisory council, when the administration that should form the consultation is an Autonomous Community.

Council of State should be consulted on certain matters, emphasizing the issuing of reports related to the regulations or general provisions that are dictated in execution of laws, as well as their modifications; delegated functions at the Autonomous Communities; draft bills to be enacted, implemented or developed in international treaties, conventions or agreements and European Union law; nullity, interpretation and termination of administrative contracts; or financial liability of public administrations.

Therefore, in general, Council of State does not issue opinions on draft bills, but in special cases, such as those above mentioned.

On the other hand, it should be noted that in Spain, apart from the courts and tribunals that make up the judiciary, there is another body, the General Council of the Judiciary to which article 122 of the Constitution entrusts its government. In this way, to the General Council correspond all the necessary powers to apply the organic statute for judges and magistrates, in particular leading to promotion, inspection and disciplinary procedures.

In particular, with regard to the consultative function, it should be noted that Article 561 of its Organic Act 6/1985, 1 of July, provides that the General Council shall inform those preliminary draft laws and general provisions that regulate specific matters to the jurisdictional function.

Thus, the report of the council will be submitted within 30 days (15 in case of urgency) the procedural rules or that affect the constitution, organization, operation and government of the courts.

In that sense, recently, the General Council had to issue a report in relation to the Organic Act of the Judiciary's modification, and other laws of special significance as well, such as Acts 39/2015 and 40/2015, both of 1 October, on administrative procedure and public sector legal regime.

However, even if the informing function of the rules with repercussions in the field of Justice corresponds, in principle and exclusively to the General Council of the Judiciary, the truth is that it has been considered desirable to have the collaboration or participation of the Supreme Court as the highest judicial body in all branches of justice, except with regard to the provisions concerning Constitutional guarantees (Article 123 of the Constitution) in cases of special importance, such as the abovementioned amendment of the Organic Act of the Judiciary.

This amendment of the law also included a reform of the Act 29/1998, of 13 July, regulating the jurisdiction for judicial review, that has introduced a substantial change in the model of a cassational appeal for judicial review at the Contentious-Administrative Division of the Supreme Court.

It should be emphasized that, notwithstanding to the fact that the Senior Judges of the Third Chamber of the Supreme Court, or Administrative Division of the Supreme Court, met in a plenary session in order to study the modification, this collaboration was not carried out by the same Third Chamber, but by the Governing Chamber, which corresponds to the governmental functions of the

Supreme Court itself and whose members belong to the different chambers that comprise it.

Finally, it should be noted that Act 39/2015 establishes that, annually, Public Administrations will publish a Normative Plan which will contain legal or regulatory initiatives that will be raised for approval in the following year. Once approved, the Annual Regulatory Plan will be published at the corresponding Public Administration Transparency Site. And, even if it is not a consultative function, it is a rationalization measure that allows citizens to be aware of those rules that shall be approved and, consequently, to be attentive to a possible participation in its future elaboration. However, this measure can generate some controversial issues, since Public Administrations in many occasions must order rules that have not been previously foreseen to be approved.

QUESTIONNAIRE-ANSWERS

Part 1: Input mechanisms *prior* to the drafting of legislation

A) Input from the courts

1. Are there any general mechanisms in your Member State for the courts, and more specifically the highest courts, to provide solicited or unsolicited input or advice in the phase before legislation is drafted?

No, as it's explained at the attached note.¹

If not:

f. Do you think input mechanisms for the courts would be desirable at this stage, and in what form?

The powers' separation established at the Constitution of 1978 does not make it advisable. According to its Article 66, the political decision must correspond to the legislative power as representative of national sovereignty. The legislative activity is developed by the Legislative Houses, composed by the Congress of Deputies and the Senate. On the other hand, to propose legislation, corresponds, in a general way, to the Government. Consultation with the Courts is only possible in technical aspects, of which they know by the exercise of their strictly jurisdictional function.²

g. What is the basis (for example, constitutional, statutory or unwritten law) for the existing mechanisms?

Article 117 of the Spanish Constitution, as it's explained at the attached note.

2. Are there objections or risks attached to the formal consultation of the courts at the stage before legislation is drafted? If so, what are they? How can they be resolved?

¹ No, como se explica en la nota adjunta.

² La separación de poderes establecida en la Constitución de 1978 no lo hace aconsejable. De acuerdo con su artículo 66, la decisión política le debe corresponder al poder legislativo como representante de la soberanía nacional. La actividad legislativa es desarrollada por las cámaras, compuestas por Congreso de los Diputados y el Senado. Por otra parte, la iniciativa legislativa corresponde con carácter general al Gobierno. La consulta a los Tribunales sólo es posible en aspectos técnicos, de los que conocen por el ejercicio de su función estrictamente jurisdiccional.

Apart from violating the powers' division established at the Constitution, the risk that the judicial body should be identified with any legitimate political options present in the chambers and, in particular, with the Government that is currently exercising power.³

3. Are there objections or risks attached to giving unsolicited advice at the stage of the drafting of legislation, for example by means of an unsolicited opinion, an annual report or publication? If so, what are they? How can they be resolved?

There is no risk as long as at, first, the input of data is statistical and based on technical criteria. And secondly, it doesn't politically commit the courts. In Spain, this possibility already exists, and reference can be made to the Annual Report of the Public Prosecutor's Office, which highlights possible shortcomings and needs that exist in the judicial area; or the annual report of the President of the Supreme Court, as well.⁴

B) Input from advisory bodies

4. Are there any general mechanisms in your Member State for advisory bodies to give solicited or unsolicited input or advice at the stage before legislation is drafted?

Yes, as it's explained at the attached note.

If so:

a) Are the advisory bodies consulted structurally or incidentally at this stage, and in what way?

They are consulted structurally, as it's explained at the attached note. Council's consulting shall be mandatory when it is established by law, and optional in all other cases. The Council's opinions shall not be binding unless the law provides otherwise.⁵

³ Al margen de infringir la división de poderes establecida en la Constitución, el riesgo de que al órgano judicial se le identifique con alguna de las legítimas opciones políticas presentes en las cámaras y en particular con la del gobierno que en el momento esté ejerciendo el poder.

⁴ No hay riesgo siempre y cuando, primero, el aporte de datos sea estadístico y basado en criterios técnicos; y, segundo, que no comprometan políticamente a los órganos jurisdiccionales. En España ya existe esa posibilidad, pudiendo hacerse referencia a la Memoria anual del Ministerio Fiscal, en la que se ponen de relieve las posibles carencias y necesidades que existan en el ámbito judicial; y la memoria anual del Presidente de Tribunal Supremo.

⁵ Son consultados de forma estructural, como se indica en la nota adjunta. La consulta al Consejo será preceptiva cuando así se establezca en las leyes, y facultativa en los demás casos. Los dictámenes del Consejo no serán vinculantes, salvo que la ley disponga lo contrario.

b) To what extent do the advisory bodies themselves take the initiative to advise the legislator or draw attention to the quality of legislation, for example by means of unsolicited advice, a response to a public consultation, a publication or a contribution on that subject to the annual report?

The advisory bodies have no initiative; it is merely a consultative function following the request of the competent bodies at the legislative procedure. However, an annual report of the evacuated consultations is issued.⁶

c) What aspects of the quality of legislation are specifically addressed and can you give an example?

The Council of State, in the exercise of its functions, shall ensure the observance of the Constitution and the rest of the legal system. It shall assess timeliness and suitability aspects when the nature of the matter so requires or is expressly requested by the consulting authority, as well as the greater effectiveness of the Administration in the fulfilment of its purposes. Likewise the General Council of the Judiciary shall inform those preliminary draft laws and general provisions that regulate specific matters to the jurisdictional function.⁷

d) To what extent is the given input public?

The opinions are public, but always referred to regulations, as explained in the attached note.⁸

e) Do you think such input mechanisms for advisory bodies at this stage would be desirable, and in what form?

It is desirable, because it contributes to the improvement of the legislative work, as long as it leaves room for the strict political decision.⁹

⁶ Los órganos consultivos no cuentan con iniciativa; se trata de función meramente consultiva a raíz de la petición de los órganos competentes en el procedimiento legislativo. No obstante, sí se emite una memoria anual de las consultas evacuadas.

⁷ En el ejercicio de sus funciones, el Consejo de Estado velará por la observancia de la Constitución y del resto del ordenamiento jurídico. Valorará los aspectos de oportunidad y conveniencia cuando lo exija la índole del asunto o lo solicite expresamente la autoridad consultante, así como la mayor eficacia de la Administración en el cumplimiento de sus fines. De igual modo, el Consejo General del Poder Judicial informará aquellos anteproyectos de ley y disposiciones generales que regulen cuestiones que puedan afectar a cuestiones propias del ejercicio de la función jurisdiccional.

⁸ Los dictámenes son públicos, pero referidos siempre al ámbito reglamentario, como se explica en la nota adjunta.

⁹ Resulta deseable, porque contribuye a la mejora de la obra legislativa, siempre que deje margen a la estricta decisión política.

f) What is the basis (for example, constitutional, statutory or unwritten law) for the existing mechanisms?

Constitutional; And legal in case of General Council of the Judiciary 's report.

5. Are there objections or risks attached to the formal consultation of advisory bodies at the stage before legislation is drafted? If so, what are they? How can they be resolved?

No. it only provides technical data, leaving last decision to who should adopt it.¹⁰

6. Are there objections or risks attached to advisory bodies giving unsolicited advice on the drafting of legislation, for example by means of an unsolicited opinion, a publication or a contribution on the subject in the annual report? If so, what are they? How can they be resolved?

No. There is no initiative. Only the annual report. From that point of view no risks are detected since it only provides technical data and leaves the last decision to whom should adopt it. In any case, the only risk could be derived from becoming a legislative body.¹¹

A) General

7. Are there any general or specific input mechanisms in your Member State (except for those for the courts and advisory bodies) at the stage before legislation is drafted, for example public consultation via the internet or otherwise?

Yes. Article 105 of Spanish Constitution foresees that law shall regulate the hearing of citizens directly, or through the organisations and associations recognised by law, in the process of drawing up the administrative provisions which affect them; and the procedures for the taking or administrative action, guaranteeing the hearing of interested parties when appropriate.

Thus, Act 39/2015, on administrative procedure and basic for all the Spanish administrations, and Act 40/2015, for public sector legal regime and specifically for National Administration, both of 1 October, provide that public administrations must submit all different projects o which are intended to approve to public information process. In a

¹⁰ No. Solo aportan datos técnicos y deja la última decisión a quien debe adoptarla.

¹¹ No hay iniciativa. Sólo la memoria anual. Desde ese punto de vista no se detectan riesgos ya que únicamente aporta datos técnicos y deja la última decisión a quien debe adoptarla. En todo caso, el único riesgo podría derivar de constituirse en órgano legislativo.

first phase, projects shall be published on their web sites. And, in a second stage, projects shall be submitted to a hearing process by potentially affected subjects by the norm to be approved. In the interests of greater legal certainty, and the predictability of the regulation, is committed to improving ex ante normative planning. To this end, all public administrations will disclose an Annual Regulatory Plan in which all proposals with the rank of law or regulation that will be raised for approval in the following year will be collected.

This regulation follows the recommendations made in this regard by the Organization for Economic Co-operation and Development (OECD) in its report issued in 2014 «Spain: From Administrative Reform to Continuous Improvement».¹²

8. Have you any additional or other remarks about input mechanisms before legislation is drafted?

No.

Part 2: Input mechanisms *after* legislation has been drafted

A) Feedback from courts

9. Are there any formal or informal feedback mechanisms in your Member State for the courts, and more specifically the highest courts, to provide solicited or unsolicited input or advice *after* legislation has been drafted and some experience has been gained with implementation and enforcement?

¹² Sí. El artículo 105 CE prevé que la ley regulará la audiencia de los ciudadanos, directamente o a través de las organizaciones y asociaciones reconocidas por la ley, en el procedimiento de elaboración de las disposiciones administrativas que les afecten. Así como el procedimiento a través del cual deben producirse los actos administrativos, garantizando, cuando proceda, la audiencia del interesado.

Así, la Ley 39/2015, de procedimiento administrativo y básico para todas las administraciones españolas, y la Ley 40/2015, de régimen jurídico del sector público y específicamente de la Administración del Estado, ambas de 1 de octubre, disponen que las administraciones públicas deben presentar todos los proyectos que tengan la intención de aprobar a un proceso de información pública. En una primera fase, los proyectos se publicarán en sus sitios web. Y, en una segunda etapa, los proyectos serán sometidos a un proceso de audiencia por los sujetos potencialmente afectados por la norma a ser aprobada. En aras de una mayor seguridad jurídica, y la predictibilidad del ordenamiento, se apuesta por mejorar la planificación normativa ex ante. Para ello, todas las Administraciones divulgarán un Plan Anual Normativo en el que se recogerán todas las propuestas con rango de ley o de reglamento que vayan a ser elevadas para su aprobación el año siguiente.

Este reglamento sigue las recomendaciones formuladas a este respecto por la Organización de Cooperación y Desarrollo Económicos (OCDE) en su informe publicado en 2014

No, as it's explained at the attached note.

If not:

h) Do you think such feedback mechanisms for the courts would be desirable, and in what form?

*It would be desirable. Through annual reports that reflect the experience derived from the new rules, which came into force in the last year.*¹³

i) What is the basis (for example, constitutional, statutory or unwritten law) for the existing mechanisms?

Article 117 of the Constitution, as it's explained at the attached note.

10. Are there objections or risks attached to the formal consultation of courts at the stage after legislation has been drafted? If so, what are they? How can they be resolved?

*It's not possible according to the Constitution of 1978. It could only be articulated through the mentioned annual reports. Once more, special reference can be made to the annual report of the Public Prosecutor's Office, which highlights the shortcomings, needs and possible improvements, as well as the President of the Supreme Court where it is possible to make proposals for improvement.*¹⁴

11. Are there objections or risks attached to drawing the attention of the legislator, unsolicited, to shortcomings in the quality of legislation, including its soundness and implementability, for example by means of an annual report or publication? If so, what are they? How can they be resolved?

According with answer number 10.

B) Feedback from advisory bodies

12. Are there any formal or informal feedback mechanisms in your Member State for the advisory bodies to provide solicited or

¹³ Resultaría deseable. A través de informes anuales que reflejen la experiencia derivada de las nuevas normas, que hayan entrado en vigor en el último año.

¹⁴ No es posible de acuerdo con la Constitución de 1978. Únicamente se podría articular a través de los mencionados informes anuales. Nuevamente se puede hacer especial referencia a la memoria anual del Ministerio Fiscal donde se pone de manifiesto las carencias, necesidades y posibles mejoras, así como del Presidente del Tribunal Supremo donde cabe la posibilidad de realizar propuestas de mejora.

unsolicited input or advice after legislation has been drafted and some experience has been gained with implementation and enforcement?

No.

13. Are there objections or risks attached to formal feedback from advisory bodies at the stage after legislation has been drafted? If so, what are they? How can they be resolved?

*There are no risks if it's limited to technical aspects. The only risk is that a critique of political work will be achieved.*¹⁵

14. Are there objections or risks attached to advisory bodies giving unsolicited advice on the quality of legislation, including its soundness and implementability, for example by means of an annual report or publication? If so, what are they? How can they be resolved?

No, as it was explained above.

C) General

15. Are there any general or specific input mechanisms in your Member State (except for those for the courts and advisory bodies) at the stage after legislation has been drafted, for example public consultation via the internet or otherwise?

*Act 39/2015 strengthens the ex-post evaluation, since together with the duty to continuously review the adaptation of the rules to the principles of good regulation, it is mandatory to periodically evaluate the application of the rules in force, in order to check whether have fulfilled the objectives pursued and whether the costs and burdens derived from them were justified and adequately valued.*¹⁶

16. Have you any additional or other remarks about feedback mechanisms after legislation has been drafted?

16.

¹⁵ No existen riesgos si se limita a aspectos técnicos. El único riesgo es que llegara a realizar una crítica a la labor política.

¹⁶ La Ley 39/2015 fortalece la evaluación ex post, puesto que junto con el deber de revisar de forma continua la adaptación de la normativa a los principios de buena regulación, se impone la obligación de evaluar periódicamente la aplicación de las normas en vigor, con el objeto de comprobar si han cumplido los objetivos perseguidos y si el coste y cargas derivados de ellas estaba justificado y adecuadamente valorado.