ADAPTING SPANISH WATER LAW AND INSTITUTIONS TO MEET THE WATER CHALLENGES OF THE 21ST CENTURY

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I) GENERAL INTRODUCTION.

The organisers of this prestigious seminar have placed my talk in a part of the programme titled "Institutions for good water governance". I should begin by saying that although it has enjoyed wide acceptance, the concept of governance is an essentially broad and ambiguous one. It has not been used widely in the Spanish context, much less in water law, at least in works of a certain significance or quality.

This does not mean that there have not been a good many works devoted to governance from a material viewpoint. Every book or article on, for example, institutional issues, deals with it. And it should be acknowledged that of these, there are many admirable examples in the Spanish context, for the simple reason that at this institutional level Spain boasts some long-established institutions, clearly ahead of their time in what are today seen as objectives to be met in any policy that is undertaken in the area of water. One only has to think of the *Confederaciones Hidrográficas*, or River Boards, pioneers in basin-centred water administration although certainly not as far back as 1926 as some people somewhat frivolously claim. That was the year the River Boards began to plan and manage hydro works at a basin level, but they did not administer the water in such a territorial boundary until thirty years later.

However, what is true is that the presence of the water users in these bodies goes back to 1926, and they had a say firstly in the planning of the works and later, albeit in a more discreet manner, in how they were managed. Because the concept of hydrological planning – albeit linked initially to hydro works only – also originated in Spain, firstly at the level of basin planning and linked to works in 1926, and 1933 saw the birth of the concept of the National Hydrological Plan, under the Minister of Public Works, Indalecio Prieto, drafted by the engineer, Manuel Lorenzo Pardo.

And while we are talking about institutions linked to governance, let us not forget that the situation whereby users share in the costs of hydro works had its origins in Spanish law – leaving aside certain aspects that under current law are not so relevant – in the Hydraulic Works Act, going right back to 1911. This Act was a response to the 19th-century system of concession of public works – a system that has been revived today, incidentally – and envisaged various systems of carrying out hydro works, one of which – implementation

by the State with users paying part of the costs, which by the 1960s had turned into a levy – was the one that was finally adopted; and today there is a proposal for the total recovery of the costs of services associated with water, which the Community water framework Directive marked down for 2000, with certain exceptions, it must be said.

Similarly, we should remember Irrigation Communities, whose origins go back a long way; in fact, each new research discovery places these origins further and further back; in Aragon alone, what has come to be called the Bronze of Agon, which includes what we might today call Irrigation Community "Regulations", dates from well before the Christian era. The Irrigation Communities practise "self-administration", as it were, of water by its users, with their own "jurisdiction" for resolving conflicts (water "Juries") which is still remarkable even today and above all, still provides good service.

The idea of the emergence of a "water Act" – a concept that is still unknown in some countries – has long been part of Spanish life and there is no doubt that any content or concept of "governance" should necessarily be based on the prior existence of a Law. There is no governance without a Law and, of course, a Law devoted specifically to the object in question, which is both modern and suitable for the respective requirements of the times. 1866 saw the first Spanish Water Act to regulate jointly continental and maritime waters, which incidentally foresaw, by a century and a half, the tenor of the 2000 water framework Directive in this respect. And then the 1879 Spanish Water Act, this time relating to continental waters only, which was in force for over a century, until 1st January 1986, had a clear influence on the legislations of a good many South American countries, and even today one can spot concepts and systems that were found in the 19th-century Spanish act.

As I say, governance is a broad and ambiguous concept that allows for virtually any type of content. Today, incidentally, a necessary part of any study to do with governance would be the current situation regarding Spanish statutory reform, in which there has been, still is and will probably continue to be, debate over the appropriate role for the Autonomous Communities in water management and differences with the powers to act that the State might have. Currently the traditional value of the hydro basin as an administrative area –which is what is reflected in Spanish legislation – is being weighed up with the position that should be granted to the Autonomous Communities – here I am talking about the participation of the Autonomous Communities in the State-managed basins, as Autonomous Communities may also manage basins when they are wholly within their territory – deriving from the obvious importance of their "sectorial" powers to act such as agriculture, industry, the environment, tourism, natural protected areas, territorial and city planning, and so on. It is a debate that focuses on the "natural" geographical division aspect and somehow seems to be at odds with the political division aspect in principle and in the entirely artificial reality from the hydrographic viewpoint.

At any event, to conclude this introduction, it is worth pointing out that Spain is an economically developed country, with enviable GDP and income distribution figures – enviable when compared with almost any country in the world – and she currently finds herself in a prolonged upward-moving economic cycle which started in 1994, the trend being sustained in recent years, with growth rates that are far superior to those of other

European countries (particularly Germany and France whose economic development seems to have been fairly inert for several years).

Spain is also a country that might be said to be "mature", hydrologically speaking, with a large number of hydraulic infrastructures: specifically, there are close to 1,500 dams, some of which have been in operation since the Roman occupation of Spain (such as the Proserpina dam near Mérida). Such a large number of dams caters for the regulation of nearly 40% of Spain's total hydro resources, far more than the 9% of natural regulation that might be obtained without hydro infrastructures. This meagre 9% would have led to devastating effects with regard to demand; however, with so many infrastructures, water supply has been assured, except for temporally and territorially limited episodes – no less harmful for that – and now under study is the question of supplying water to certain regions of the Mediterranean area, a problem that has given rise to bitter controversy over the last few years, and it is still going on. For example, Act 10/2001 of 5th July concerning the National Hydrological Plan, which represented an attempt to supply water to Mediterranean basins with a transfer from the Ebro basin amounting to 1,050 cubic hectometres, was challenged by the promise of the incoming Prime Minister, during his investiture address, to repeal this transfer and implement a new water policy based strictly on basin-centred management and the search for new resources through desalination and the recycling of waste water.

Indeed, an Executive Order in 2004 repealed the clauses referring to the Ebro transfer in Act 10/2001 of 5th July, and a Programme called AGUA was implemented, based essentially on the re-use of waste water and desalination, with a commitment to supply the Mediterranean basins with the same quantity of water as promised in the National Hydrological Plan.

At any event, it should be borne in mind that in Spain there are over three million hectares of irrigation land and this determines specific permanent water needs to keep them operating. Around 80% of hydro resources used in Spain are given over to agriculture, leading to a clear conclusion: agriculture is the sphere in which the problems as well as the solutions to water conflicts that Spain undergoes are to be found. The modernisation of irrigation resources, under the terms of the National Irrigation Plan (2002), is one of the obvious options in the attempt to reduce consumption and obtain a more rational and efficient management of water resources.

II) THE CURRENT LEGAL FRAMEWORK.

In the first part of this paper, I referred to the value for governance of a Water Law appropriate for the needs of the time and I demonstrated the antiquity in Spain of a Water Law (1866, 1879). In this section, starting with a comment on the content of the 1978 Constitution, I shall be describing the evolution of post-constitutional water regulations with a view to talking about the arrival and characteristics of certain institutions of significant relevance to Spain's water law.

1. PRINCIPALS OF THE SPANISH CONSTITUTION FROM A WATER STANDPOINT.

The 1978 Constitution has three features that are basic and decisive for a clear understanding of modern water law:

a) It is a Constitution that assigns a very important role to the environment. Article 45 of the SC refers to the right to an appropriate environment and deals with the rational use of natural resources. It contemplates administrative and even criminal sanctions for the most serious offences against the environment. It is a Constitution that was fully committed to various movements and events that were occurring at the time: The Stockholm Conference (1972), the birth of the United Nations Environment Programme (UNEP, 1975) and the Mar del Plata Conference on water (1977).

b) The Constitution also attributes great significance to public property (art. 132 SC). For example, it places within the public maritime-territorial domain certain assets and contemplates the disaffectation of others that by Law include the general features of public ownership (exemption from prescription and seizure, and inalienability).

c) The Constitution has a decentralised territorial structure of government by the State through the proposal to set up Autonomous Communities. This allows for the existence of Autonomous Communities' powers to act with regard to water, albeit with formulae that are somewhat obscure and essentially open to interpretation (art. 149.1.22 SC). For example, the State would manage the water resources that ran through more than one Autonomous Community, while the Autonomous Communities would administer the resources that ran through their territory, which leads one to wonder whether the Constitution was talking about isolated rivers or hydro basins, an issue that was not resolved by the Statutes of Autonomy that were passed later (1979-1983) but which had to wait until Act 29/1985 of 2nd August, concerning Water Resources.

2. FEATURES OF ACT 29/1985, OF 2ND AUGUST, CONCERNING WATER RESOURCES.

These constitutional bases gave rise a few years later to Act 29/1985 of 2nd August, concerning water resources, for which:

a) Problems of water quality were formally put on a par with those of quality. Changes introduced to the text in this respect include: regulation of tipping with an added tax element, the tipping levy, evaluation of hydro works, precepts on the rational use of water that were mirrored in the concession system, and so on.

b) All water resources were declared to be in the public domain as a logical consequence of the principle of the hydrological cycle on which the Act was based (art. 1), particularly with regard to groundwaters (art. 2); however, the Act envisages a situation in

which owners may exercise an option to go over to the public scheme or stay in the system pertaining up till then (temporary provisions 2 and 3), which was to lead in some areas to a faulty application and gave rise to conflict in this sphere (the Upper Guadiana, certain areas in the South of Spain) which still exists today and is undoubtedly the cause of problems besetting the governance of water resources. I shall come back to this later.

c) It is an Act that settled the distribution of powers to act options proposed by the Constitution (art. 149.1.22 SC) based on the criterion of the hydro basin, which it expressly defined. Thus the State would administer the hydro basins that took in the territory of more than one Autonomous Community and the Autonomous Communities those that were contained exclusively in their particular territory.

d) In addition, Act 29/1985 situated hydro planning as the key to all water management. It states that all operations on the hydro public domain were to be submitted to hydro planning (art. 1.3), under the auspices of the Basin Hydrological Plans and the National Hydrological Plan. With regard to the material content, it is quite clear that hydro planning regulated by this Act does not just comprise an account of the works to be carried out, as was the case in traditional hydro planning, but that this is above all a regulation designed to adopt decisions on water management, implying a certain territorialisation of water law based on the key role of the Basin plans. For its part, the National Hydrological Plan, which has to be passed by the Cortes Generales, is devoted essentially to regulating transfers between geographical regions with distinct Basin Hydro Plans.

e) The River Boards (*Confederaciones Hidrográficas*) were regulated as Basin Bodies in State management boards, establishing them as Autonomous Bodies with their own legal status and with extensive autonomy. The Autonomous Communities can request their incorporation into the State Basin Bodies, which means that they become involved in certain sections (the Basin's Board and Water Council) depending on the significance of the territory and population within each basin. Accordingly, an administrative organisation was set up that was more than remarkable, in that while it was a part of the General State Administration, it was also strongly influenced by the autonomous territory perspective.

f) The Act gives a major role to users in certain sections of Basin Bodies by guaranteeing that at least 1/3 of their members have seats on the Basin's Board and Water Council. This is a very high level of participation, as they are not incorporated into merely advisory areas; the Boards, as their name indicates, adopt decisions for the management of the Basin. Similarly, the Water Council is the planning body, whose fundamental power is to pass the Basin Hydrological Plan and submit it to the Cabinet for final approval.

g) The Act regulated an economic-financial framework with certain tax schemes, linked only to the implementation of hydro works, as under Spanish law, water is a free resource. Through the regulation levy, users share in the cost of regulation works (reservoirs); and through water levies, they contribute to the cost of various works (canals) and their exploitation. This in theory could lead to a complete recovery of costs, but in practice the State takes on various amounts by way of a subsidy (for example, the proportion corresponding to flood control reservoirs).

h) Finally, the Act regulated the National Water Council, an advisory body with extensive participation (Administrations, users, experts, employers' and trade union organisations) which is obliged to intervene by issuing its opinion in proposed legislation connected with water as well as in hydrological planning mechanisms.

This was to be the essential part of an Act that, in general, has been well received by various analysts although the application of some of its institutions was problematic. The Act saw its almost full constitutional ratification through Constitutional Tribunal Judgement 227/1988 of 29th November, a signature document in Spanish water law and even public law.

It is an Act that, obviously, has seen regulatory developments and various modifications. In the next section, I shall be referring to the most essential of these, which will give me the opportunity to mention the arrival of various institutions to Spanish law.

3. THE IMPLEMENTATION AND MODIFICATION OF ACT 29/1985 OF 2ND AUGUST, CONCERNING WATER RESOURCES.

The implementation of the 1985 Water Act began with the passing of two essential Regulations: the Public Hydrological Domain (1986) and the Hydro Planning and Public Water Administration (1988) regulations. The latter enables the technical preparations for hydro planning to be set in motion.

A) Hydro planning.

An important aspect here was the presentation of a Draft National Hydrological Plan (1992-1993), which envisaged an interconnection between all the hydro basins in the peninsula with the planning of water transfers in various directions. There was to be extensive political and social debate about this which led to the Government of the time withdrawing the Draft Plan.

The intercommunity basin hydrological Plans (those which affected various Autonomous Communities and referring to State-managed basins) were to follow their course and were finally passed by Central Government by Executive Order in 1998.

A new National Hydrological Plan was presented in September 2000, and after heated debate, was transformed into Act 10/2001 of 5th July, concerning the National Hydrological Plan. I previously mentioned in section I) how the main decision of this Plan – the transfer of water from the Ebro to the Mediterranean basins – was repealed in 2004.

B) Citizens and users. The right to information.

Users make up a not inconsiderable percentage of bodies that are not only advisory but also with powers of decision in the sphere of Basin Organisations. 1994 saw the arrival of "citizens" through their representatives to the National Water Council and the basin Water Councils, with a smaller representation than what tends to be the norm today. 1994 also saw the setting up of the Council of the Environment, as an advisory body to the Ministry that from 1996 onwards was called the Ministry of the Environment. It is made up of representatives of environmental NGOs and consumer, union and employer organisations. This body was given legal status in 2006.

This means that users and citizens are present in bodies who have the power to examine and approve Hydrological Planning, which from the perspective of all the conditions required, on the theoretical level of governance, with regard to social participation in the construction of public water policies are complied with in Spanish law.

The right to information in matters of the environment was regulated generally in 1995 and since 1999 (Act 46/1999 of 13th December) there has been a specific provision for this in the Water Resources Act. The exercise of this right to information was legally ratified in 2006 through a regulation that was a legacy of the Aarhus Convention. In practice, the right to information is becoming more and more widespread, and essential tools for this are the new technologies (web pages). Each region's Water Council has been given the responsibility for these tasks.

C) The "water market"; an extensive theoretical debate and limited practical measures.

There have been frequent discussions during the period we are talking about, first by economists and later experts in other areas, and even environmentalists, who have all emphasised the need to introduce economic mechanisms to ensure better water management. In the 1990s, this endeavour and pressure was stepped up considerably, with contributions from water markets in the United States, Chile and Australia, whose praises were sung by their proponents. For example, it was claimed that with a water market, there was no need for a large number of hydro works, as the invisible hand of the market would steer water to the activities that were most significant, financially speaking. Finally, with the passing of Act 46/1999 of 13th December, these ideas became positive law with the regulation of a water market based on a transfer of water usage rights contract entered into by users with minor administrative control, and also based on what are known as the Water Usage Rights Exchange Centres, administrative mechanisms that originated in California for the 1991 drought.

These market mechanisms have been used very infrequently. Very few water transactions have been carried out in accordance with the legal provisions, but much more importantly, one suspects that there have been many more that have occurred outside the law. In the recent drought that began in 2004, contracts were entered into by users from different basins (the Tagus and the Segura) to meet the needs of the Segura, requiring the legal authorisation provided by Executive Act 15/2005 of 16th December, in force until 30th

November 2006, and extended to 30th November 207 by Executive Act 9/2006 of 15th September. These are typically emergency measures to respond to situations that are theoretically exceptional but which are occurring more and more frequently here, and one suspects that the direction climate change is taking will lead to further imbalance of water resources. At any event, even though there have been few transactions, it is true to say that they have served to alleviate tense situations arising from water shortages caused by the drought.

D) The pre-eminence of Community law.

Finally, mention should be made of the increasing pre-eminence of Community law in Spanish water policy. Much of Act 29/1985 of 2nd August concerning Water Resources was designed with the Community acquis in mind, and it is no coincidence that the Act came into force at the same time as Spain's entry into the European Community (1st January 1986). But this influence is growing as Community regulations extend their scope. The culmination of this evolution was reached with the so-called "framework" water Directive (Directive 2000/60/EC of the European Parliament and Council of 23rd October 2000, which establishes a Community framework for action in the sphere of water policy), a text that will standardise the water regulations and policies of the 27 member States that the Community will have as from 1st January 2007. The aim of this text is to ensure that water resources are in a healthy state by 2015 through the use of various techniques or mechanisms, such as basin hydrological planning, basin-centred water management and the principle of cost recovery for services provided by water. As is plain to see, none of this is unfamiliar to Spanish law.

The Directive was incorporated into Spanish legislation through the reform to the Revised Text of the Water Resources Act effected in late 2003.

III) CURRENT PROBLEMS.

And so, having described the legal framework in such as way as to explain some of its applications, I would like to conclude by specifying where the main problems lie in the governance of water resources in Spain.

A) The ownership of water.

Water is under public ownership in Spanish law, although there are a few instances of private ownership under the option offered to the former owners – an option granted by the 1985 Act – to continue with their ongoing situation. This controversy over ownership was of great interest in the past, but today the distinction between public property/ private

property needs to be seen in its proper context based on the elementary observation that water is a natural resource and that the Community framework Directive makes no distinction between types of ownership for the purposes of envisaging common mechanisms for the control and preservation of the resource and its quality; this absence of distinction has repercussions on Spanish law when the Directive is incorporated.

At any event, it has to be acknowledged that the growing pressure for the need for desalination has led to certain vagueness in the law with regard to the ownership of desalinated water (different options in 1999 and 2005) which today, from the perspective of the desalination operation, is clearly veering towards being considered as an asset in the public domain

Spain has proposed the construction of a set of norms to foster desalination among private owners, which might be more effectively achieved through a system of administrative authorisation than through the current option of a concession system for the carrying out of such an activity (a concession which later requires a new concession procedure in order to acquire the right to use the desalinated water).

B) Shortcomings in the management of groundwaters. The Upper Guadiana.

It is in the area of groundwaters where there are still instances, under the previously-mentioned option, of private ownership, and in some zones of the country this is the predominant type of ownership. The administrative intervention procedures over groundwaters under the terms of the 1985 Act have yet to evolve into effective administrative policing and in some places there is even a certain anarchy, with mass extractions with no administrative control, leading to declarations of overexploitation of aquifers and massive environmental damage. This is the case with the Upper Guadiana, for which the law even envisages the approval a Special Plan, something which has yet to come to fruition.

C) The revision of basin hydrological Planning.

At present, the basin hydrological planning revision process is just about to begin, whose purpose is to meet the deadlines laid down by the Community framework Directive, and which is supposed to be completed by 31st December 2009. The process cannot be said to have formally begun until the hydrographic boundaries are decided, a concept that is somewhat broader than basin boundaries (as hydrographic boundaries include coastal and cross-border waters), also a requirement laid down by the Community framework Directive. The process looks set to be a long one – as was the case with the early basin plans passed in 1998 – and will probably be even longer because of the strict requirements with regard to public participation, which will inevitably prolong the process.

D) Problems of effectiveness in certain bodies and possible changes in their structure.

The broad participation which has long been a feature of Spanish water law has brought about the emergence of operating problems in certain bodies and steps are now being taken to remedy them. One example is the National Water Council or the Basin Water Councils (or Demarcation Water Councils as they are referred to now). The presence in one body of representatives from public administrations and society, and the application by these bodies of the principles of collegiate bodies (each member having one vote and decisions adopted by a majority vote) can lead to the implausible situation in which the vote of the representative from the Autonomous Community of Andalusia (eight million inhabitants) has the same weight as that of an expert in water matters. The same could be said, at the basin level, of the presence in basin (or demarcation) Water Councils of political representatives or simple citizens' associations.

Under debate at the moment is the proposal to remove representatives of Central and Autonomous Community Administrations from the National Water Council, and instead incorporate them into a typical mechanism of cooperation among Autonomous Communities: a Sectorial Conference. Similarly, the basin (demarcation) Water Councils would be made up exclusively of representatives from social organisations (users, unions, employers, consumers, ecologists and so on). The result would be that these bodies would have a purely advisory capacity which would have a direct effect on the demarcation Water Body, as the National Water Council was originally merely an advisory body.

E) The permanent tension between the State and the Autonomous Communities.

Based on some essentially vague Constitutional provisions (art. 149.1.22 SC), the 1985 Water Resources Act introduced the criterion of the hydro basin to determine the distribution of powers to act. Today this criterion is under debate with one Statute of Autonomy (that of Andalusia) opting for a project that would mean that the Guadalquivir basin would be "partially" handed over to the Autonomous Community of Andalusia because the water it contains has no bearing on any other Autonomous Community. In spite of the fact that over 90% of the Guadalquivir basin is in Andalusia, as well as the most important hydro resources and the population, it seems rash to claim that no other Autonomous Community is affected, as this would mean that the powers to act would be exclusively in Andalusia's hands, as featured in the Draft Statute; this is something that might well exceed the Autonomous Community's prerogative, at least in the light of the criteria used in Constitutional Tribunal Judgement 227/1988 of 29th December. Even so, the Tribunal was careful to say that the solution that it considered to be most in keeping with the Constitution (referring to the hydro basin) was not necessarily the only one possible. Is the proposal in the draft Statute of Autonomy of Andalusia another constitutionally possible solution? This issue warrants much closer examination than we have time for here.

F) The right to water.

The structure of the right to water in certain mechanisms of the United Nations, and discussions about its content and applicability at an international level (I draw your attention to the 4th World Water Forum held in Mexico, where the content of the right to water was certainly one of the serious problems under discussion) brings up a theme that is clearly topical but whose aspects for a developed country such as Spain are very different to those for countries in the early stages of development. As well as the interesting legal problems posed by this right (regarding holders, content, providers of the right), here we shall limit ourselves to pointing out that in a country like Spain, this right is of necessity linked to urban water services, usually supplied by city or town councils. In this respect, it would be advisable for the Water Resources Act to include the provision of this right, with specific references to the minimum quantity of water that city and town councils should supply to each person, and to criteria regarding a favourable price for certain social levels (the concept of "affordable price" as in other public services in the general interest), regardless of whether the effective structure of such a right was in keeping with municipal regulations and by-laws. The Ministry of the Environment has proposed modifications in this respect, which are currently under debate.

G) Cost recovery.

The principle of cost recovery proposed by article 9 of Community Directive 2000/60/EC has been transposed into Spanish law although it will only be directly in operation in 2010. Until then, it needs to be closely examined to enable it to be effectively implemented by that date.

The regulation envisages a distinction between supply, irrigation and other (industrial) services, with certain exceptions to the application of the pure principle of cost recovery (because of territorial planning or social problems, to put it briefly) which will be hard to define in specific cases. Under any circumstances, any exception to the principle will need to be fully justified and reasoned, as the principle of cost recovery is rightly structured as an essential tool to stop abusive and wasteful use of the resource, characteristics which unfortunately often go with certain uses in terms of water fees that can, in some cases, seem ridiculous. As this is a Community regulation, it is obvious that the European Community authorities will be making sure that it is fully complied with. Sanctioning breaches is always an option for the European Commission, and there is no reason to believe that this resource will not be used.

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