THE DECREE-LAW[1]

Luis Martín Rebollo
Tenured Professor of Administrative Law

1. The Spanish Constitution allows the Government to pass decree-laws, that is, norms equivalent to a law, in emergency situations, with the exclusion of certain matters and upon subsequent ratification by the Parliament (the Parliament then turns the decree-law into a draft law that will be debated and, if necessary, amended). Decree-laws, their content and their precondition –the urgent need– shall only be reviewed by the Constitutional Court.

This extraordinary source of law has been extensively used (and sometimes abused) by the different Governments in the last 37 years. The Constitutional Court has generally been tolerant with them and decree-laws have rarely turned into laws. For all these reasons, some amendments should be proposed.

2. Between 1979 and 2015, 518 decree-laws were adopted by the Government, in only around ten cases the precondition was questioned by the Constitutional Court and not even 20% of the decree-laws became laws.

What was foreseen as an exceptional mechanism for extraordinary situations has now acquired a semblance of normalcy as proven by the fact that around 25 percent of the laws and norms equivalent to them are decree-laws. These conclusive figures are too high for a system that should guarantee the primacy of the Parliament and no further comments are needed: 518 decree-laws from January 1979 to December 2015 means an average of 14 decree-laws per year and 52 per legislative period, while 85 decree-laws were passed in the 6th legislative period (1996-2000) and 76 in the 10th legislative period (2011-2015). The proportion of decree-laws to the total number of laws and norms equivalent to them oscillated between 14 percent in the period 1986-1989 and 36 percent in the period ended in 2015.

After ratification by the Parliament, the rule should be to debate and amend the draft law. However, only 91 of the 518 decree-laws (18 percent) have finally become law.

As far as the control of decree-laws is concerned, the case law has been exemplary. The Constitutional Court recognizes the need for balance, confirms that the requirement of urgency is not an empty clause that gives leeway to the Government and requires “some proof of exceptionality, seriousness, relevance and unpredictability that determines the need for

[1] To obtain a more detailed analysis of the data and constitutional jurisprudence, see my work “Uso y abuso del Decreto-Ley (un análisis empírico)” (Use and abuse of the decree-law, an empirical analysis), *Revista Española de Derecho Administrativo,* 174, 2015, págs. 23-92.

immediate legal action and a decision in a shorter period of time than that set forth for parliamentary procedures". These forceful statements are nevertheless not always translated into a demanding control given that the precondition is usually flexibly construed. So far, 67 decree-laws have been the object of an appeal or an exception of unconstitutionality. 25 decree-laws have been partially rejected by the Court, from which in only 12 cases the Court has detected infringement of the limits of decree-laws: in 3 occasions due to regulation of forbidden matters and only in 9 due to the inexistence of the precondition: the extraordinary and urgent need.

3. In view of all this it can be concluded that there exists a high amount of decree-laws regulating a wide array of matters, many of which presenting perpetuity ambitions rather than a temporary nature. The precondition has been construed following too loose criteria and the number of decree-laws turned into laws is low. Relatively few appeals have been lodged, of which few have been upheld (and partially) and only around ten judgments confirm the lack of a precondition, which proves the deference shown by the Constitutional Court to the Government.

The aforementioned leads us to a last conclusion. The regulation and practical use of decree-laws are not satisfactory. Reforms should revolve around: a) narrowing the interpretation of the precondition, b) proving that the emergency of the legal procedure does not tackle what it should, c) excluding permanent regulations that are alien to the immediate circumstance motivating the decree-law, and d) imposing that all ratified decree-laws turn into draft laws (except for few occasions). All in all, the idea that gave birth to this constitutional tool (as an exception to the principle that the Parliament is where the legislative power lies) should be recovered.