

# RELATIONS BETWEEN “REGULATION” AND “LAW” IN TAX MATTER

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## TITLE I.- GENERAL THEORY OF PUBLIC RIGHT

### 1.- The origin of the statutory authority of the Government in the Right Compared.

A Constitutional data is today, that the statutory authority is in the Government of the Nation. This is not but the denouement of a longevously and complex historical evolution, whose common denominator in the time, common, likewise, in the distinct spaces, has been a fight fratricide between two stamens social by the agglutination of the normative power. “De facto”, the conflict between the Assembly of remarkable and the King to exert the authority to dictate general norms, brings cause of the Low Half Age<sup>1</sup>, but, the statutory authority of the planned Administration in the juridical legislations of our days finds his origin in the confrontation produced between two main institutions: the Parliament and the Crown, during the 16th century in England and won the 18th century in France<sup>2</sup>.

After the medioevo appears a new historical stage that will visit from the Renaissance until the 18th century. Element definitorio of this, designated “Modern Age”, went the concentration of the political power in the institution of the Monarchy, fruit of the empty of power to that had driven the fight of powers between the distinct estamentos of the feudal order, trigger of a

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<sup>1</sup> This phenomenon has special importance in matter impositiva, as “it is common place in the doctrine base the content originario of the principle of legality tributaria in the mediaeval practice of the consent of the taxes by the súbditos”. GONZÁLEZ GARCÍA, And., “The principle of legality tributaria in the Spanish Constitution of 1978”, in *The Spanish Constitution and the Sources of the Right*, I.And.F., 1979, Vol. II, pág. 991. In effect, with the incorporation of the representatives of the cities in the Regal Curia from the 13th century (until this moment composed by noble and clergymen) and his assent for the approval of the tributes, the sovereignty of the Monarch sees limited when being shared with the Courts and the King. It affirms SAINZ OF BUJANDA, F., in his documented and exhaustive study, how “all the historians coincide in affirming that the entrance of the flat State in the Curia transformed the nature of this assembly, giving origin to a new institution –the Courts-, attendant fundamentally of the otorgamiento of the service”. *Inland revenue and Right*, Vol. I, Institute of Political Studies, Madrid, 1975, pág. 231. On the types of provision of public character in our high mediaeval Inland revenue, see this author, págs. 216 et seq. Vineyard. Also: - W. ULLMAN, *Principles of Government and Political in the Half Age*, Madrid, 1971, págs. 155 et seq.; - PÉREZ ROYO, F., “The principle of legality tributario in the Constitution.,in *Studies on the project of Constitution*, Centre of Constitutional studies, Madrid, 1978, págs. 395 et seq. In dates more recent resume FALCÓN And TELLA, R., “as the limitations when can (that in this consists essentially the State of Right), when of the can tributario treats , start already of the Low Half Age”. “A fundamental principle of the Right Tributario: the reservation of law”, REDF, number 104, 1999, pág. 707.

<sup>2</sup> Phenomenon that will repeat during the 19th century in other countries of Europe like Germany, Spain, Austria, Prusia, ... . An analysis detailed and exhaustive regarding this matter can see in SANTAMARÍA PASTOR, *Foundations of Administrative Right*, Ed. Centre of studies Ramón Areces, Madrid, 1988, págs. 690 et seq

political crisis of the church, the empire and the feudal nobility<sup>3</sup>. Two facts would contribute to a large extent to reinforce the hegemonic position of the Monarch in front of the rest of orders that until then incidían very actively in the political life, social and economic. Of a side, cimienta the figure of the vassalage -every time exists a more accused number of noble that put to the service of the king- and, of another, increases the number of marriages between monarchs. Of all this would surface a –National State- whose political power exerts it the Monarch with a prominent position on the rest of mediaeval powers to such an extent that it identifies him with a UNITARY power and “that by his qualities –independence, indivisibility, incondicionalidad... - It called *sovereign*”<sup>4</sup>.

Nonetheless, whereas the greater part of the countries of Europe consolidate, in elder or lower degree, a model of authoritarian state under the empire of the absolute Monarchy<sup>5</sup>, **England** lived the first conatos of rebellion by part of the Parliament against different dynasties (Tudor, Estuardo), that would repeat in the time and that would drive to the signature of the Letter of Rights (*Bill of Rights*) of 1689 after the “glorious Revolution”<sup>6</sup>.

“1.- That the Pretend power of suspending laws, and execution of Laws, by royal authority- without consent of Parliament, is illegal.

2º That the pretend power of dispensing with Laws by royal authority, ace it have been assumed and exercised of late, is illegal”.

(...)

BILL OF RIGHTS

<sup>3</sup> RODRIGUEZ BEREIJO, To.: “The political crisis of the Church, the Empire and the feudal nobility, like archaic rests of a world in transformation, produces a big empty to be able to that they will treat to fill the nacientes National Monarchies”, *Introduction to the study of the Financial Right*, I.And.F., Madrid, 1976, pág. 209.

<sup>4</sup> SAINZ OF BUJANDA, *Inland revenue and Right*, vol I, ob., cit., pág. 313. CAZORLA PRIETO, L. M<sup>a</sup>, “Considerations on the power tributario: his structure in the General Law of 28 December 1963”, in *Studies of Right Tributario*, Vol. I, IEF, Madrid, 1979.

<sup>5</sup> Vineyard. BERLIRI, “Appunti sul fondamento and il contenuto dell'art. 23 della Costituzione”, in *Studi in onore gave Achille Donato Giannini*, Milano, To. Giffrè editore. 1961, the one who devotes the section second of the study to *the Evoluzione storica of the principle dell'car-imposizione in regime monarchico*, or also BARTOLHINI, S. *Il Principe gave legalità dei tributi in matter gave imposte*, Pavoda, Cedam, 1957.

<sup>6</sup> “The attempts of supplantation of the legislative power of the Parliament are multiple in this period, so much under the Tudor as under the Estuardo, -says SANTAMARÍA PASTOR-. In some cases, the monarchs acted obtaining very wide delegations to legislate of the own Parliament ...; in others, dictating norms invoking reasons of public order or the martial law ...; in others, establishing right of customs; in others, finally, suspending the execution of the laws or dispensing individually of his observance by means of the invocation of his power of prerogative ....; But if it is true that the Parliament did not leave to happen occasion to manifest his disconformidad, total or partial, with such normative practices, always considered like abnormal. A posture that finished fructificando, after the *Glorious Revolution*, with *Bill of Rights* of 1689...”. *Foundations of Administrative Right*, Ed. Centre of studies Ramón Areces, Madrid, 1988, págs. 694 et seq.

With the uprising, England achieves -as- an attainment of antaño claimed by the estamentos distinct to the Crown: do effective the principle of separation of powers<sup>7</sup>. The Law suplanta to the Monarch. The parliament erige in the decisive and conclusive power to effects of the establishment of the laws and of the tributes<sup>8</sup>, what will end in a model in which, so that the Monarch can dictate regulations needs delegation expresses -“delegated legislation”-<sup>9</sup>, that by general rule will not be able to contradict, suspend or derogate Law any -under penalty of illegality- when treating of a “subordinate legislation”<sup>10</sup>.

A century later that that glorious English revolution took place, becomes in *France* a revolutionary movement (championed by the bourgeoisie) so spectacular as spread: “The French Revolution”. The intellectuals tratadistas of the then: LOCKE, MONTESQUIEU, ROUSSEAU, would illustrate the dogmas of a new state model inspired by the division of powers (Locke and Montesquieu)<sup>11</sup> and in the popular sovereignty (Rousseau<sup>12</sup>), both in conflict with the concentration of powers in hands of the prince and hardly conciliables with the attribution of the normative authority general to the Executive<sup>13</sup>, as; of a side, in a pure

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<sup>7</sup> On the deslinde of fiscal attributions between the king and the legislative Camaras observed in England during the Modern Age, vineyard. SAINZ OF BUJANDA, F., *Inland revenue and Right*, Vol. I, ob., cit., págs. 264 et seq.

<sup>8</sup> “No taxation without representation”. Maximum that uses Phillips like title of his work (today a classical), published in *British Tax Review*, 1962, págs. 153 et seq.

<sup>9</sup> R. NÚÑEZ-VILLAVEIRAN And OVILO, distinguishes between the Anglo-Saxon models and French or continental. In the first, to the “not to recognise statutory authority to the Administration, has forced to resort in the systems of this type, precisely to the technician of the legislative delegation (“delegated legislation”) for suplir the problems of that destitution”. “Delegations and legislative permissions”, in *The Spanish Constitution and the Sources of the Right*, Vol. III, ob., cit., pág. 1533. Like this also, OF OTTO, I., *Constitutional right*, ed. Ariel, 1997, pág. 220. “This secondary normative power, only can it obtain the executive, by ‘Delegation’, in the Anglo-Saxon countries”. GALICIAN ANABITARTE, To., *Law and Regulation in the western Public Right*, Institute of Administrative Studies, Madrid, 1971, pág. 101, the one who quotes regarding this matter for England: JENNINGS, *The Law and the Constitution*, 5ª ed. Pág. 18, and for United States, CORWIN, comment to *the Constitution of the United States of America*, pág. 85.

<sup>10</sup> See the documented study of the professor GARCÍA OF ENTERRIA, And., *Legislation delegated, statutory authority and judicial control*, 3ª ed., publisher Civitas, Madrid, 1998, págs 91 to 95.

<sup>11</sup> “It is necessary -begins affirming GALICIAN ANABITARTE, in the chapter IV (LOCKE, MONTESQUIEU, ROUSSEAU And KANT: legislative and executive Function) of his book, titled *Law and Regulation in the western Public Right*, ob., cit., págs. 125 and ss- that say once again that the founder of the theory of *the separation of powers* was LOCKE and no MONTESQUIEU.

<sup>12</sup> A comment on the main work of ROUSSEAU, *Him contrat social*, can see -among others- in GARCÍA OF ENTERRÍA, And., “The Public Administration and the Law”, REDA, number 108, 2000. On the concept of law in Rousseau: J.-M. COTERET, *Him puvoir legislatif in France*, Paris, 1962, pp. 9 and ss; Ch. STARCK, *The concept of law in the German Constitution*, Madrid, 1979, pp. 185 et seq., quoted in GARCÍA MALE, R., *Reservation of Law and statutory authority*, ed. Ariel, Barcelona, 1988, págs. 86 et seq

<sup>13</sup> The Law would purchase an exceptional dimension whereas legitimación of the general will and guarantee of the protection of the fundamental rights of the person and of the right of property. “The freedom consists in depending so only of the Laws”. VOLTAIRE (“Thoughts on the Public Administration”, XX in *Opúsculos satirical and philosophical*, translation of C.R. Dampierre, Alfaguara, 1978, pág. 190). Known is, by the other, that “The bases of the modern State of Right find in the ideology of the French revolutionaries and his formulation more conspicúa is due to the theorists illustrated (LOCKE, ROUSSEAU and MONTESQUIEU)”. JIMÉNEZ LETTUCE, F., “Right penalizing Official. The principle of legality and the reservation of law in front of the

model of separation of powers to the executive reserves him the simple execution of the law and, of another, the principle of the national sovereignty comports that only the representatives of the same have the competition to dictate norms<sup>14</sup>.

Nonetheless, it would not be easy task eradicate the hegemonic paper that until the revolution of 1789 had exerted the French Monarchy. Loomed the institution, the theorists of the monarchic system answered defending to ultranza the inherent authority of the Administration to dictate normative disposals, especially statutory. In effect, that conflict of interests saldaría with a positive result in favour of the will of the executive in statutory matter, to the cual would be him recognised the authority to dictate statutory disposals; pressure to which sucumbió the legislative “perhaps by need”<sup>15</sup> (as exclusive competition of the Monarch had been in a near past the normative power); or simply by the inertia of the monarchic power, in a first moment, and later because of the hegemony of the different executive powers (Directors, Consuls, Emperor)<sup>16</sup>. Like this, in spite of that immediately after the revolution (1971) constitucionaliza the whole transfer of the normative authority to the Parliament<sup>17</sup>, very soon the first

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statutory authority of the Administration: the Sentence 117/1995 of 17 July”. Aragonese magazine of public Administration, 1995, number 6-7, pág. 511.

<sup>14</sup> They can follow preaching in the present the foundations that lighted up the French revolution?. Hardly, as as it affirms with atino GONZÁLEZ, And. “First, never it has existed a separation of powers in the supposed form by Locke and Montesquieu; second, because with frequency said separation has seen attenuated by the existent interrelationships between the powers, or by the eagerness of supremacy of one of them; and third, because in way any is pensable that only the Parliament was qualified for tutelar with the owed guarantees the derivative requirements of the principle of consent of the taxes”. “The principle of legality tributaria in the CE of 1978”, ob., cit., págs. 1011 et seq., and also in PÉREZ OF AYALA, J. L. And GONZÁLEZ, And., *Right Tributario*, ed., University Square. Salamanca, 1994, pág. 46.

<sup>15</sup> BOQUERA OLIVER, J. M<sup>a</sup>, “Enjuiciamiento and inaplicación judicial of the regulations”, REDA, n<sup>a</sup> 40-41, 1984, pág. 12. The Kings –says this author- reacted against the “conception rusioniana” of the law and “treated to achieve the power to adopt general disposals. The adherents of the royalty to support his pretence, defended the idea that the power to adopt general mandates was inherent to the Administration. The legislative, perhaps by need, yielded to the pretence of the Executive with an intermediate formula. The defenders of that explained that the Legislative conferred or delegated the statutory power to the Executive. The statutory power was not an own power, inherent of the Administration, but a can that this received of the Legislator”. (Situation that, as we will see varies in the course of the time).

<sup>16</sup> SANTAMARÍA PASTOR, *Foundations ...*, ob., cit., pág. 697.

<sup>17</sup> “The French revolution pretended to contribute a principle of strict legality ... . It corresponds this period, first, with a total negation of the statutory authority” of the Executive. REBOLLO PUIG, M., “Juridicidad, legality and reservation of law like limits to the statutory authority”, R.To.P., number 125, 1991, pág. 78; negation that affirms S. PASTOR, *Foundations ...*, ob., cit., pág 697, only would last a decade. Like this, in the French Constitution of 1791 the executive did not have normative authorities to apply the Laws “(only proclaim” in accordance with the laws to order or recognise his execution”. Cap. IV, Section 1<sup>a</sup>, article 6 of the Constitution of 1791)” [GALICIAN ANABITARTE AND MENÉNDEZ REXACH, “Comments to the article 97 of the CE”, in *Comments to the Spanish Constitution of 1978*, directed by ALZAGA VILLAAMIL, Or, ed. Edersa, 1998, pág. 178]; vineyard. Likewise GARCÍA OF ENTERRÍA, And., “The public Administration and the Law”, ob., cit., pág. 571 and also S. PASTOR, *Foundations ...*, ob., cit., págs. 697 et seq., the one who describes how the concentration of the legal and statutory authority in hands of the Parliament carried to an overflow, fact that forced to that authorised on purpose to the King “in diverse laws to dictate “réglementes” to complete his disposals”.

constitutional texts of the 19th century recognise the statutory authority of the always subordinated Government to the law, whereas mechanisms of execution of this<sup>18</sup>, all time that attaches at the beginning of constitutional legality, as the attribution of such statutory authority confers to the executive with *plasmación* expresses in the own Letter Magna<sup>19</sup>.

It is, by all this, to mean the big stigma that supposed the French Revolution enarbolando the flag of the “Law” at most bastion and although the course of the coming events did recaer the statutory authority in hands of the executive, this framed in a constitutional paradigm under the empire of the law and of the principle of predicable legality –by the other- of all the administrative device.

To the thread of the big innovations contributed by the French Revolution to the countries of Europe, GARCÍA OF ENTERRÍA, And., it affirms “The Public Administration experiences in this moment the most notable transformation of his history. Until then the Administration was a personal attribute of the absolute monarch, vicar of God in the earth that, in virtue of this formal superiority, governed by his alone prudence to the grey of his village. In front of this criterion of the alone prudence in the attention to the very general, the administrative device goes to have from now that take into account the prescriptions of the legality, only in virtue of which can order and forbid (“The Public Administration and the Law”, ob., cit., pág. 571).

Of this luck would attain reach an attachment between two normative models very differentiated, the “democratic system” that posits the constitutional foundation of the legislative power, whereas representative of the village, like gifted organ of legitimacy to produce general norms and, the called “monarchic principle” with legitimacy to produce ordenanzas or regulations and whose penetration in the democratic model would drive to consolidate definitively the general statutory power of the Administration, no needed of parliamentary habilitations<sup>20</sup>.

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<sup>18</sup> In alike sense, MARTÍN MATEO, R., *Manual of Administrative Right*, ed. Trivium, Madrid, 1992, pág. 131; REBOLLO PUIG, M., “Juridicidad, legality and reservation of law ...”, ob., cit., págs. 78 and ss; ; GARCÍA OF ENTERRÍA, And., *Legislation delegated, statutory authority ...*, ob., cit., págs. 99 and ss; DÍEZ MORENO, F., “The statutory reservation and the CE”, in *The Constitution and the Sources of the Right*, Vol I, I.And.F., Madrid, 1979, págs. 626 et seq.; GALICIAN ANABITARTE, To. And MENÉNDEZ REXACH, To., “Comments to the article 97 of the CE”, ob., cit., págs. 177-178. To these questions also devotes the attention GARCÍA MALE, R., *Reservation of Law and statutory authority*, ed. Ariel, Barcelona, 1988, págs. 86 et seq.

<sup>19</sup> The recognition of a statutory authority general in hands of the monarch in matter of execution of the Laws and in matter of police –say CAR FERNÁNDEZ-VALMAYOR And R. GÓMEZ-FERRER MORANT- found his first *plasmación* positive in the article 14 of the French Constitutional Letter of 1814 that allowed to the King dictate *them réglemtes et ordonnances pour l'execution give lois et the sûreté of l'Etat*. Later, in the article 13 of the Constitutional Letter of 1830 “remains definitively consecrated the constitutional base of the statutory authority around the formula of the “execution of laws” (that it receives later the article 3 of the Constitution of 1875)”, when establishing the same that the king will be able to do regulations and ordenanzas necessary for the execution of the same, but with the impossibility to suspend neither dispense. “The statutory authority of the Government and the Constitution”, RAP, ° 87, 1978, pág. 172.

<sup>20</sup> Vineyard. GARCÍA OF ENTERRÍA and FERNÁNDEZ RODRÍGUEZ, those who understand that the definite consolidation of a statutory power of the Administration produces with the called ‘monarchic principle’, “that looked for to integrate after the end of the Napoleonic Empire in the democratic diagrams lighted up by the Revolution”. *Course of Administrative Right*, ed. Civitas, eighth edition, 1997, pág. 169.



Along the 19th century until mediated of the XX observes in France a flexibilización of the principle of legality<sup>21</sup> all time that a gradual extension of the statutory authority of the Administration<sup>22</sup>; evolution that will culminate

In 1958 date of which dates the afamada Constitution *Gaullista* with plasmación positive of the statutory reservation. constituzionalizan, in this way, two normative fields very differentiated: the bounded by the reservation of law (art. 34)<sup>23</sup>, *versus* the circumscribed by the subject matters to statutory regulation (art. 37)<sup>24</sup>. positiviza, therefore with the exposed, of a side the *principle of reservation of law* with character restrictivo, and with the constitutional faculty conferred by the article 38 that -in those matters reserved to law- the Parliament, by means of delegation expresses, has competition to enable to the Government so that this dictate Ordenanzas in execution of law that, although they can derogate previous laws, do not have legislative value, but the one of mere statutory acts, that only will earn strength of law when it have produced the parliamentary ratification<sup>25</sup>. It treats, therefore, of a statutory authority of execution of laws, by means of habilitation expresses<sup>26</sup>. Of another side, positiviza also the *principle of*

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<sup>21</sup> REBOLLO PUIG, M., “Juridicidad, legality and reservation of law ...”, ob., cit., pág. 79, it comments: “... it abandons generally the originario sense of the principle of legality to leave it reduced simply to the expression of the superiority of the Law”.

<sup>22</sup> “Like this, to finals of the 19th century the jurisprudence of the contentious Court-official admits the possibility that the president of the Republic dictate regulations, although restringidamente. After the first world-wide war the utilisation of the regulations without previous law does increasingly frequent ... “. GARCÍA MALE, R., *Reservation of Law and statutory authority*, ob., cit., pág. 88; CAR FERNÁNDEZ-VALMAYOR And R. GÓMEZ-FERRER MORANT, “The statutory authority ...”, ob., cit., pág. 172.

<sup>23</sup> In the article 34 enumerate the matters reserved to law. However, on a big part of these matters the reservation affects to the “fundamental principles” and no to all his regulation, by what in such suppositions can complete by statutory texts: like this, GARCÍA OF ENTERRÍA, And., *Legislation delegated, statutory authority and judicial control*, ob., cit., págs. 108-109; On these subjects can see GARCÍA MALE, R., *Reservation of Law and statutory Authority*, ob., cit., págs. 91 et seq.; CLAVERO ARÉVALO, M. F., they Exist autonomous regulations in Spanish right?, RAP, number 62, 1970, págs. 11 et seq.; RIVERO, *Precis of droit administratif*, Dalloz, Paris, quoted by BAENA FORTRESS, M., “Reservation of law and statutory authority in *The Constitution and the Sources of the Right*, Vol. I, ob., cit., pág. 286; DÍEZ MORENO, F., “The statutory reservation and the Spanish Constitution”, in *The Constitution and the Sources of the Right*, Vol. I, ob., cit., págs. 624 et seq.

<sup>24</sup> Article 37 of the French Constitution: *Them matières autres that celles qui sont du domaine of the loi ont a caractère règlementaire*. (“The distinct matters of those that fall inside the sphere of the law, will have statutory character”).

<sup>25</sup> GARCÍA OF ENTERRÍA, And., *Legislation delegated, statutory authority ...*, ob., cit., págs. 110 ff.

<sup>26</sup> To the margin this legislative technician, follows keeping in the article 21 the possibility to develop laws without legal habilitation: “With the Constitution of 1958, in spite of that enters remarkable innovations in this terrain, follows admitting a statutory power to develop Laws without specific habilitation of this, as it deduces of the article 21 of the Constitution, by which corresponds to the President of the Government, ensure the execution of the Laws. Vineyard. To. OF LAUBADÈRE, J.C. VENEZIA And And. GAUDEMET, *Traité of Dorit Administratif*, 9<sup>a</sup> ed. Paris, 1984, Volume I, págs. 316 and 317 ; J. RIVERO, *Droit Administratif*, 9<sup>a</sup> ed., Paris, 1980, pág. 62.; G. VEDEL And p. DELVOLVÉ, *Droit Administratif*, 9<sup>a</sup> ed., Paris, 1984, págs. 293-294; R. CHAPUS, *Droit Administratif General*, Paris, 1985, págs. 434 and 435. Anyway, it remains clear that this possibility exists even in front of matters entirely reserved to the legislator and in base to a constitutional power”. Appointment taken of ROBOLLO PUIG, M., “Juridicidad, legality ...”, ob., cit., pág. 115.

*reservation of regulation* by which does not fit legal inferences in the statutory authority of the Government to dictate independent regulations in matters of governmental court; that they will be norms no subordinated to the Law, but on the contrary, in foot of equality with her, with foundation equally in the French Constitution.

Especially singular results the case of *Germany*, characterised by a group of States of constitutional monarchic cut that perviven during all the 19th century. In the game of the relations between “Law-Regulation”, happens of the classical ideology of the principle of reservation of law<sup>27</sup> -ínsito in a model of constitutional monarchic cut classical European<sup>28</sup>- to the consolidation of a juridical diet sustentado in the doctrine of the called “material law”<sup>29</sup>, inspired by the claim of the formal instrument of the “Law” approved by the Parliament to regulate matters atinentes to freedom and property. Of this luck, the transformation in Germany produces of silent “form”<sup>30</sup> and of the hand of the scientific doctrine, with the theory of the “material Law”.

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<sup>27</sup> In the Constitutions of the German constitutional monarchies, the principle of reservation of law plays a paramount paper like mechanism garante, on the one hand, of the separation of powers (in that Legislative “moment” versus “Executive monarchic”), and, of another side, of the preservation of the individual sphere – freedom and property- in front of interferences of the monarchic sovereignty. Regarding this matter vineyard. GARCÍA MALE, R., *Reservation of Law ...*, ob., cit., págs. 32 et seq. Also they make an exhaustive analysis in this regard VILLACOSTA MANCEBO, L., *Reservation of law and Constitution*, ed. Dykinson, 1994, págs. 48 et seq. and BATHROOM LEÓN, J. M<sup>a</sup>. *The constitutional limits ...*, ob., cit., págs. 24 et seq., the one who develops the relation between law and regulation in the German classical doctrine. For this last author OTTO MAYER was the acuñador of the denomination “reserves of law” that no of the Institute. On the paternity of the principle of reservation of law attributed to OTTO MAYER pronounce –among others- GARRIDO FAILS, F., *Treated of Administrative Right*. Volume I. Institute of Political Studies, Madrid, 1966, pág. 252 and GARCÍA MALE, R., “The concept was coined by Otto Mayer, the one who developed it initially”, ob., cit., pág. 27. [OTTO MAYER, *Deutsches Verwaltungsrecht.*, 3<sup>a</sup> ed. Mark und Leipzig, 1924, or, his version in Spanish, *Right German Official I*, ed. Depalma, Buenos Aires, 1949].

<sup>28</sup> It would treat of a political system of the designated dual state systems (typical of the European Constitutional Monarchies of the period posrevolucionaria) in which confraternizaban, on the one hand, the Crown and the representative Assembly, organ legitimated to approve the laws (with the collaboration of the Monarch) and, by another, the own Monarch, the one who attained to retain in his hands the authority to dictate statutory disposals in those own matters of the Administration, through the administrative regulations. By the contrary, would need legislative habilitation to create juridical regulations when being a “subject field to the law”. See OF OTTO, I., *Constitutional right*, ed. Ariel, 1997, pág. 221

<sup>29</sup> Vineyard. CAR FERNÁNDEZ-VALMAYOR And GÓMEZ-FERRER MORANT, “The statutory authority of the Government...”, ob., cit., pág. 174-175. An exhibition destallada on the origin, concept and evolution of the term “material law”, can see in: GALICIAN ANABITARTE, To, *Law and Regulation in western public Right*, Madrid, 1971, pág. 279 (vineyard. págs. 275 et seq.). Also quoted by VILLAR EZCURRA, L., “Matters reserved and Spanish Constitution”, in *The Spanish Constitution and the Sources of the Right*, Vol. III, ob., cit., pág. 2074. The “material Law” –says GARCÍA OF ENTERRÍA- has been one of the big constructions of the classical school of the German Public Right” (vineyard. The extensive German bibliography that quotes this author in this regard in *Legislation delegated, statutory authority*, ..., ob., cit., págs. 96 et seq. Also, D. JESCH, *Law and Administration*, I. And. To., Madrid, 1978, págs. 14 et seq.; R. NÚÑEZ-VILLAVEIRAN And OVILO, “Delegations and legislative permissions in the Constitution”, in *The Constitution and the Sources of the Right*, vol. III, ob, cit., págs. 1531 et seq.; GARCÍA MALE, R., *Reservation of Law ...*, ob., cit., págs. 37 et seq.; BATHROOM LEÓN, L. *The constitutional limits ...*, ob., cit., págs. 45 et seq.

<sup>30</sup> Term coined by SANTAMARÍA PASTOR, *Foundations ...*, ob., cit., pág. 702.

*De facto*, the formulations proposed by Paul LABAND<sup>31</sup> and Georg JELLINEK<sup>32</sup> will leave footprint *-of iure-* in the positive right of finals of the 19th century and principles of the XX<sup>33</sup>, with reflection in the imperial Constitution of 1871; the Constitution of Weimar of 1919 and, later, in the Fundamental Law of Bonn (art. 80.1). Predicamentos That will extend later to other countries like Italy and Spain.

LABAND Builds his theory from the concept of “proposition or juridical norm” (doctrine of *the Rechtssatz*) identifying “proposition or juridical norm” with “material law” or disposal that acts in the sphere of the freedom and property of the citizens. The regulation of such matters, anyway needs the formal course of law, this is, had to be authorised by the Parliament. The juridical materialisation of this doctrine carried to distinguish between laws in material sense and laws no material or administrative.

With regard to the disposals dictated by the Executive (Regulations), habida explains the previous division, could approve two type of norms<sup>34</sup>:

1.- Regulations organizatorios or *verwaltungsverordnungen*, that the Administration can dictate discrecionalmente, to the not invading that sphere of contents.

2.- Juridical or normative regulations (*Rechtsverordnungen*) or disposals of the executive that, for containing “disposal or juridical norm”, require of legislative delegation expresses by part of the Parliament.

By his part, JELLINEK differentiates the following categories of Regulations<sup>35</sup>:

- Regulation of execution of the law: *vollzugsverordnung*
- Regulation with strength of law: *gesetzvertretenden veordnungen*
- Complementary regulation to law: *gesetzergänzeden veordnungen*

The constatación of the previous theses, underline, remains patent in the article 80 of the Fundamental Law of Bonn<sup>36</sup>:

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<sup>31</sup> In his famous work *Give Budgetrecht nach give Bestimmungen der preussischen Verfassungsurkunde unter Berücksichtigung der Verfassung give Norddeutschen Bundes*, Berlin, 1871.

<sup>32</sup> In his appointed work *Gesetz und Verordnung*, Reiburg i. Br., 1987

<sup>33</sup> On these extremes and authors have consulted S. PASTOR, *Foundations ...*, ob., cit., págs. 700 et seq.; likewise: VILLAR EZCURRA, “Matters reserved to Law and Spanish Constitution”, ob., cit., págs. 2075 et seq.; GARCÍA MALE, R., *Reservation of Law...*, ob., cit., págs. 38 et seq.; BATHROOM LEÓN, *The constitutional limits ...*, ob., cit., págs. 45 et seq.; BLOND LLORENTE, “Rank of law, strength of law, value of law”, RAP, 100-103 (I). Between the doctrine tributaria, vineyard. RODRÍGUEZ BEREIJO, To., *Introduction to the study of the financial right*, ob., cit., págs. 218 et seq., and also *The budget of the State. Introduction to the Budgetary Right*, Madrid, 1970, págs. 54 et seq.

<sup>34</sup> In the same sense, GARCÍA OF ENTERRÍA, And., *Legislation delegated, statutory authority...*, ob., cit., págs. 95-96; CAR FERNÁNDEZ VALMAYOR And GÓMEZ-FERRER MORANT, “The statutory authority ...”, ob., cit., págs. 174-175.

<sup>35</sup> For greater development remit us to BATHROOM LEÓN J.M<sup>a</sup>, *The constitutional limits of the statutory authority*, ed. Civitas, Madrid, 1991, págs. 25-26.

<sup>36</sup> Without prejudice to the previous, aim GALICIAN ANABITARTE And MENÉNDEZ REXACH, “Comments to the article 98 of the CE of 1978”, ob., cit., pág. 179, like “The model of the constitutional monarchy German of the 19th century has suffered modifications under the fundamental Law (Grundgesetz) of 1949: it has broken the pretended equation Law = Norma juridical = interventions in the freedom and property. descarta That it exist a limit to the potential regulation of the legislator... the controversial question is to determine which matter has to be regulated by Law”. On the transformations in of the reservation of law in Germany, vineyard. GARCÍA MALE, R. *Reservation of law ...*, ob., cit., págs. 68 et seq.

“Durch Gesetz Können die Bundersregierung, ein Bunddesminister oder die Landesregierung ermächtigt werden, Rechtsverordnungen zu erlassen. Dabei müssen Inhalt, Zweck und Ausmass der erteilten Ermächtigung in Gesetze bestimmt werder”<sup>37</sup>.

It interests to call the attention on the important transcendence that this position doctrinal has had in Spain, as his heires is the theory of the legal habilitation kept in our country by a qualified sector doctrinal, as which the executive has a statutory power with authority to regulate the organisational appearances and interns of the Administration. Treating of disposals with effects *adextra*, that is to say, that affect to the sphere of the rights and freedoms of the citizens is prescriptive legal habilitation<sup>38</sup>.

In *Spain*, tracing us back to the first norms written approved by the Courts gaditanas, fits to underline like these reserve to the Parliament the legislative authority, enervating any normative authority by part of the executive (Decrees of 24-9-1810 and 16-1-1811, decree this last by which approves the “Provisional Regulation of the Executive Power”).

Nonetheless, so only a year after the approval of the quoted provisional Regulation would see the light the Decree of 26 January 1812, text that constituted the spearhead in favour of the normative authority of the Regency, to the one who reserves him the competitions to issue decrees, regulations and instructions conducentes for the execution of the laws, formula that extrapolates to the Constitution of Cádiz of 1812 (article 171, I)<sup>39</sup>, all time that to the Constitutions approved subsequently during all the 19th century<sup>40</sup>. In said ínterin, the statutory

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<sup>37</sup> “By means of Law can be enabled the federal Government, a federal minister or the Governments of the *Ländern* to dictate normative Regulations. For this have to determine in the Law the content, the end and the extension of the habilitation that awards”.

<sup>38</sup> Thesis kept in Spain by GARCÍA OF ENTERRÍA, And., *Legislation delegated, statutory authority and judicial power*, 1ª ed. 1970, ob., cit., págs. 88 et seq.; GARCÍA OF ENTERRÍA and TOMÁS-RAMÓN FERNÁNDEZ, *Course of Administrative Right*, eighth edition, ed., Civitas, Madrid, 1997, págs. 192-193, 200, S. PASTOR, *Foundations ...*, ob., cit., págs. 795 et seq., B. LEÓN, *The constitutional limits ...*, ob., cit., págs. 27 et seq. especially pág. 36; LATHES MORE, J., “The relation between the Law and the Regulation: legal reservation and legislative reference...”, ob., cit., pág. 474 et seq.; REBOLLO PUIG, “Juridicidad, legality and reservation of law ...”, ob., cit., págs. 81 et seq.; M. MATEO, *Manual of administrative Right*, ed. Trivium, Madrid, 1992, pág. 137, and others ... This doctrine has had also big predicamento in the Spanish jurisprudence.

<sup>39</sup> “In definite –says GARCÍA MALE, R.- The normative authority of the king is wide and has big autonomy in the Constitution of 1912” (pág. 48), arriving even to defend the existence of “an autonomous statutory power (arts. 170 and 171), especially in the sphere of the public order (pág. 56)”. *Reservation of Law ...*, ob., cit.

<sup>40</sup> Constitution of Cádiz, art. 171.1ª, Constitution of 1837, art. 47.1, Constitution of 1845, art. 45.1, Constitution of 1869, art. 75, and Constitution of 1876, art. 54.1 Vineyard. Regarding this matter, it TRAINS CUESTA, *Course of Administrative Right*, ed. Tecnos, Madrid, 1986, pág. 139. A study on the statutory authority in this period can see in GALICIAN ANABITARTE, “Law and Regulation in Spain”, RAP, number 57; and in MARTÍN RETORTILLO, “The doctrine of the matters reserved to the law and the recent Jurisprudence of the High court”, RAP, number 39, 1962, pp. 292 et seq. On the normative relations between the Courts and the executive in the Spanish constitutionalism, vineyard. GARCÍA MALE, R., *Reservation of law ...*, ob., cit., págs. 42 and ss; author that affirms: “it is not possible to put in the same sack, as it does Galician Anabitarte, to all the Constitutions from

authority of the Government conceives , then , with constitutional foundation but with scope merely executive of the Law<sup>41</sup>, supeditada well to the consent of the Courts, well to the legal permission<sup>42</sup>. Gone in the 20th century it would be necessary to expect to the Constitution approved in the 1<sup>a</sup> Republic (1931, article 79) to see formulated the principle of the statutory titularity of the Government<sup>43</sup> of form originaria and generic.

Established the new political diet dictatorial under the mandate of the General Franco approves the Law of Courts on 17 July 1942<sup>44</sup>. In her it continues in the marked line by the laws of 30 January 1938 and 8 August 1939, in regard to the extraordinary prerogatives conceded to the Boss of the State between which explained the possibility to dictate laws and Regulations<sup>45</sup>. Amén of this, follows a material concept of Law whereas limited to the regulation of determinate matters. Like this, the articles 10 and 12 established the matters reserved to law, without prejudice to that his material field could see increased, habida explains –the same- entered a material concept of Law that has been tildado of “flexible” when allowing “expand the field of the reservation to will so much of the government and in definite, of the boss of the State, as of the own Courts, previous dictamen, in such sense, of the Commission of legislative competition”<sup>46</sup>.

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1812 until 1931” justifying such aserto in that, for example in the Spanish Constitution of 1845 “the real power increases substantially his normative activity, promulgándose independent regulations” (págs. 53-54).

<sup>41</sup> GALICIAN ANABITARTE, *Law and Regulation ...*, ob., cit., pág. 81; CHARRO FERNÁNDEZ-VALMAYOR And GÓMEZ-FERRER MORANT, “The statutory authority ...”, ob., cit., págs. 178 et seq. S. PASTOR, *Foundations ...*, ob., cit., pág. 775

<sup>42</sup> In synthesis, have stood out the following common shots of the Spanish constitutionalism: 1) configuration of the statutory authority as merely executive of the laws. 2) In all the monarchic constitutions contains a precept that enumerates the suppositions of decisions of the Executive for which this precise the consent of the Courts or be authorised for this by means of law (1812, art. 172; 1837, art. 48; 1845, art. 46; 1856, art. 53; 1869, art. 74; 1876, art. 55), it does not treat , however, of reservations of law in strict sense (this is, to regulate determinate matters), but of legislative permissions for singular acts ...; 3) The only reservation of authentic and invariable law is the established for the creation of taxes (1812, art. 178.8; 1837, art. 73; 1845, art. 76; 1856, art. 81; 1869, art. 15; 1873, art. 17; 1876, art. 3; 1931, art. 115). On this last particular vineyard. SAINZ OF BJUNDA, *Inland revenue and Right*, Vol. I, págs. 318 et seq. CAZORLA PRIETO, L. M<sup>a</sup>, “Considerations on the power tributario...”, ob., cit., págs. 99 et seq.; PÉREZ ROYO, F., “The principle of legality tributaria in the Constitution”, in *Studies on the project of Constitution*, Centre of Constitutional Studies, Madrid, 1978, págs. 393 and ss, ...

<sup>43</sup> Without prejudice to that some author –GARCÍA MALE, R.,- from the reflections of S. MARTÍN RETORTILLO, considers that of the literal tenor of the quoted precept (art. 79) “in the Constitution of 1931 only fits to admit the existence of executive regulations, in spite of the contradictions in that it incurs on the question some doctrine”. *Reservation of law...*, ob., cit., pág. 45

<sup>44</sup> Regarding this matter it can see ÁLVAREZ GENDÍN, S., *general Treaty of Administrative Right*, Volume I, ed. Bosch, 1958, págs. 219 et seq.

<sup>45</sup> For a study documented on the subject vineyard. Also GALICIAN ANABITARTE, “Law and Regulation in Spain”, R.To.P. Number 57. Also CLAVERO ARÉVALO, M.F., they Exist autonomous regulations in the Spanish Right?, R.To.P., number 62, 1970, pág. 13.

<sup>46</sup> Like this, ROOMS HERNÁNDEZ, J. “Again on the autonomous regulations in Spanish Right”, R.ap., number 84, 1977, págs. 649-650. On the matters to which reserved the legislative authority of the Courts can consult,

By his part, the Law of Juridical Diet of the Administration of the State of 1957 refers basically to the regulations of execution, although in his article 24 late the idea of an autonomous statutory power, when foreseeing that the no contemplated matters in the articles 10 and 12 of the Law of Courts will adopt the form of Decree<sup>47</sup>. Later the Organic Law of the State of 1967 established in favour of the Council of Ministers the exercise of the statutory authority (art. 13), that configured like a general and no executive authority of the Law (unlike the Law of Courts), although without that in precept any proclaimed the autonomous statutory authority of the Government<sup>48</sup>.

It is to review the controversy aroused between Spanish academicians, with regard to the possible existence of independent regulations during the period mentioned. Against of his admission pronounces ROOMS HERNÁNDEZ protecting in the flexible “interpretation” of the concept of material law foreseen in the articles 10 and 12 of the Law of Courts<sup>49</sup>, *versus* a more generalised doctrine in favour of the admission of such regulations (CLAVERO ARÉVALO, GALICIAN ANABITARTE, GARRIDO FAILS, FERNÁNDEZ CARVAJAL, SANTAMARÍA PASTOR And PAREJO ALONSO, ...<sup>50</sup>). Authors, these last for those who

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BAENA FORTRESS, M, “Reservation of Law and statutory authority in the new Spanish Constitution”, in *The Spanish Constitution and the Sources of the Right*, vol. I, IEF, Madrid, 1979, págs. 295 et seq.

<sup>47</sup> Vineyard. CLAVERO ARÉVALO, M. F., “they Exist autonomous regulations ...”, ob., cit., págs. 15 et seq.

<sup>48</sup> *Ibidem*, págs. págs. 15-16.

<sup>49</sup> ROOMS HERNÁNDEZ considers that in the francoist system did not fit the possibility of autonomous regulations with base in the following reasoning: so that they exist autonomous regulations is necessary that exist a reservation of regulation and likewise a reservation of law, so that all what do not regulate by law will remain assigned to the regulation by decree of the Government. Now well, since in the francoist system adopted a system of reservation of relative law and no material, since, in spite of the articles 10 and 12 of the Law of Courts that established the matters reserved to law, the Government and the Courts could propose a Decree or a proposition of law in distinct matters to the reserved to law, was not true that the regulation had a circle typical of matters, therefore “there was not place, then, to my way to see –says this author- in the legislation in question a pretended statutory reservation of which derived the possibility of existence of autonomous regulations”. “Again on the autonomous regulations”, ob., cit., pág. 649 et seq

<sup>50</sup> “The examination verified of the constitutional sources allows to arrive to the conclusion that in the juridical system Spanish exists the autonomous Regulation”. CLAVERO ARÉVALO, “Exist regulations ...”, ob., cit., pág. 17. In the same GALICIAN sense ANABITARTE, “Law and Regulation ...”, ob., cit., págs. 82 et seq. FERNÁNDEZ. CARVAJAL, “The normative authority in the Fundamental Laws in Spain”, R.To.P. Number 69, 1970, págs. 169-170, GARRIDO FAILS, “The sources of the Right and the statutory reservation in the project of Constitution”, in *Study on the project of Constitution*, Centre of Constitutional Studies, Madrid, 1978, pág. 44.

the previous controversy has seen surpassed today so much by the doctrine as by the Jurisprudence<sup>51</sup>. The problem, definitely, has been and is to find his diffuse outlines<sup>52</sup>.

Finally and like antecedent more next to our Constitution of 1978, is to quote the project that of the same approved, in which it remained configured the statutory reservation to way and similarity of the planned in the Constitution Gaullista of 1958. It said like this the article 79.1 of the Constitutional project: “it Corresponds to the statutory authority of the Government the regulation of the no reserved matters to the Law, without prejudice to the foreseen in the Tít. VIII”<sup>53</sup>.

Beside this autonomous statutory authority of the Government (sustentada in the reservation of regulation), bet by an executive statutory authority ejercitable in accordance with the CE and with the laws<sup>54</sup>. However, the final approval of this preliminary draft would not be possible, partly, because of the important reticencias that aroused. In fact, the planned proposal in the article 79.1 consistent in establishing the statutory reservation was abandoned in the first parliamentary debate<sup>55</sup>.

## 2.- Notes on the statutory authority of the Government in the frame of

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<sup>51</sup> See the documented study of SANTAMARÍA PASTOR and PAREJO ALONSO, *Administrative Right. The Jurisprudence of the high court*, Ed. Centre of Studies Ramón Areces, Madrid, 1989, in whose pág. 60 it can read literally: “The clearest guideline of all this jurisprudential doctrine roots in the cutting recognition of the existence (and legality) in our Right of the independent regulations: an important guideline, that tercia of explicit way in the controversy that regarding this matter took place, in the academic field, in the last years of the Franco regime, adding to the posture defended, beside a sector doctrinal, by the Council of State in his quoted motion of 1969”. Vineyard. The abundant jurisprudence that there quotes in this regard. “It seems clear that the independent Regulation has existed and exists, no already during the francoist period but from a lot before”. Like this, S. PASTOR, *Foundations of Administrative Right*, ob., cit., págs. 748 and ss, for the one who these “have existed always, at least from the death of Fernando VII in 1833, as it shows it a fast query to the Legislative Collection”. By his part, already saw like GARCÍA MALE, R., *Reservation of Law...*, ob., cit., págs. 42 to 46, it affirms that in the Spanish constitutionalism and particularly in the constitutions of 1837, 1845 or 1876, the normative capacity of the King is wider, translating in a merma of the normative capacity of the Courts. In these Constitutions “the power decants in favour of the monarchic principle”. Thesis shared by VILLACOSTA MANCEBO, L. *Reservation of Law and Constitution*, ob., cit., págs. 49-50.

<sup>52</sup> As as it has said “there is not any field in which the Administration can act without being of direct or indirect way limited by the Law”. BATHROOM LEÓN, J. M<sup>a</sup>, *The constitutional limits...*, ob., cit., pág. 193.

<sup>53</sup> On the draft of November of 1977 vineyard. DÍEZ MORENO, F., “The statutory reservation and the Spanish Constitution”, ob., cit., págs. 637 et seq.; ROOMS HERNÁNDEZ, J., “Again on the autonomous regulations...”, ob., cit., págs. 655 et seq.

<sup>54</sup> “The Government directs the politics ...: It exerts the executive function and the statutory authority in accordance with the Constitution and with the Laws” (art. 95).

<sup>55</sup> Regarding this matter vineyard. GARRIDO FAILS, F., “The sources of the Right and the statutory reservation ...”, ob., cit., pág. 45. Appearance that will confirm later the maximum organ interpreter of our Constitution in Sentence of 20 May 1986: “(...) In our legislation does not recognise the principle of statutory reservation”. With regard to the possible “hypotheses on the reasons of such suppression”, vineyard. DÍEZ MORENO, F., “The statutory reservation and the Spanish Constitution”, ob., cit., págs. 643 et seq.

## **The Spanish Constitution of 1978.**

Our Spanish Constitution of 1978 results extremely parca and concise in the regulation of the statutory authority. By all development in this regard it limits to put of self-evident the possibility of the Government to dictate statutory disposals without that, in precept any, remain defined the concept, scope and juridical diet of such function.

“Of the Government and of the Administration” constitutes the rúbrica general that heads the Title IV of the CE, Title that gives received to the articles 97 to 107. Of them, the key of vault that sustenta the exercise of the statutory authority, on purpose attributed to the Government and, in definite, the general frame of the constitutional functions of the same, is the article 97 of the Letter Magna that prays like this:

“The government directs the inner and external politics, the civil and military Administration and the defence of the State. It exerts the executive function and the statutory authority in accordance with the Constitution and with the Laws”.

So as to know the extremes or -at least- trace the profile of the statutory competition of the Government, is convenient to begin remarking his configuration in the Constitutional Text separated of the functions of direction and of execution. In effect, fix that the article 97 quoted discierne three fields of susceptible performance to concretise in the following types of powers<sup>56</sup>: power of direction, that extends to the inner and external politics, to the civil and military Administration, and to the defence of the State; power of execution, willing faculty with reason to materialise the will of the legislator and, finally, power of normación or statutory power.

From among the important and complex competitions attributed to the Government, focalizaremos the attention in his statutory authority, what will go through the analysis of the article 97 of the CE, all time that by compendio of constitutional precepts that of one or another way refer equally to said authority.

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<sup>56</sup> Vineyard. In this sense, OF OTTO, *Constitutional right. System of Sources*, Ed. Ariel, 1997, pág. 223.



To) it is an indisputable fact that the attribution of the statutory authority to the Government has *constitutional nature*<sup>57</sup>, without prejudice to that his exercise has to make attending so much to the planned prescriptions by the Constituent as by the legislator.

*The Government (...) Exert (...) The statutory authority in accordance with the Constitution and with the Laws (Art. 97 CE).*

The problem that arises is to determine if the constitutional foundation finds fit the legislative foundation, this is, if the Government has attributed the statutory authority expresses and only by the Constitution or also by the Laws. The nuance, although it could seem baladí, is not it, as precisely the fact that it defend to ultranza the constitutional foundation of the statutory authority of the Government, has carried to an important sector of the constitutional and administrative doctrine to defend that the independent regulation can regulate all those no subject matters at the beginning of reservation of law<sup>58</sup>, as well as to question frontally the need of a legislative reference that enable to the Regulation to develop a law, in the case of the executive regulations, as it affirms -“the foundation of the statutory authority of the Government finds in the same Constitution and thus it is contradictory that after recognising this starting point, as it does it the theory of the legal habilitation<sup>59</sup>, keep to continuation that without habilitation marry by case is not possible the exercise of the statutory authority”<sup>60</sup>-.

Affirmations these, that no obstan to conclude that the regulation is a normative act of the Government and more genéricamente of the Administration<sup>61</sup>, whose exercise is subjected to the Constitution and to the Law (article 97 CE).

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<sup>57</sup> It says MUÑOZ MACHADO in this regard, “All the statutory authority, already was of execution or general, comes from en última instancia of the Constitution”. “On the concept of the executive regulation in the Spanish right”. R.To.P., 1975, number 77, pág. 173.

<sup>58</sup> PAREJO ALONSO, L., JIMÉNEZ-WHITE, L and ORTEGA ÁLVAREZ, *Manual of Administrative Right*, 1998, Ed. Ariel, Barcelona, págs. 260-261.

<sup>59</sup> Thesis kept in Spain by: GARCÍA OF ENTERRÍA, And., *Legislation delegated, statutory authority and judicial power*, 1ª ed. 1970, ob., cit., págs. 88 et seq.; GARCÍA OF ENTERRÍA and TOMÁS-RAMÓN FERNÁNDEZ, *Course of Administrative Right*, eighth edition, ed., Civitas, Madrid, 1997, págs. 192-193, 200, ... . Also adherents of the legal habilitation for the regulation of appearances reserved to Law LATHE BUT, J., “The relation between the law and the regulation: legal reservation and legislative reference. Some conflictive appearances to the light of the constitutional jurisprudence”, R.To.P., number 100-102, January-December, 1983, págs. 475 et seq.; REBOLLO PUIG, “Juridicidad, legality, ...”, ob., cit., págs. 81 et seq.; SANTAMARÍA PASTOR, *Foundations of Right...*, ob., cit., págs. 795 et seq.; BATHROOM LEÓN, *The constitutional limits ...*, ob., cit., págs. 27 et seq., especially 36.; MARTÍN MATEO, *Manual of administrative Right*, ed. Trivium, 1992, Madrid, pág. 137.

<sup>60</sup> OF OTTO, *Constitutional right ...*, ob., cit., pág. 238. Of the same seem are: - BASSOLS COMA, “The diverse demonstrations of the statutory authority in the Constitution”, RAP, number 88, pág. 128; - GALICIAN ANIBATARTE and MENÉNDEZ REXACH, “Comment to the article 97”, in ALZAGA, Or, *The Spanish Constitution of 1978*, volume VIII, Madrid, 1985, pages 55-60; GARRIDO FAILS, F., *Treated of Administrative Right*, ed. Tecnos, 1987, pág. 236.

<sup>61</sup> GARCÍA OF ENTERRÍA and TOMÁS-RAMÓN FERNÁNDEZ, *Course of Administrative Right*, ob, cit, pág. 168, they affirm: “it calls statutory authority to the power in virtue of the cual the Administration dictates Regulations; it is, perhaps, his more intense and grave authority, since it involves to participate in the training of the legislation”. On the concepts of “Government” and “Administration” vineyard. GARRIDO FAILS, F.,

b) The normative authority that has the Government is –on line with the previous considerations- an *authority subordinated* to the constitutional prescriptions and to the empire of the Law<sup>62</sup>, materialised –to our effects- in the principles of reservation of law and primacy of the Law.

Suffice us review here some meant works from among the ingente quantity of juridical writings that versan in this regard; this is, that treat the relations that establish between the statutory authority and the constitutional principles of reservation of law, primacy of the law ...: REBOLLO PUIG, “Juridicidad, legality and reservation of law ...”, ob., cit., págs. 76 et seq. LATHE BUT, J., “The relation between Law and regulation...”, ob., cit., págs. 473 et seq., NÚÑEZ VILLAVEIRÁN And OVILO, “Delegations and legislative permissions ...”, ob., cit., págs. 1528 et seq.; GÓMEZ FERRER MORANT., The statutory authority of the Government in the Constitution, in *The Constitution and the Sources of the Right*, vol I., ob., cit., págs. 118 and ss; BASSOLS COMA, M., “The diverse demonstrations of the statutory authority in the Spanish Constitution, ob., cit., págs. 162 et seq.; GALICIAN ANABITARTE and MENÉNDEZ REXACH, “Comments to the ...”, ob., cit., págs. 180 et seq.; RODRÍGUEZ OLIVER, “The constitutional consecration of the principle of legality like limit for the norms approved by the Administration”, in *The Spanish Constitution and the Sources of the Right*, Vol. III, ob., cit., págs 1721 et seq.; PABLO L. MURILLO OF THE CAVE, “Observations around the statutory authority of the Government”, Fascicles of the Faculty of Right. *University Illes Balears*, number 10, 1985, págs. 110 et seq.; GARCÍA OF ENTERRÍA And T. R. FERNÁNDEZ, *Course of Right ...*, ob., cit., págs. 231 et seq.; GARRIDO FAILS, F., *Treated of Administrative Right*, ob., cit., pág. 241-242; SANTAMARÍA PASTOR, *Foundations of Right...*; ob., cit., págs. 741 and ss and 768 et seq.; JESCH, D., *Law and Administration*, ob., cit., págs. 38 et seq.; BARTHOLINI, *Il principio gave legalità dei tributi in matter gave imposte*, ob., cit.; OF OTTO, I., *Constitutional right*, ob., cit., págs., 225 et seq.; CARLASSARE, L., *Regolamenti dell'esecutivo and principle gave legalità*, ed. Padova, 1966; EMBID IRUJO, To., “statutory Authority”, *Basque Magazine of Public Administration*, number 29, 1991, págas. 96 et seq. Between the doctrine tributaria can see: FERREIRO LAPATZA, J. J., “The principle of legality and relate them Law-regulation in the legislation tributario Spanish”, *Studies of Right and Inland revenue*, no. II 1987; CALVO ORTEGA, R.: “The regulations tributarios in the state legislation Spanish”, *HPE*, 17, 1972; GONZÁLEZ, And., “The principle of legality tributaria...”, ob., cit., págs. 917 and ss; CAZORLA PRIETO, “The constitutional principles-financial in the new juridical order”, *Magazine of Public right*, 1980, págs. 544 et seq.; CHECA GONZALEZ, “The principle of reservation of law in matter tributaria”, *Studies of Right and Inland revenue*, vol., II 1987; MARTÍN QUERALT, J., “The primacy of the right in the relations between the Public Inland revenue and the taxpayers, speech read in the solemn opening of the course 95-96, published by the University of Valencia; PÉREZ ROYO, F., - “Principle of legality, have to to contribute and decrees-laws in matter tributaria”; *REDC*, number 13, 1985, págs. 54 and ss; - “The principle of legality tributaria in the Constitution”, ob., cit., págs. 393 and ss; - “Foundation and field of the reservation of law in matter tributaria, H.P.And., number 14; GARCIA AÑOVEROS, J.: “The sources of the Right in the General Law Tributaria”, *RDFHP*, 54, 1964; ...

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*Comments to the Constitution*, ed. Civitas, Madrid, 1985, págs. 1366 et seq.; the one who concludes that both concepts are different. With regard to the statutory authority attributed to the Government by the article 97 CE, “... wants to say with this that does not exist the statutory authority of the Administration?”, and it concludes this author “the statutory authority is an administrative authority whose use is reserved totally to the supreme organ of the Administration...” (pág. 1367). Of the same, can see also “Constitution and administration”, *REDA*, number 20, 1979, págs. 10-11.

<sup>62</sup> Like this It Sentences of the TS of 19-7-91, and SSTs of 16-4; 7-4; 12-6 all they of 1997.

Nonetheless, said subordination reaches a radius of greater performance, as the same observes not only with regard to the CE and to the Law, but also with regard to the rest of the juridical legislation by virtue of the art. 9.1 CE that subject generically the performance of the citizens and public powers to the CE and to the rest of the juridical legislation; very known that, this power limited of the public powers to the that alludes of general form in the article 9 of the CE, sections 1 and 3, reiterates and concrete specifically for the performance of the Public Administration in the article 103.1 of the same constitutional text that orders full submission of the administrative performance to the law and to the Right<sup>63</sup>.

In this global frame of constitutional principles in that they deploy the lines of the exercise of the statutory authority, is to have very in consideration the principle of normative hierarchy guaranteed constitutionally in the article 9.3, as well as the retroactivity of the penalizing disposals, the juridical security, the responsibility and interdiction of the arbitrariness of the public powers, foreseen –also- in the last constitutional precept mentioned<sup>64</sup>.

c) *Formally* the regulation adopts the form of *agreed* Decree by the Council of Ministers, issued by the King (art. 62.f CE)<sup>65</sup>. It is of matizar that –logically- no all the

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<sup>63</sup> On the meaning of the meanings “submission to Law”, to the juridical legislation and to the Right can see PABLO L. MURILLO OF THE CAVE, “Observations around the statutory authority of the Government”, fascicles of the Faculty of Right. University *Illes Balears*, number 10, 1985, págs. 113 to 115. On the delimitation of the principles of juridicidad and legality, vineyard., REBOLLO PUIG, M., “Juridicidad, legality and reservation of law ...”, ob., cit., págs. 112 et seq.. In this regard GUTIERREZ GUTIERREZ, I., *The controls of the legislation delegated*, ed. Centre of Constitutional Studies, Madrid, 1995, pág. 118 it affirms: “... for the perhaps majority doctrine the principle of legality recognised in the article 9.3 of the Constitution coincides with the principle of juridicidad of the administrative action typical of the State of Right, referred to the relation between the administrative action and the juridical legislation in his group, and no to the relation between the Law and the Regulation that establishes inside this last. But this principle of juridicidad results almost tautológico in the constitutional State and the own Constitution consecrates it in another article, the 103.1.”

<sup>64</sup> Vineyard. -Among others- PABLO L. MURILLO OF THE CAVE, “Observations around the statutory authority of the Government”, ob., cit., pág. 113; Díez Pícazo, “Constitution and sources of the Right”, in *The Constitution and the Sources of the Right*, Vol. I, I.And.F., Madrid, 1979, págs. 653 et seq. GARCIA AÑOVEROS, J.: “The sources of the Right in the General Law Tributaria”, ob., cit., and his speech of closure “On the Constitution and the sources of the Right”, in *The Spanish Constitution and the Sources of the Right*, Vol. III, IEF, Madrid, 1979; CAYÓN GALIARDO, “The interdiction of the discrecionalidad in the management tributaria”, REDF, number 36, 1982.

<sup>65</sup> GARRIDO FAILS, F., *Treated of Administrative Right*, ed. Tecnos, vol. I, 1989, pág. 237, note on foot number 36 affirms: “During the period of the Spanish constitutional Monarchy, the statutory authority exerts *for the king*, by what the Ministerial orders were formally Real order. The new monarchic stage initiated with the designation of Rey Don Juan Carlos I has not supposed a turn to the practice of the Real Orders; instead, the decrees are *Royal decrees* in congruence with the article 62.f) Of the Constitution”.

agreements adopted by the Council of Ministers that have like formal vehicle a Decree are Regulations, but only those that have normative character<sup>66</sup>, and no, for example, other administrative acts approved by Decree or Order Ministerial like nominations or cessations. The Constitution consecrates, by the other, to effects of the procedure of his preparation, the right of individual and collective participation of the citizens in the preparation of the administrative disposals that affect them (art. 105.To).

Repair in that the content of the expression “regulation” is not limited in the valid Letter Magna, neither neither clearly in the laws, as although yes there is a hierarchical disposal of the norms emanated by the Government-Administration in the article 23.3 of the Law 50/1997, of 27 November, of the Government; in our juridical legislation does not contain a table of contents of each one of these juridical courses<sup>67</sup>; fact that generates no few problems. Between them, of hierarchical type-juridical, since although after the Law 50/1997 of the Government<sup>68</sup> and in accordance with the dogmatic juridical administrative, does not doubt of the exclusion of the circular, instructions and similar disposals of the concept of Regulation, in the practice, a cumulus of factors carries to that these can hide authentic regulations with juridical effects out of his own organisational organ or domestic.

**d)** The *titularity* of the statutory authority attributes constitutionally of direct form that no exclusive to the Government of the nation (art. 97 CE). So that they possess equally this authority the Governments or Councils of Government of the Autonomous Communities (arts. 137 and 153.To CE), all time that the Local Administration (arts. 137, 140 and 141 CE) giving place, respectively, to the state regulations, autonomic<sup>69</sup> and local<sup>70</sup>.

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<sup>66</sup> MARTÍN MATEO, R., *Manual of Administrative Right*, ed. Trivium, Madrid, 1992, pág. 136.

<sup>67</sup> Among others a lot of authors that put of self-evident this fact OF OTTO, *Constitutional right*, ob., cit., pág. 217 it affirms: “The concept of regulation in the Spanish Constitution no engloba reference any to the matter, does not allow, in other words reserve the calificativo of statutory for the norm that occupies of determinate questions and exclude it in the other”.

<sup>68</sup> In whose article 23.3 does not quote between the regulations to the "disposals of authorities and inferior organs jerárquicamente".

<sup>69</sup> Among others it can consult MESTRE THIN J.F., “autonomic Regulations and Council of State”, REDA, n. 59, 1988; MUÑOZ MACHADO, S., *Right Public of the Autonomous communities*, Vol. I, ed. Civitas, Madrid, 1982; ESCUIN PALOP, C., *The statutory authority of the Autonomous Communities*, ed. Tirant The Blanch, Valencia, 1990, ...

<sup>70</sup> Vineyard. FERREIRO LAPATZA, J. J., *Treated of Financial Right and tributario local*, ed. Marcial Pons, Madrid, 1993; EMBID IRUJO, To., *Ordenanzas and municipal regulations in the Spanish Right*, Institutes of Studies of Local Administration, Madrid, 1978; PAREJO ALFONSO, L., *The local normative authority*, ed. Marcial Pons, Barcelona, 1998; GALÁN GALÁN, To., *The autonomous normative authority local*, ed. Atelier, Barcelona, 2001.

Said titularity extends to other subjects and organs by Law. In this last sense, enjoy also of statutory authority the Legislative Cameras, the General Council of the Judicial Power and the Constitutional Court.

**And)** The CE establishes the possibility that the statutory authority of the Government and of the autonomous Communities can *enjuiciar* through the Courts. In the first case, the article 106.1 CE<sup>71</sup> does recaer the authority of the control of the regulations in the Courts without more, whereas concerning the Autonomous Communities the article 153.c) Establishes that the control of the activity of his respective statutory norms will exert it the contentious jurisdiction-administrative. By reason of the matter seems logical that it was this jurisdiction the one who occupy of said tackled, what no obsta for others like the civil, penal, labour, “by the technician of the application or by road of exception incidan directly in the control of the contrary Regulations to the laws”<sup>72</sup>.

### **3.- On the distinct types of Regulations that exist dictated by the Administration**

The regulation, norm emanated of the Administration, secondary source of Right and disposal jerárquicamente subordinated to law, admits different modalities in function of the explanatory parameter that take like reference. To know: the territorial body or independent Administration that dictate it, hierarchical order, effects that projects ... .

Between the administrative and also constitutional doctrine (although in lower degree) constitutes a frequent fact the attempt to classify the distinct demonstrations that can adopt the regulation. Without spirits to be exhaustive in his exhibition, habida explains the different typologies that the authors assume, no always coincident, will treat to expose the main modalities that are used to to aim:

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<sup>71</sup> “Article 106 CE: “The Courts control the statutory authority and the legality of the administrative performance, as well as the submission of this to the ends that justify it”.

<sup>72</sup> BASSOLS COMA, M., “The diverse demonstrations of the statutory authority in the Constitution”, ob., cit., pág. 114.

To) Regulations emanated of the territorial and institutional Administrations. Attending to the distinct entes territorial with express constitutional recognition and/or legal of the statutory authority, the regulations can be:

- *State*: the articles 97 and 106 of the CE attribute the statutory authority to the Government of the Nation.
- Of the *Autonomous Communities*: the Statutes of autonomy of the respective CCAA recognise to the Governments or Councils of Government of the CCAA statutory authority (arts. 152, 153, c) and 161.2 of the CE).
- *Venues*: in virtue of the article 137 of the CE the Local Corporations and the Deputations have autonomy for the management of his respective interests, what interprets in the sense that they also can create his own normación<sup>73</sup>. In the ordinary legislation the article 4 of the LHL recognises statutory authority to the Entes Local, Provinces and Islands. The art. 22 of said law, awards to the City council in Plenary the faculty to approve organic regulation and ordenanzas.

Amén of the entes territorial, arouses the question of if they possess statutory authority the institutional entities<sup>74</sup>, all time that the called independent public “organisations” that according to the TC detentan authority of normación own, although needed of legal habilitation, of which do use through norms or disposals that issue low different classifications: circular, resolutions, ... . It is the case, for example, of the Bank of Spain, of the National Commission of the Stock market, of the National Commission of the Electrical System. It suffice here aim the subject that will be object of development in phases more advanced of this work.

Logically, neither the process of preparation of the resultant regulations of these distinct territorial administrations and no territorial, neither the system of publication<sup>75</sup> neither, in fín, the fields of application and legitimación to resort in road of review will be the same<sup>76</sup>.

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<sup>73</sup> In this sense, GARCÍA OF ENTERRÍA, And., Course of Right ..., ob, cit., pág. 204, and MARTÍN MATEO, Manual of Administrative Right, ob., cit., pág. 135.

<sup>74</sup> GARRIDO FAILS understands that they can be of two types: Statutes and Regulations, “The sources of the Right and the statutory reservation in the project of Constitution”, in *Studies on the project of Constitution*, C.And.C., Madrid, 1978.

<sup>75</sup> Official bulletin of the State, Official Bulletin of the autonomous Community or Official Bulletin of the Province.

<sup>76</sup> CAZORLA PRIETO, L.M<sup>a</sup> and ARNALDO ALCUBILLA, And., *Subjects of Constitutional right and of Administrative Right*, ed. Marcial Pons, 1988, Madrid, pág. 575.

b) Regulations of execution, independent and of need. Prácticamente With total security, this typology of regulations is the one of greater importance and transcendence, given the important appearances that of the same fits to preach so much from the qualitative point of view like quantitative.

His construction brings cause of antaño, in particular, of the classification supported by VON<sup>77</sup> STEIN in the consistent 19th century in differentiating three classes of regulations: -*secundum legem* (executive); - *praeter legem* (independent) and -*against legem* (of need). Triología That, according to the administrative doctrine, does not have big importance in the actuality.

*Executive regulation* is that that dictates developing, complement or application of a law. In our juridical legislation does quotation to the same so much in the article 10.6 of the Law 30/1992 of Juridical Diet (“regulation for the execution of the laws”) as in the article 22.3 of the THE 3/1980 of 22 April, of the Council of State. Under a rúbrica of greater scope pronounces the Law of Government whose article 5.1.h Refers to the “regulations for the development and execution of the laws”. By his part, the Constitutional Court, in Sentence 18/1982, of 4 May, defines them by his direct and concrete links to a “law, to a group of laws, so that said law (or laws) is completed, developed, detailed, applied and filled or executed by the regulation”<sup>78</sup>.

It observes , then , like the previous concept of executive regulation gives received to a compendio heterogeneous of performances of collaboration of the law with the regulation that exceed of the appearance purely executive of that, that has arrived to tildarse, even, of executive “authority” absolutely desorbitada<sup>79</sup>.

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<sup>77</sup> VONSTEIN , *Verwaltungslehre*, Stuttgart, 2ª edition, 1985, Volume I, págs. 73 et seq

<sup>78</sup> In the same sense, the Sentences of the High court of 22-10-81 and of 4-2-82 and the Sentences of the Constitutional Court 39/1982 of 30 June and 18/1982 of 4 May. In this last can read: “... It stands out like “executive regulations” those that are direct and specifically tied to a law, to an article or articles of a law or to a group of laws, so that said law (or laws) is completed, developed, detailed, applied and filled or executed by the regulation” (F.J. 4º).

<sup>79</sup> “It is evident that this Spanish concept of Regulation for the execution of the Law or executive Regulation includes faculties of regulation of content very different. It is not the same to dictate norms to apply, detail, explain or develop the Law that *complement it* adding precepts or supposed in fact new. These are data that put of relief a conception and a practice in Spain of the statutory authority “executive” absolutely desorbitada”. GALICIAN ANABITARTE and MENÉNDEZ REXACH, “Comment to the article 97 of the Spanish Constitution”, ob., cit.,

Remember that in the first phases of the development of the statutory authority of the Monarch in France after the French revolution (from 1789 until the Constitution of 1791) and in Spain during the 19th century, the scope of said authority was basically of execution of the law. His current formulation differs –likewise– of the concept originario of the that brings his cause, as the German classical doctrine distinguished between regulation *secundum legem* (regulation for the execution of the law) and regulation *intra legem* (regulation of complement of the law).

The evolutionary process of the statutory authority executive that, as it explains us SANTAMARÍA PASTOR<sup>80</sup>, every time incorporates new formulas of collaboration law-regulation, ends in an imprecise concept of executive regulation to the that neither the legislation neither the doctrine gave sufficient answer as: 1.- It extends the content of the executive regulation without knowing clearly his linder, since they receive diverse modalities of collaboration between the law and the regulation. 2.- They create new phenomena like the regulation delegated, that equiva to a deslegalización whereas it treats of matters of scarce or invalid legal regulation.

The solution to the problem –understands the author mentioned– goes through reinterpretar the concept of executive regulation, so that it comprise the diversity of technicians of collaboration. Said notion globalizadora is the one who today know like “legislative reference”.

“By executive regulations has to understand, then, all the generated in virtue of a legislative reference, with independence of the amplitude of this”<sup>81</sup> and for whose gestation is prescriptive dictamen of the Council of state (art. 22.3 LOCE and 10.6 of the LRJAE)<sup>82</sup>. This requirement has been put of self-evident in numerous occasions by the Courts of Justice. His omission involves the nullity of the executive Regulation that pretend approve<sup>83</sup>. Treating of regulations approved by the Autonomous Communities, will be prescriptive the query to the autonomic

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pág. 183, note on foot of page number 53. By his part the recent Jurisprudence keeps a wide meaning of the executive Regulation defend his character of innovative text in the sense of explicitar rules that in the Law are billed being able to also clear concepts of the same that they are imprecise. “The innovations, obviously, require that they fulfil two conditions: that it exist legal habilitation in shape of previous law that develop and the second, that the innovation no rebase the terms of the habilitation, going against of the precepts of the enabling Law or of the rest of the legislation” (S.TSJ Of Galicia of 5-3-1999, F.J. 6°).

<sup>80</sup> SANTAMARÍA PASTOR, *Foundations ...*, ob., cit., pág. 744 et seq.

<sup>81</sup> SANTAMARÍA PASTOR, *Foundations ...*, ob., cit., págs. 743 to 745.

<sup>82</sup> The executive regulations demand the dictamen of the Council of State, like ex “guarantee in front of” of objectivity and impartiality and like guarantee of technical perfection and tarpaulin in the preparation of the same” (Foundation of first Right, STS 28-1-1997).

<sup>83</sup> Between others, SSTS 22-10-1981; 12-7-1982; 15-10-1982, etc.



consultative organs<sup>84</sup>, admitting that such dictamen was substituted by the one of a consultative upper Organ autonomic only when the Autonomous Community do not have own consultative organism (S. TSJ Of Balearic 16-6-1998).

By the contrary, the *independent regulations*, characterised by his desvinculación with the law, do not require of said formality. Like general norm consist in administrative disposals that do not develop neither complete or apply laws, but they dictate by the Administration without previous legal permission.

It is to certify that while some authors refer indistinctly to the independent or autonomous regulations, equating both terms and identifying them with the meaning that finish to expose<sup>85</sup>, others prefer to descend to a greater degree of precision in his semantic terminology. In particular, of the reading of these authors, the difference that observes between both terms is that the expression autonomous regulation reserves for some matters that the Law can not regulate and that, therefore, remain reserved to the executive, meaning that coincides with the reservation of regulations that foresaw in the French Constitution of 1958 and that, as it has reiterated, does not exist in our Country<sup>86</sup>.

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<sup>84</sup> Sentences of the Upper Court of Justice of Balearic dated: 28-6-1996, 2-7-1996 and 16-6-1998. In them it remains clear that to tenor of the foreseen in the Law 5/1993, of 15 June, the consultative organ is the “*Consell Consultiu* of the Balearic Islands” (art. Art.10.2), whose dictamen will have to issue so much in the suppositions of statutory disposals generals in execution of the law, as in the disposals that develop a legislative reference..

<sup>85</sup> Like this, for example, it TRAINS CUESTA, R., *Course of Administrative Right*, ed. Tecnos, 1986, pág. 142, it uses like a criterion sorter of the regulations, the existent relation between these and the Law, in function to which distinguishes between executive regulations and independent *or autonomous regulations* (the underlined is ours). Also, SANTAMARÍA PASTOR, *Foundations of Administrative right*, ob., cit., pág. 745, it studies “The called independent or autonomous regulations”, although when it develops the exercise of the statutory authority (p. 789) it prefers to designate them independent regulations, since in his opinion the autonomous “adjective” loans to confusion so much with the norms homónimas of the valid French system (product of the constitutional diet of statutory reservation, non-existent between us), like the regulations dictated by the Autonomous Communities or by the public entities or deprived to which the CE or the Law recognise a diet of functional independence or autonomy (for example the Constitutional court, Universities, etc.)

<sup>86</sup> In this sense, BATHROOM LEÓN, J. M<sup>a</sup>, affirms: “The independent regulation like this understood (the one who dictates the Administration without that it authorise him previously a law) distinguishes easily of other affine figures: of the autonomous regulation separates him the one who this last supposes the attribution to the Administration of an exclusive material field that the legislator can not invade, whereas the independent statutory authority is compatible with the absolute primacy of the law in any field”. *The constitutional limits ...*, ob., cit., págs. 163-164. By his part, CLAVERO ARÉVALO, distinguishes until a triple meaning of the autonomous regulation (the first that would identify with the executive regulation, the second with the independent regulation and the third with the properly autonomous regulation understood like “those norms dictated by the Administration in some matters that have been him reserved and in which the law can not regulate”. “They exist autonomous regulations in the Spanish Right?”, RAP, number 62, 1970, págs. 10-11.

To the margin of this question and given the confusion and abundant dispersion doctrinal that exists on the matter, perhaps was convenient to demarcate the main predicable appearances on the independent regulations. To know:

- They are fruit of the generic statutory authority of the Administration, attributed constitutionally to the Government (art. 97), differentiable, therefore, of the regulations dictated in execution and development of the laws.
- Nevertheless the previous, the CE does not define neither limits the acervo of matters whose regulation remains reserved to the executive.
- Under any pretext the independent regulation can vulnerar the principle of reservation of law, neither neither the principle of freezing of rank of law<sup>87</sup>.
- In general, the independent statutory authority is subjected to the CE and to the Laws so much in his configuration as in his application and judicialización.
- The scientific and jurisprudential doctrine do not doubt in recognising the existence of such regulations, being able to quote like examples the following: Code of the circulation and another rule in matter of traffic (STS 4 February 1982, 18 March 1985 and 12 November 1986); regulatory Decree of the advertising of the tobacco and drunk alcoholic in the dependent means of the State (STS 24 nov. 1980); Decree on the conditions to be Agents of Customs (STS 11 April 1981); Decree on permission of private banks (STS 14 May 1986); etc.<sup>88</sup>.

Finally the called “*Regulations of need*” are those that dictate for paliar adverse effects produced in contextual situations; transitory, that advise to approve disposals even in the supposed that they enervate determinate laws. Formally it is necessary that exist general or sectorial laws that apoderen to governmental organs or officials to adopt such measures. In this sense is to quote the L.Or. 4/1981, of 1 June, of the states of alarm, exception and place; exceptional situations contemplated in the article 116 CE or, also, but in the local field, the

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<sup>87</sup> Vineyard. CAR FERNÁNDEZ-VALMAYOR and GÓMEZ-FERRER MORANT, “The statutory authority of the Government and the CE”, RAP, number 87, pág. 193-194.

<sup>88</sup> Other examples can see in: -SANTAMARÍA PASOR and PAREJO ALONSO, *Administrative Right. The Jurisprudence of the High court*, ob., cit., pág. 69, it notices number 131; -BATHROOM LEÓN, *The constitutional limits ...*, ob., cit. Pág. 195.

article 21.1.j Of the LRL that authorises to that the mayor, in case of catastrophe or public misfortunes, can adopt necessary “and suitable measures”.

c) *Juridical regulations and administrative regulations*. This division has his cause in the distinct effects that can derive of a determinate administrative disposal.

By *juridical or normative regulation* understands all that administrative disposal that projects his field of performance to the external relations of the Administration, this is, that regulates appearances that affect to the rights and freedoms of the citizens (effects *adextra* ). Now well, whereas his put is to create rights or modify the already existent, an important sector doctrinal<sup>89</sup> understands that these juridical regulations can not conceive but like disposals of execution of a law, so that it always will be necessary that in these cases exist:

1.- Previous law that regulate the appearances that it treat .

2.- Specific habilitation of the Law to the Regulation in all and each one of the suppositions in that it do use, habilitation that will be able to consist in any one of the possible references that can give in the field of the relations of collaboration law-regulation.

What comports to conclude with the following equality:

Normative regulation or juridical = Regulation executive and complementary of the Law
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This construction doctrinal comes from of the classical doctrine German that had occasion to study, consecrated in the article 80 of the Fundamental Law of Bonn, in which it preaches the need that it exist legal habilitation or law autorizante (*Ermächtigungsgesetz*) so that they can dictate regulations in matters reserved to Law<sup>90</sup>.

<sup>89</sup> Vineyard. Following section (4.1.- Debate doctrinal).

<sup>90</sup> Fact that derives of the German distinction between material law and formal law and that today –as it says BATHROOM LEÓN, J. M<sup>a</sup>- does not have felt as the law answers anyway to a formal sense (“will expressed by means of a special and solemn procedure”) and no to a material sense. *The constitutional limits* ..., ob, cit., pág. 27.

In contrary sense, other authors, supporting in the constitutional foundation that protects the statutory authority of the Government (art. 97), they do not consider prescriptive the need of enabling law to dictate regulations that affect, develop and complement laws, but, by the contrary, since the Spanish Constitution does not allude on purpose to said formal requirement, does not have felt to invoke it<sup>91</sup>.

To the another extreme of the juridical regulation finds the *administrative regulation or of consistent* organisation in all disposal of the Administration that does not generate right to the citizens, but it produces effects *adintra*, this is, in the breast of the administrative relations, whereas it occupies of the organisational appearances of the Administration and also of the called special relations of subjection.

Linking with the problematic questions that mentioned lines backwards, it will be necessary to question if all independent regulation is administrative regulation or, if, by the contrary, the independent regulation can affect to a field of greater relations that the properly internal of the Administration.

Regarding this matter they are constatables –in synthesis- two lines of thought: that that circumscribes to the independent regulation, no needed of legal habilitation, to the own sphere of the Administration like vehicle to regulate the internal organisational relations and, by the contrary the posture of those who understand that the same amen of the relations *adintra*, can also regulate those matters that are not object of reservation of law. With this us adentramos in the subject of the relations between reservation of law and regulation to whose analysis devote the spaces that follow.

#### **4. Teoría General of the right on delegaciones legislative formal or legal references**

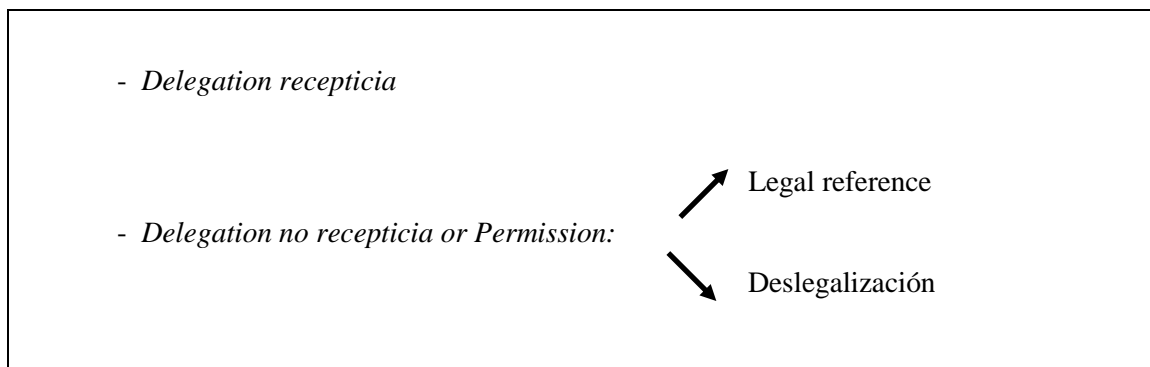
##### **4.1. Delegations Recepticias and formal Delegations or references**

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<sup>91</sup> GALICIAN ANABITARTE and MENÉNDEZ REXACH, “Comment to the article 97 ...”. ob., cit., págs. 63 et seq. OF OTTO, *Constitutional right ...*, ob., cit., pág. 235 and ss, among others.

The General Theory of the Right on the "legislative Delegation", and in particular, on the reenvío material or recepticio and, formal or no recepticio<sup>92</sup>, brought of the Private International Right, results of extraordinary utility in the field of the Financial Right and Tributario not only to explain the statutory disposals dictated by the Government in matter reserved to Law, but also to be able to understand and pose the juridical validity of all those statutory disposals and infrareglamentarias dictated by organs jerárquicamente inferior to the Government (Minister, General Directors, etc.), as well as by other Administrations called independent.

The formulation of the professor GARCÍA OF ENTERRÍA includes inside the widest gender "legislative Delegation", two categories, in the second of which goes back to distinguish between two diverse types. To know:



It splits as of a unitary conception of the term “legislative Delegation”, which nevertheless admits two variants: the delegation recepticia and the delegation no recepticia or permission<sup>93</sup>.

<sup>92</sup> Of this theory does echo the professor GARCÍA OF ENTERRÍA, in *Legislation Delegated ...*, ob., cit., págs. 198 and ss, and also in the field tributario, the caranimal: -PÉREZ ROYO, in “The sources of the Right Tributario and the new constitutional legislation”, in *Inland revenue and Constitution*, IEF, M. 1979, P. 36 and in his article "Relate between primary norms and secondary norms in Right Tributario", already quoted; and, PALAO TABOADA, C., "Reservation of Law and Regulations in matter tributaria. Considerations around the Regulation of the income tax, in *Financial Functions of the General Courts*, Publications of the Congress of Deputies, Madrid, 1985.

<sup>93</sup> Vineyard. GARCÍA OF ENTERRÍA and TOMÁS-RAMÓN FERNÁNDEZ, *Course of Administrative Right*, ed. Tecnon, 2011, pp, 262 et seq.; GARCÍA OF ENTERRÍA, in *Legislation Delegated ...*, ob., cit., págs. 198 and ss, Kept, among others authors, by NÚÑEZ-VILLAVEIRÁN And OVILO, R. “Delegations and legislative permissions in the CE”, in *The Constitución Spanish and the Fuentes of the Right*, IEF, Madrid, Vol. III, 1979, pp. 1535 et seq.

These words have been object of analysis between the doctrine tributaria of does a lot of years, although with dispersion of criterion, supported in ancient laws. These authors distinguish between “Delegation” and “Permission”, treating it like distinct phenomena, although it is true that does not exist unanimity of criterion in the definition of the same. The greater unification of criterion find it in CORTÉS DOMÍNGUEZ when it affirms that “The Spanish doctrine on the sources of the Right has come distinguishing, however, with sharpness, the two situations. The delegation gave place to the legislative decrees; the permission, instead, produced no a norm of legal rank, dictated by the executive –as it is the supposition of the legislative Decree and of the Decree-law-, but

The **Delegation recepticia** found regulation in the pristine editorial of the Organic Law of the Been number 1/1967, of 10 January, artículo 51 of the L.Or.And.<sup>94</sup> And of his exercise arise the legislative Decrees. In these cases speaks of delegation *versus* permission because the norms that create has out of law or rank of law, so that by means of the delegation elevates or assumes the rank of the norm delegated (Texts articulated of Laws of Bases and Texts Refundidos), whereas in the supposition of **the permission** of the Law to the Regulation does not produce a change of the own rank and originario of the norm remitted (regulations), but both norms remitente and remitted conserve his own sustantividad.

The **reenvío formal or no recepticio** is what the professor Of Enterría identifies like reference, in virtue of which has that a determinate supposed in fact was regulated by the norm remitted, but without that it exist the phenomenon of integration of the norm reenviada in the reenviante (of his exercise arise regulations), unlike the *reenvío recepticio* whereby the norm reenviante apropia of the content of the reenviada, that does his and to the that loans thus his own virtue dispositiva (is the supposition of Texts articulated of Laws of Bases and of the Texts Refundidos)<sup>95</sup>. In summary, the reference consists in that a Law reenvía to a normación ulterior, elaborated by the Administration

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a norm of the executive –without legal rank-, that is to say, with statutory rank”. *Legislation Tributario Spanish*, ed. Civitas Madrid, 1985, p. 33. In the same sense that already pronounced SAINZ OF BUJANDA affirming that “it Neither is hit the reference that does , with character differentiated, to “the delegations or permissions”, since the delegation seems to aim to the possibility that the Administration produce legislative decrees, whereas the simple permission seems to refer rather to the supposed that the Courts allow that matters of his competition are regulated by administrative disposals. *Inland revenue and Right*, Vol. IV, IEF, M. P. 175. CALVO ORTEGA, R. “Considerations on the legislative delegation in matter of direct taxes”, RDFHP, Vol. XIX, number 80, 1969, p. 249 et seq., it distinguishes also both terms, understanding by “legislative Delegation”, “the transfer to an organ of the executive Power, of an own authority of the Can Legisltivo delegante, conserving this the titularity and transferring only the exercise. The authority that it speaks consists in dictating acts with value and strength of law” (p. 236). Arriving to the conclusion in the page 253 that the only sense that can have the expression “legislative permission” in matter tributaria is like “instrument deslegalizador” applicable alone for those matters covered by the principle of preference of law, that is to say, regulated already by an act with strength of law but no for the precepts or points covered by the principle of reservation of law, since “the principle of reservation of law is indisponible for the ordinary legislator”. By his part GARCÍA AÑOVEROS, J. It affirmed: “Perhaps the Law considers them like synonymous (referring to the art. 11 LGT). But delegation and permission are different things and, to refer to the transfer of own competition of the Courts in matter tributaria to the Administration, the suitable expression is delegation”. “The sources of the Financial Right in the General Law Tributaria”, Magazine of Financial Right and Public Inland revenue, n. 54, 1964, p. 337. From our point of view the doctrine of the professor GARCÍA OF ENTERRÍA gone on down a big quantity of authors deletes infinity of contradictions, confusions, unilateral interpretations disperse, based, by the other, in Laws or precepts derogated in his immense majority.

<sup>94</sup> Art. 51: "The Government will be able to subject to the sanction of the Boss of the Been disposals with strength of Law with arrangement to the permissions express of the Courts".

<sup>95</sup> *Legislation delegated, statutory authority ...*, ob., cit., págs. 198 et seq.

the regulation of some elements that complement the ordination that the own Law establishes. We are, then, in front of a reenvío purely formal or no recepticio, therefore it is not a reenvío material<sup>96</sup>. In the very understood that said collaboration of the regulation or reference, always has to respect some essential principles under penalty to incur in inconstitucionalidad when regulating matters vedadas to regulation when being reserved only to the Law.

Inside the Delegation no recepticia or **permission**, it is necessary distinguir two suppositions: reference and deslegalización. It says the professor Of Enterría that big part of the confusion that exists with the concept of the "Regulation delegated", fundamentally equivocal, is precisely because it does not separate reference of deslegalización. And we can not be more than agreement with him. Like this, so that it exist **reference** is necessary that the Law foresee the material content and enable on purpose to the regulation so that it develop said matter. Now well, whenever the Law deliver to the Regulation a regulation reserved constitutionally to Law that do not contain by himself same rules will be producing a deslegalización, a manipulation of the legal rank, degrading it (or elevating the rank of the statutory regulation).

#### 4.2. “Legislative reference” versus “Deslegalización”

As it saw in the chapter I and develop in following sections, lto reference of the Law to the Regulation for the regulation of a subject reserved to Law by the Constitution, in principle is possible whenever the Law autorizante contain the principles and material limits on the matter, leaving to the Regulation the work of development and complement indispensable.

However, if the Law that contains the reference does not collect the normative content material and limits to deliver to the Regulation such regulación, produces the phenomenon of the “Reference in white” that the Constitutional Court in an important number of Sentences has equated to “Deslegalización” (on line with the theses kept by the professor García of Enterría), that will be able to reach to the whole of the regulation or to a part: in the first case, because it

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<sup>96</sup> GARCÍA OF ENTERRÍA and TOMÁS-RAMÓN FERNÁNDEZ, *Course of Administrative Right*, ed. Tecnon, 2011, pp. 279-280. Following the doctrine of these authors, other important differences between them are: that while the delegation recepticia consumes or exhausts in a sólo norm, the reference does not exhaust never in so much do not derogate the law of reference; the Administration can substitute ilimitadamente the norm remitted invoking the initial delegation that remains opened. In the delegation recepticia only can operate in favour of the Government; the reference, instead, fits in favour of any statutory norm, ministerial or even inferior.

makes a reference in white to the regulation to regulate a matter reserved, and in the second due to the fact that, treating of a particular appearance reserved to law, this remits his regulation to the regulation without referring to this part of the matter in the own Law.

Of this luck, are to distinguish the following situations<sup>97</sup>:

- a) If it exists reservation of Constitutional Law, already was of organic character, already was of ordinary character, will not be able to stir up said requirement that his regulation make by Law. So that if a Law transfers in white to the Administration matter constitutionally reserved to Law, will be a Law inconstitucional<sup>98</sup>, like consequence of a reference in white to the regulation, producing in terms of the Constitutional Court a deslegalización<sup>99</sup>.

In this regard, it is to repair in that some sector of the doctrine – LATHES MORE, J., ROIG, To.<sup>100</sup>- They consider that in this case we are not -technically speaking- in front of a deslegalización but in front of a reference in white, that nevertheless this the TC in a lot of pronouncements equates to the phenomenon of the deslegalización, treating as synonymous both terms. It considers then, that in the field of the matters reserved to law properly does not produce a deslegalización but a reference in white, in whose case prefer expressions eat: “reference in white”; “references without sufficient determination of the essential elements” or “references incondicionadas or carentes of true and strict limits”<sup>101</sup>.

The **Constitutional Court** Spanish has been cutting in this sense invoking in successive and reiterated occasions –many times with occasion of the reservation of law tributaria- the impossibility that by means of delegations produce deslegalizaciones in the matters reserved to law, vulnerándose like this the constitutional reservation via references in white to the corresponding regulation. Son To quote like examples: the S. TC 37/1981, of 16 November, in direct allusion to the phenomenon of the “deslegalización” habida

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<sup>97</sup> “Regarding the deslegalización (...) seems clear that: - His application can not effect in the matters reserved to the organic –or ordinary law-, since by principle such matters have to be regulated by norm with rank of law, in the already exposed terms. – The deslegalización finds his own field in those matters reserved formally to the law –reserves formal- in what here it does not exist a background juridical foundation that prevent the statutory regulation, since such matters if they had not been regulated by law would belong to the field typical of the independent statutory authority”. CAR FERNÁNDEZ-VALMAYOR J. And GÓMEZ-FERRER MORANT, R. “The statutory authority of the Government and the Constitution”. R.To.P., N. 87, 1978, p. 197.

<sup>99</sup> Doctrine of GARCÍA OF ENTERRÍA, And. And RODRÍGUEZ FERNANDEZ, T. Followed with profusion by the TC.

<sup>100</sup> “The reference in white does not suppose a deslegalización in technical sense”. LATHES, MORE, J. “The relation between the law and the regulation: legal reservation and remsión normative. Some conflictive appearances to the Light of the jursiprudencia constitutional”, RAP, 100-102, 1983, pp. 471- 507.

<sup>101</sup> ROIG, To. *The Deslegalización. Origins and constitutional limits in France, Italy and Spain*. Ed. Bookshop-Publishing Dykinson, 2003, p. 203, note on foot n. 78



account the Law limited to “do a reference in white to the corresponding regulation”, resulting like this a violation of the reservation of constitutional law tributaria tipificada in the articles 31.3 and 133.2 of the CE, with the consequent result to declare unconstitutional the Law impugned. Very meant has been the S. TC 83/1984, of 23 July, in whose FJ 4º, affirms that The principle (of reservation of law) does not exclude the possibility that the Laws contain references to statutory norms, but yes that such references make possible an independent regulation and no clearly subordinated to the Law, what would suppose a degradation of the reservation formulated by the Constitution in favour of the legislator. The high Court understands that lace references or legal habilitations to the statutory authority have to be such that restrict sure enough the exercise of this authority to a complement of the legal regulation that was indispensable by technical reasons or to optimise the fulfillment of the purposes proposed by the Constitution or by the own Law. This criterion appears contradicted by means of legal clauses, of the type of which now questions, in virtue of which produces a true “deslegalización” of the matter reserved; this is, a total abdication by part of the legislator of his faculty to establish limiting rules, transferring this faculty when titling of the statutory authority, without fixing not even which are the ends or objective that the regulation has to continue. By his part in Sentence 37/1987, of 26 March, reiterate that the reservation of constitutional Law forbids “all deslegalización” of the matter reserved: “it Forbids this concrete reservation of Law all operation of deslegalización of the matter or all attempt of regulation of the content of the right of private property by independent or extra «regulations legem», but no the reference of the legislator to the collaboration of the normative power of the Administration to complete the legal regulation and attain like this the full effectiveness of his mandates...”. In S TC 3/1988, of 21 January, establishes : “there is not, therefore a «deslegalización of the matter» regarding the fixation of the types or behaviours sancionables, but a reference to the regulation that leaves to except the essential and necessary elements to guarantee that it will not produce an independent statutory regulation and no subordinated to the Law (FJ, 10). The S. TC [112/2006, 5 April 2006](#) again incide on the references that give place to “a true deslegalización of the matter reserved, this is, a total abdication by part of the legislator of his faculty to establish limiting rules, transferring this faculty when titling of the statutory authority, without fixing not even which are the ends or objective that the regulation has to pursue».

They exist nevertheless other Sentences in which this same Court when referring to the references in white omits the term deslegalización: like this in Sentence number 19/1987 of Constitutional Court, Plenary, 17 February 1987, FJ 4: “As it occurs with others of the reservations of present Law in the Constitution, the established by the art. 31.3 C.And. («Only they will be able to establish personal provision or patrimoniales of public character with arrangement to the Law») does not have another sense that the one to ensure that the regulation of determinate vital field of the people depend exclusively of the will of his representatives, without that this exclude the possibility that the Law can contain references to norms infraordenadas, but yes the one of that, by means of such references, cause, by his indeterminación, **a degradation of the reservation formulated by the Constitution** in favour of the legislator (STC 83/1984)”. Or also in Sentence number 99/1987 of Constitutional Court, Plenary, 11 June 1987, the Court foresees that in the art. 103.3 C.And. It establishes a reservation for the regulation by Law of diverse fields of the public function, between which explains the «Statute of the public civil servants». In this field, therefore, will have to be only the Law the source introductora of the norms demanded by the Constitution, with the consequence that the statutory authority will not be able to deploy here innovando or substituting to the legislative discipline, not to being him neither possible to the legislator have of the same reservation through **references incondicionadas or carentes of true and strict limits**, as this would comport a desapoderamiento of the Parliament in favour of the statutory authority that it would be contrary to the constitutional Norm creator of the reservation

b) If what produces is a freezing of the rank of law like consequence that a determinate matter comes regulating by norm with legal rank, the reference in this case operates excepcionando the principle of the freezing of the rank<sup>102</sup>. That is to say, if a matter comes regulated by law, so that in the future it can innovarse or substitute his material content will have to keep the legal rank, unless a back law stir up said freezing by means of the reference to the regulation<sup>103</sup>.

Of this luck, the back law of equal or greater juridical rank, that abrogate or reform the existent will be able to enable so that they dictate statutory precepts, that, through the phenomenon of the reference, integrate in the own material regulation that the law contains. That is to say, it has to exist a "contrarius actus" of the same rank, then, habida explains the principle of normative hierarchy that governs in our juridical legislation (art. 9.3 CE), the consequence -in contrary case- will be the nullity of the statutory disposal by infringement of the principle of primacy of the law or of hierarchy of norms.

According to the principle of the "contrary " actus" a matter regulated by the Law with imperative character can not be regulated in accordance with the regulations without the timely deslegalización of that, as the purely executive nature of the Decree, carries like requirement that the regulation of the matter in him established do not affect to the substantial content of the Law that pretends to develop, for being fundamental principle of the statutory authority of the Administration that to his time has some intimately tied limits at the beginning of legality, consequence of the cual can not never have on matters reserved to the laws, without permission of the legislative power (reservation of law), neither neither dictate norms that infrinjan the established in others of upper rank (primacy of the law or hierarchy of the norms): STS 24-4-1984.

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<sup>102</sup> GARRIDO FAILS, *Treated of Administrative Right*, ob., cit., pág 234, understands that the singularity of the phenomenon of the deslegalización consists, among others supposed, in that the new decrees (consequence of the norm with strength of law to the Government so that this agree Decrees in matters previously regulated by Law) "will be able to regulate unencumbered the matter object of the previous laws. In sum: there has been a "deslegalización" of such matter, or, what is the same, a "degradation" of the laws that regulated it. Now well, it is lawful this legislative technician after the Constitution?. The doubt, at least, arouses ; and, of course, it has to refuse in matters "reserveace to law". The previous question is answered by other authors, of the way that follows: "The deslegalización is a pathological consequence, enfermiza, of the administrative activity, that in matter tributaria has to refuse with all emphasis. Like this, Martín Bassols, considers that the constitutional legislation closure definitively the phenomenon of the deslegalización". ROSEMBUJ, T., *Elements of Right Tributario*, ed. Bluma, 1982, Barcelona, pág. 37.

<sup>103</sup> By all GARCÍA OF ENTERRÍA and TOMÁS-RAMÓN FERNÁNDEZ, *Course of Right ...*, **ancient year** ob., cit., pág. 243. It affirms FERREIRO LAPATZA, J.J. : "The first (observation) does reference to the called effect of freezing of the rank, by which a matter remains reserved to the Law no by reason of a constitutional norm but by disposal of the own Law that regulates it or, in some cases, the reservation for her. The regulation, in these suppositions, can not regulate this matter no for going against of the Constitution, that at all says, but for respecting the rank of the legal norm. Only another back law can deslegalizar again this matter attributing to the regulation the possibility to regulate it. Until this suceda the rank of the norms that regulate it appear 'frozen' to the level of the Law", "The principle of legality and relate them Law-regulation ...", ob., cit., pág. 879.

In Sentence of the T.S. Of 24-4-1984, it considers "invalid" the Decree 412/1982 of 12 February by violation of the reservation of formal law in matter of management tributaria. The quoted decree attributed competitions liquidadoras to the organs of inspection. "... This assumption of norms liquidadoras by part of the Inspection can not by the road of regulation attribute them, because such measure will suppose a rape of the principle of normative hierarchy -to what could add a contradiction to the legislative will, that manifested negatively on the alluded assumption in the process member of parliament of the Law of Reform of the Procedure Tributario-". Like this then , the Court understands that the functions of the organs of management and inspection are delimited in the LGT and therefore, as it exists a reservation of formal law, will not be able to the Administration exert the statutory authority to "dictate disposals that suppose infringement of other norms of upper hierarchy, by his natural limitation of that authority, of not being able to contend in his regulations precepts "against legem" (SSTS 3-2-1963; 13-12-1977, 24-11-1990)".

#### **4.3. The called "Regulations delegated"**

Perhaps we would have to begin advancing that the figure designated "Regulation delegated" is a construction doctrinal of periods happened today into disuse. This juridical construction is mattered of Italy<sup>104</sup> and between the Spanish authors of Financial Right and Tributario had quite predictcamento whereas the ancient article 11 of the LGT of 1963 alluded to the delegations and legislative permissions in matters of court tributario reserved to Law. In particular, this article consented that the regulation of the theementos essential of the tribute was susceptible of delegation or permission whenever precisploughsn by Law its criteria and principles that had to follow for his determination.

The doctrine tributaria understood by "Regulation delegated" aquél that dictates in virtue of a habilitation of the legislative to the Government to develop matters covered by the principle of legality or the one of preference of Law<sup>105</sup>. This is, that that can "discipline matters covered by

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<sup>104</sup> See regarding this matter CALVO ORTEGA, R., "Considerations on the legislative delegation in matter of direct taxes", R. DFHP, number 80, 1969, pág. 260.

<sup>105</sup> PÉREZ ROYO, F., it employs this term (Regulations Delegated) to designate those suppositions in that the law authorises on purpose to a secondary source to regulate a matter that, in absence of said permission , would

the reservation of law or because has strength of active law”<sup>106</sup>. The professor Fernando PÉREZ ROYO<sup>107</sup>, in an attempt of classification distinguished like this between the normal executive regulations (limit to dictate norms for the execution of the laws in matter that of his are typically statutory) and Regulations delegated, that develop his activity of integration or modification of the legislative discipline in matters covered by the principle of legality or the one of preference of law. In this case the habilitation has to be specific and especially contain a predeterminación of the content. So that these last divided to his time in regulations delegated in matter covered by the principle of legality and regulations dictated in virtue of a simple delegation (reservation of formal law).

Some authors of Right Tributario that treaton originariamente the subject denied the possibility that they can make delegations and permissions on said elements, due to the fact that it weighs a reservation of constitutional law on the matter<sup>108</sup>. A contrary position in this regard it keeps PÉREZ ROYO, gone on down TEJERIZO LÓPEZ<sup>109</sup>, for the one whois yes is possible the figure of the regulation delegated whenever the habilitation was specific "and -especially, when it treat of matters covered by the principle of legality tributaria, that is to say, no of mere deslegalización- contain a predeterminación of the content, according to the own diagram of the delegation to that before we have alluded"<sup>110</sup>.

In the actuality, derogated the General Law Tributaria of 1963 and substituted by the Law 58/2003 that does not contain quotation any on the regulations delegated neither on permissions,

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have been vedada to the Regulation. "Relations between primary norms and secondary norms in Right Tributario", in *The Constitution and the Sources of the Right*, Vol. III, IEF, Madrid, 1979, pág. 1660.

<sup>106</sup> CALVO ORTEGA, R. "The regulations tributarios in the State Legislation Spanish", HPE, n. 17, 1972, p. 59.

<sup>107</sup> *The Constitution and the Sources of the Right*, ob., cit., pp. 41 and ss, 47-48.

<sup>108</sup> Like this GARCÍA AÑOVEROS, affirms: "The norm of the art. 11.1 and 2 of the LGT produces another consequence: it recognises the possibility of delegation in matter tributaria strict, what in my opinion is contrary to the Fundamental Laws and in concrete to the art. 9 of the Fuero (...). The competition of the Courts in this matter is not susceptible of delegation, neither neither the prerogative of the Boss of the State. (...). Thus, we have to consider that the norm on delegation contained in the art. 11 LGT is unconstitutional". "The Sources of the Right in the LGT", R.DFHP, number 54, 1964, págs. 338-339. And equally, to trial of CALVO ORTEGA the essential elements of the tribute (fact imponible, taxpayer, parameter and type of gravamen) can not be object of legislative delegation. "Out of the quoted elements, any another of the tax (or of the obligation impositiva) can be object of legislative delegation"... "Considerations on the legislative delegation in matter of direct taxes", ob., cit., pág. 273. And also of the same author, "The regulations tributarios in the Spanish legislation", H.P.And., number 17, 1972, pág. 60. "So that -it affirms And.GONZÁLEZ- although by means of the call deslegalización does not empower to the executive power to dictate norms with strength of formal law, but simply authorises him by the law to regulate by means of decree a series of questions in matter previously reserved to the formal law, the deslegalización is not admissible inside the field of the article 31 of the Constitution. However, it argues in the doctrine if it fits the possibility that the Administration, having the pertinent legislative permission, regulate by means of statutory norms the matter protected by the principle of preference of law of the article 10 LGT". "Comments to the art. 6 LGT", ob., cit., págs. 66-67.

<sup>109</sup> "The sources of the financial Right to the light of the Spanish Constitution", in *The Constitution and the Sources of the Right*, Vol. III, IEF, M., 1979, p. 2030.

<sup>110</sup> "Relations between primary norms and secondary norms in Right Tributario", ob., cit., pág. 1660.

delegations, etc., consider that it has to be to the general theory of the executive Regulation without more, that already have studied in this work and to which remit us. In definite and to our trial, such regulations delegated were not but executive regulations in puridad of concept. Thus it will be necessary to be to the limits and conditionings of the exercise of the statutory authority of the Government to dictate executive regulations; limits between which weighs to a large extent the principle of reservation of constitutional law in matter tributaria. We consider that so much the previous doctrine like the valid, what have treated to save is that for the matters reserved to law in the field tributario very uniquely for the essential elements of the tribute do not fit a “regulation”; a normación”, via regulation, but it has to be the Law the one who regulate such appearances. And to our trial, what pretended precisely the article 11 was salvaguardar this maximum and no on the contrary. This is, avoid that the regulation could invade these matters reserved to law by the Constitution. Therefore, in the line of the professor GARCÍA OF ENTERRÍA, have defended his utility, with all the lacks formulated.

Andn the present, understand, would not have to follow posing the speech of this subject in terms that the delegation or permission is not possible for matters reserved to Law by the CE and yes for which are subject at the beginning of preference of Law as: the ordinary practice; the basic legislation (12.2.To LOFAGE) and the jurisprudential interpretation today consolidated, commission to remember us that also for the regulation of the matters reserved constitutionally to Law (even in matter of reservation of organic law and also treating subject matters to an absolute reservation<sup>111</sup>) admits the reference of the Law to the regulation always in complementary terms (like secondary source of the right) and no substitutive and whenever no innove in matter reserved to legislative discipline. In matter tributaria is doctrine consolidated by the TC that with regard to “some” essential elements of the tribute and of another provision patrimoniales of public character fits the call to the Regulation in terms of auxiliary or complementary intervention.

“Even in regard to the fields reserved by the Constitution to the regulation by Law is not, then , impossible an auxiliary or complementary intervention of the Regulation, but always –as it said in the juridical foundation 4º of the STC 83/1984, of 24 July- that these references ‘are such that restrict, sure enough, the exercise of this authority (statutory) to a complement of the legal regulation, that was indispensable by technical reasons or to optimise the fill of the purposes

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<sup>111</sup> On this subject pronounces in extensive the professor BATHE LEÓN the one who develops how in penal matter (of always considered like absolute reservation) exist diverse executive regulations of development, having been also admitted by sentences of the TC. *The constitutional limits...*, ob., cit., pp. 38 and 41.

proposed by the Constitution or by the own Law' (STC 99/1987, of 11 June, in which it signals, F.J. 3°).

Thus, to our trial, to preserve the principle of legality tributaria, where it is necessary to load the inks is in the need that the Law contain the material regulation of the substantive appearances reserved to Law, well by the CE, well by the ordinary legislator and, that to his time, the norm with legal rank remit to the regulation so that, in his case, complement of form auxiliar the regulation. By means of this reference; supposed that it exist reservation of constitutional Law, makes possible jurídicamente open the matter to the complement statutory and, in the case of the preference of law, excepciona the principle of the freezing of the legal rank.

#### **4.4. Limits of the theory of the legal reference of the Law to the Regulation:**

##### **Reference**

##### **Legal and reservation of constitutional law. Remisión Legal and formal reservation of law.**

Up to now, we have analysed the generic frame in which it develops the general theory of relative Public Right to the relations between reservation of law and statutory authority. Without prejudice to all the previous, his concretion will depend on the branch of scientific knowledge on which project, then, as we know, the statutory authority extends to all the fields of the Juridical Legislation. Of this luck, the constitutional and legal configuration that weigh on a determinate matter will influence decisively in the determination of the scope and limits of the exercise of the statutory authority.

The fact that on the core or rather, cores, of the financial matter and tributaria weigh a material reservation and/or formal<sup>112</sup> of Law, definitely conditions the paper that the regulation, secondary source of the Right, can have in the regulation of such subjects.

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<sup>112</sup> Fix that so much the basic appearances like the formal criteria of Right tributario regulate by Law, freezing in this way the juridical rank of his regulation. Like this for example, the distinct tributes have his own regulatory Law, all time that will have to be to the warned in the LGT, as well as in the rest of Laws that could be of application (Law 30/1992, L. 43/1995 of the IS, etc..)

## A) Legal reference and reservation of Constitutional Law

If it exists reservation of constitutional law on a matter, in virtue of the general Theory on formal delegations the legal reference allows his opening to the regulation. This is, the reference enables to the Administration to dictate a regulation remitted, without the which this could not go in in the concrete matter because it is him vedada<sup>113</sup>.

Seated the previous general doctrine, the disquisitions pose from antaño because the Spanish Constitution does not specify the degree of intensity with which the law has to regulate the matters reserved to legal rank and therefore does not establish the limits that operate so that a regulation can develop via reference a rule reserved to law. Lack that has tried paliar by the doctrine establishing distinct classifications to the use that treat to determine the limits of the legislative reference to the regulation. Between them they stand out the following:

- a) Authors that distinguish between reservation of organic and ordinary law.
- b) Authors that distinguish between reservation of absolute and relative law.
- c) Thesis that refutan the “literal interpretation” of the reservation of constitutional law (absolute and relative reservations).
- d) Thesis doctrinales that advocate the análisis of each reservation of law in particular..

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<sup>113</sup> SANTAMARÍA PASTOR, affirms “The entrance of the regulation in the matters reserved, by lawful that it was, is something in some abnormal form, that only can be valid if the law on purpose requires to the Government for this”. *Principles of Administrative Right General I*, Iustel, 2009, p. 267. BATHROOM LEÓN, J. It concludes in this sense “that the permission or habilitation of the law to the Regulation in the matters reserved to the law is indispensable requirement so that this can take part”. *The constitutional limits of the statutory authority*, ob., cit., p. 36. In the same sense, SÁNCHEZ MORÓN affirms: “This does not want to say that in the matters reserved to the law was not possible any intervention of the regulation. (...) The collaboration of the regulation in these cases is admissible and even usual. But for this requires a habilitation expresses of the legislator, that is used to to designate reference or reenvío normative of the law to the regulation”. *Administrative right. General part*. Ed. Tecnos, 2011, p. 197. Tomás-Ramón FERNÁNDEZ, affirms that “Such legal habilitations only require when it treats of incidir by means of statutory norms in the field of the matters reserved to the Law by the own Constitution or when the matter that pretends regulate from now on by simple regulations comes it being by a norm with rank of Law. “Reflections around the statutory authority of the Government. Magazine of Public Administration”, n. 34 1992, p. 33. By his part, FERREIRO LAPATZA, J.J., -“The principle of legality and relate them Law-regulation in the legislation tributario Spanish”, ob., cit., pág. 879-, it affirms: “Well, we understand that in matters reserved by the Constitution to the Law does not fit to speak of freezing of rank. The matter is reserved to the Law by the Constitution and the regulation can not go in to regulate it but in virtue of permission expresses of the Law”. As they affirm the authors GAMERO MARRIED And FERNÁNDEZ BOUQUETS “the majority of the doctrine considers that it is precise that the Law contain a specific normative habilitation –the legislative reference-“. *Basic manual of administrative right*, ed. Tecnos, 2006, p. 102.

**To) Reservation of organic law and Reservation of ordinary law:** With the approval of the CE the authors FERNÁNDEZ-VALMAYOR And GÓMEZ-FERRER<sup>114</sup> formulated a distinction in relation to the reference like technician to enable to the Government to exert the statutory authority. Like this, with regard to the matters reserved to organic law, understand that they have to be excluded of the possibility of reglamentar such matters, -excluded of the delegation recepticia (law delegante and legislative decrees)-, by what with greater reason have to be excluded of statutory regulation. Obviously, “the affirmation refers to the material field reserved to the organic law, that no always comprises the whole of the matter”<sup>115</sup>. No like this in the supposition of the matters reserved to ordinary law, in which the reservation refers to the need that the legislative establish at least a basic regulation.

This thesis has been refutada by BATHROOM LEÓN , J.M. The one who considers “abandoned” this construction since after the CE there has been an alluvium of regulations of development also in matters of organic law<sup>116</sup>.

b) **Reservation of absolute and relative law.** An especially followed doctrine to effects to determine the scope of the regulation to develop matters reserved to law by the Constitution fixed in the own literal terms foreseen in the CE when it does use of the constitutional reservations, contraponiéndose like this the literal expressions of the type: “by means of law”, “the law will regulate”, “of agreement to law” (relative reservations), with the expression “only by law” (art. 53.1 CE) that would indicate that in this case the law has to regulate entirely the matter not fitting the collaboration of the regulation<sup>117</sup>. It goes on down so much the distinction that can tildar of classical (absolute reservation and relative reservation) extrapolated of the Italian

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<sup>114</sup> CAR-FERNÁNDEZ and GÓMEZ-FERRER, “statutory Authority of the Government and the Constitution”, ob., cit., págs. 194 et seq

<sup>115</sup> CAR-FERNÁNDEZ and GÓMEZ-FERRER, “statutory Authority of the Government and the Constitution”, ob., cit., págs. 195.

<sup>116</sup> According to this author, so much the legislation like the TC (SSTC 177/1985, 137/1986), and also the practice has showed the need that a lot of organic laws are developed by regulation. BATHROOM LEÓN, J. M<sup>a</sup>, *The constitutional limits ...*, ob., cit., pp. 40-41

<sup>117</sup> They are exponents of this theory, among others: VILLAR PALASÍ-VILLAR-EZCURRA, *Principles of Administrative Right*, Volume I, Madrid, 1982, p. 182; GALICIAN ANABITARTE, To., MENENDEZ REIXACH, To., Comment to the article 97 of the CE...”, ob. Cit., pp. 74 et seq., GARCÍA MALE, R., *Reservation of law and statutory authority*, Barcelona, 1988, pp. 114 et seq. It Participates also of this conception, although establishing some determinate peculiarities in this regard, distinguishing between absolute reservation, reservation reinforced and relative reservation, TORNORS MORE, J., "The relation between the Law and the Regulation. Legal reservation and legislative reference. Some conflictive appearances to the light of the constitutional Jurisprudence", RAP, 100-102, 1983, pp. 473 et seq.



doctrine and sustentada by the doctrine of the TC Spanish and by the own scientific doctrine<sup>118</sup>.

c) *Thesis doctrinales that refutan the “literal interpretation” of the reservation of constitutional law* (absolute and relative reservations).

Scientific doctrine very qualified puts in cloth of trial, questioning flatly the existence of this classification that distinguishes between absolute reservations and relative reservations of law mattered of the Italian doctrine and converted almost in dogma by big part of the scientific doctrine and also very seconded by the Constitutional Court.

Like this, it affirms that this distinction based in criteria of literal interpretation of the constitutional terms is “perturbadora”, considering that “the CE does not employ distinct literal formulas to diversify several types of reservations, but by reasons purely stylistic” (SANTAMARIA PASTOR<sup>119</sup>). By his part José BATHE understands that the efforts doctrinales based in the literal terms expressed in the CE when establishing the reservation of law “do not drive to a safe result”: “the merely juridical analyses-formal of the constitutional precepts are, at least, insufficient to explain the intensity of the reservation of law”<sup>120</sup>. Of this luck, affirms SÁNCHEZ MORÓN, “Not even is correct to distinguish between some absolute reservations and other relative, as it does part of the juridical doctrine, since in reality the solution is not the same in each case, without that it exist a species of scale of intensity of the reservations of the law, that graduates in the practice in function of diverse criteria”<sup>121</sup>. Concluding the professor FERREIRO LAPATZA that “the reservation of law is not absolute neither relative, simply reserves of law”, signalling the risk that by means of the relative absolute/distinction drive “and in fact like this has

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<sup>118</sup> In this sense SANTAMARÍA PASTOR affirms: “the Italian doctrine is used to to use a classification between suppositions of absolute reservation and relative reservation”. “We think, however, that all classification in this point is perturbadora”. *Foundations of Administrative Right*, ob, cit., 1988, pp. 784-785. José BATHE LEÓN affirms: a sector of the Spanish doctrine come to apply between us a quite wanted differentiation in the Italian doctrine: the distinction between reservation of absolute law, ... and a reservation of relative law”. SANTAMARÍA PASTOR.

<sup>119</sup> SANTAMARÍA PASTOR affirms: “the Italian doctrine is used to to use a classification between suppositions of absolute reservation and relative reservation”. “We think, however, that all classification in this point is perturbadora”. *Foundations of Administrative Right*, ob, cit., 1988, pp. 784-785.

<sup>120</sup> BATHROOM LEÓN, J. M<sup>a</sup>, *The constitutional limits ...*, ob., cit., pp. 38 and 41.

<sup>121</sup> *Administrative right*, ob, cit., p. 198.

sucedido, to a weakening of the requirements of the principle of legality collected in the Constitution”<sup>122</sup>.

***d) Thesis doctrinales that advocate the analysis of each reservation of law in particular.***

Although with distinct nuances, the authors that disagree with regard to the existence of the criterion sorter that exists between relative reservation and absolute reservation, bet by the specific analysis and individualizado of each one of the constitutional reservations to know the degree of collaboration of the regulation with the law in matters reserved constitutionally to law.

In this sense, the professor José María BATHE LEÓN, the one who refuta the theory that distinguishes between relative absolute/reservation, makes along his work an exhaustive analysis of the distinct constitutional reservations, fitting extract like result, in his own terms that: "To greater degree of affectation of the regulation of a lower fundamental right possibilities of reference of the Law to the Regulation"<sup>123</sup>. By his part, SANTAMARÍA PASTOR establishes a series of general principles (brought of the German and Italian jurisprudence) –to our absolutely useful trial- to determine the *quantum* admissible in the reference of the law to the regulation to regulate matters reserved to law<sup>124</sup>. As in definite as it affirms SÁNCHEZ MORÓN, “in the reality tampoco is posibland give a univocal answer of the intensity of the reservation of law or his vertical extension, this is, until where has to deepen the law in the regulation of a matter reserved and from where is lawful to remit to the regulation the complementary rule or of detail”<sup>125</sup>.

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<sup>122</sup> FERREIRO LAPATZA, J. *Institutions of Financial Right*, ed. Marcial Pons, 2010, p. 225.

<sup>123</sup> BATHROOM LEÓN, J. M<sup>a</sup>, *The constitutional limits ...*, ob., cit., p. 104.

<sup>124</sup> The problem, for him, is in determining the *quantum* admissible of this reference. In his opinion this can not depend on the different literal formulas fixed in the CE ("with arrangement to law", "by means of law", "the law will regulate", "in virtue of law", ...) As all classification of this type is perturbadora, so that "the criteria to fix the *quantum* admissible of reference to the regulation are the same for all the cases" and besides "can not fix with absolute precision". Thus it proposes that they follow a series of criteria used by the German constitutional jurisprudence and Italian. To know: 1.- Criterion of *the complitud* of the regulation (the Law only can remit to the statutory authority the regulation of the appearances adjectives, collateral or conexos to the core of the matter. 2.- Criterion of *the mensurabilidad* of the reference, that comports the fulfillment of three requirements conexos: that the reference was express, concrete and specific, and delimited. 3.- Criterion of *the previsibilidad* of the reference (the norm remitente has to contain material criteria or guidelines finalists of regulation). 4.- Criterion of *administrative execution* (the reference will be able to have an elder reach when the matter reserved was of the unsuspecting to the fulfillment, execution or administrative surveillance). *Foundations of Administrative Right*, ob., cit., págs. 783 et seq.

<sup>125</sup> *Administrative right*, ob, cit., p. 198.

Although minority, also between the doctrine tributaria exist voices that keep these theses. Already in the year 1969 the professor CALVO ORTEGA considered that it was more convenient and exact, in place to split of the classical absolute reservation and relative “analyse each one of the reservations separately (penal, tributaria, etc.) and through an interpretation teleológica and logical, determine the essential elements of each “matter reserved”<sup>126</sup>.

## **B) Legal reference and formal reservation of Law**

A distinct question is to determine which scope has the regulation to collaborate in the regulation of matters reserved no constitutional but formally to Law and, in particular, know what is what occurs when the Law goes in to regulate matters that previously have not been object of a material reservation of law.

In front of a current doctrinal that, as we saw in the chapter I, considers that in these cases the regulation does not have other limits that the respect to the Law in the matter and that, therefore, except that the Law it prohíba the regulation can act of independent form (OF OTTO, GALICIAN ANABITARTE and MENÉNDEZ REXACH), understand with SANTAMARÍA PASTOR, that also is these cases the prime Law by his upper rank and by the nonexistence of reservation of regulation in our juridical legislation, thus, the scope of the performance of the statutory authority will come determinate, fundamentally, by the criteria computers of the regulation of the matter that feels the own Law (program of normative ordination of the matter, having the appearances that have to be regulated, his intensity, questions and level of regulation that delivers to the regulation, ...), without prejudice to the specific clauses of reference<sup>127</sup>.

With general character, the reference consists in that "a Law remits to a normación ulterior that it has to elaborate the Administration, although without assuming as its own his content, the

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<sup>126</sup> CALVO ORTEGA, R. “Considerations on the legislative delegation ...”, ob., cit., p. 262-263

<sup>127</sup> SANTAMARÍA PASTOR, *Foundations of Administrative Right*, ob., cit., págs. 796-797. However, as it gives off implicitly of the reading of this author understand that the first requirement is the one who more weighs, especially when it treats of generic references contained in Final Disposals of the Law:

"It suffices with reading the whole of the text of a regulatory law with general scope of a matter for percatarse immediately which are the questions that pretends are regulated or no, with which criteria and which of them deliver to the statutory authority. Of this deduces the perfect uselessness of the generic clauses of statutory development that are used to to insert between the Final Disposals: what the Regulation will be able to or not doing is something that deduces of the general content, of the context of the Law, no of a final statement that is not but a luck of summary, perfectly superfluo, of the whole of references, explicit or implicit, contained in the articulated"

determination of some normative elements that complement the ordination that the own law delegante establishes"<sup>128</sup>.

The problematic, arouses , however, because when the juridical legislation regulates the subject of the delegations and permissions does not clear sufficiently this extreme<sup>129</sup>, unlike what succede in<sup>130</sup>: the Right groins, in that it speaks of the "*skeleton legislation*", in Italian Right (art. 76 of the Italian Constitution<sup>131</sup>), and in German Right (article 80 of the Fundamental Law of Bonn<sup>132</sup>).

The only exception produced , precisely, in the Right Tributario, when establishing the previous article 11 of the LGT that when tratploughs of delegations or legislative permissions referred to matters contained in the article 10.To) of the previous LGT (essential elements of the tribute), requireían thes principles and contents that had to follow for his determination<sup>133</sup>. It can not desconocerse, with everything, the utility of this article whereas it forbade delegations in white in favour of the Administration.

#### **4.5. Legal antecedents of the legislative reference in matter tributaria**

Inside the Juridical Legislation Spanish the figure of the remisión of the law to the regulation was foreseen with general character in the Organic Law of the State and, with special character, was also foreseen in the previous General Law Tributaria (Law 230/1963, of 28 December)<sup>134</sup>.

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<sup>128</sup> GARCÍA OF ENTERRÍA, And., *Legislation delegated, statutory authority and judicial control*, Ed. Civitas, 1998, pág. 197.

<sup>129</sup> Fix that the article 41 of the L.Or.And. *supra* Quoted only does allusion to the permission expresses of a law so that the regulation can regulate those matters that are of the exclusive competition of the Courts.

<sup>130</sup> On all these appearances, vineyard. GARCÍA OF ENTERRÍA, And., *Legislation delegated, statutory authority and judicial control*, ob., cit., págs. 184 et seq., author that, referring to the delegation recepticia, affirms: "the Law has to contain the guidelines 'basic' of the norm to elaborate, the principles of the new ordination of which this has to be mere development. (In the English Right speaks of *skeleton legislation* -legislation skeleton- as in the French of *lois cadres*, although one or another are pure legislative formulas, developed by simple Regulations".

<sup>131</sup> Article 76: "The exercise of the legislative function can not be delegated to the Government more than with determination of the principles and managerial criteria, only by a time limited and for determinate objects".

<sup>132</sup> Article 80: "The federal Government, a federal minister or the Governments of the Ländern can be enabled by a Law to dictate juridical regulations. The Law will have to determine the content, the end and the extension of said habilitations".

<sup>133</sup> In the same sense GARCÍA OF ENTERRÍA and TOMÁS-FERNÁNDEZ, *Course of Right ...*, ob., cit., págs. 251 and 264, and also, of the first author, *Legislation delegated ...*, ob., cit., págs. 186 et seq.

<sup>134</sup> Article 11 LGT: "The delegations or legislative permissions that refer to the matters contained in the section to) of the article 10 of this Law will require inexcusablemente the principles and criteria that have to follow for the determination of the essential elements of the respective tribute". The new LGT 58/2003 does not contemplate any precept in such sense.

It praysba like this the article 41 L.Or.And.: "The Administration will not be able to dictate contrary disposals to the laws, neither regulate, except permission expresses of a Law, those matters that are of the exclusive competition of the Courts".

In virtue of this precept (content in Organic Law and no in ordinary Law like sucedía in the previous legislation<sup>135</sup>), would produce an opening of the matters reserved to law to the field of the regulation whenever it exist "permission expresses of a Law" and, add, on line with the thesis sustentada by the professor García of Enterría<sup>136</sup>, whenever the norm with legal rank contain the substantive regulation of the matter remitted<sup>137</sup>.

In the field of the special legislation, descolló the article 11 of the LGT of 1963, not to contemplating any equivalent precept in the valid law 58/2003 General Law Tributaria, article whose literal diction was the following:

Article 11 LGT: "The delegations or legislative permissions that refer to the matters contained in the section to) of the article 10 of this Law will require inexcusamente the principles and criteria that have to follow for the determination of the essential elements of the respective tribute".

By means of this precept, the LGT in addition to referenciar clearly the need that it existed "permission expresses", established the obligation that the norm that remits contained the substantive regulation (criteria and principles) of the matter, in this concrete supposed, of the essential elements of the tribute. With everything, repair in the lacks of the quoted article in the measure in that, on the one hand, his juridical location was in an ordinary Law and, by another, his material field reduced to the essential elements of the tribute when it also weighs

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<sup>135</sup> Article 26 of the LRJAE, of 26 July 1957. By his part, the article 27 of the same Law, moved these possibilities to the field tributario when establishing: "The Regulations, Circular, Instructions and other administrative disposals of general character will not be able to establish penalties neither impose exactions, taxes, canons, rights of propaganda and other similar loads, except those cases in that on purpose it authorise it a Law voted in Courts". The consequence of such norm was, as it affirms VICENTE-ARCHE, F., "The avalanche of statutory norms in matter tributaria, dictated well by the Government, well by the Ministry of the Treasury, by means of Ministerial order". Notes to the Spanish Right, Vol. I, *Principles of Right Tributario*, of Antonio Berliri. Now well, whereas such opening produced in an ordinary Law, never could vulnerar the Fuero of the matter, that is to say, the principle of legality, in such a way says CORTÉS DOMÍNGUEZ, that exist reasons founded to think that both precepts (26 and 27) were inconstitucionales. *Legislation Tributario Spanish*, Ed. Civitas, Madrid, 1984, pág. 34. In this line the generality of the administrative doctrine and tributaria considered the inconstitucionalidad of both articles.

<sup>136</sup> *Legislation delegated, statutory authority and judicial control*, ed. Civitas, Madrid, 1998.

<sup>137</sup> A more extensive comment on the quoted article 41 PRAISE can see in CALVO ORTEGA, R., "The regulations tributarios in the state legislation Spanish", HPE, n. 17, 1972, pp. 53 et seq.

constitutional reservation on other appearances of diverse type (exemptions, Budgetary Right, public debt,...)<sup>138</sup>.

Thus, possibly it had been desirable, that in place to abrogate said precept had extrapolated -as minimum- to the rest of financial matters and tributarias that the Constitutional Letter reservation to Law. His importance can not desconocerse because, de facto, is the thesis in that they support the Courts of Justice to accommodate the requirement of the reservation of Law to the current circumstances, of a world cambiante where increase the qualitative and quantitative difficulties in the application of the tributes, and where every time is more required the collaboration of the regulation, habida explains the complexity of the financial phenomenon.

## **5. Existent relation between reservation of Law and Regulation: the horizontal distribution and**

### **Vertical of matters reserved to Law..**

The relation that exists between reservation of law and statutory authority is not, in way any, peaceful in the doctrine. The content of the same goes through to give answer to a series of interrogantes, to which neither the doctrine, neither the jurisprudence confer unit of deal. In said line will be to pose –at least- the following questions:

1.- In which terms can a regulation give development to a matter reserved constitutionally to law?. On the theory of the vertical distribution of matters between Law-Regulation.

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<sup>138</sup> GARCÍA AÑOVEROS, J., "The sources of the Right in the LGT", ob., cit., pág. 335, it affirms: "The regulation of the article 11 L.G.T., it constitutes an attempt limiter of the possibilities of delegation". By his part, CORTÉS DOMÍNGUEZ, M., *Legislation tributario general*, ob., cit., pág. 35, it says: "Historically, the art. 11 of the LGT supposed an attempt of limitation to the delegations in matter tributaria, as whereas the art. 10 of the LRJAE speaks only of "delegation expresses", the LGT, in addition to presupposing it, adds that the norm delegante will have to require "inexcusamente the principles and criteria that have to follow for the determination of the essential elements of the respective tributes". It seems to prevent like this the delegation in white, but treats of a very feeble limitation because it is inserts in an ordinary law without value vinculante for the future legislator".

2.- They require formalities to such end?. This is: it is necessary reference, habilitation or legal permission so that the regulation can develop and complement a law?.

3.- Concerning those matters no on purpose reserved to law, proceeds his regulation by means of independent regulation?. It is feasible his explanation to the light of the theory of the horizontal distribution of matters between Law-Regulation?.

#### **4.1.- Debate doctrinal**

See which has been the replaced of the authors that have known of the matter, to the questions posed. For this, will systematise the information under the analysis of the two following subjects that, in our opinion, constitute the two main cores of interest. To know:

- a) The theory of the reference or legal habilitation
- b) The content of the independent regulation

*To) On the theory of the legal habilitation like necessary condition to dictate executive regulations.*

Previously we have put of self-evident how the administrative doctrine understands by executive regulation no only that that dictates in execution of a law, but also developing and complement of the same.

It remain, then , already explicit, a first consequence, cual is, that the executive regulation brings cause necessarily of a law, this is, his scope projects on matters that, in spite of being reserved to law, require of a juridical development by means of which detail and detail determinate appearances, then , known is by all, the “generality” of the law like one of the main shots that characterise it. The object of study, fits to place it, therefore, under the designated structure of “vertical distribution of matters”, as which the primary or basic appearances have to regulate

by means of norm with rank of law, reserving to the regulation the function of complement and/or development<sup>139</sup>.

Now well, to carry to term said tackled, the law, has to enable or authorise to the regulation? Or, what is the same, is necessary legal habilitation to regulate by means of regulation matters reserved to law?.

Regarding this matter, we advance, they exist two currents doctrinales, without prejudice to the speciality or details that each author makes:

To. 1) Authors that consider prescriptive that the law authorise to the Administration to dictate regulations that develop or complement a law (theory of the legal habilitation). In this line position , among others, GARCÍA OF ENTERRIA, And., BATHROOM LEÓN, J. M<sup>a</sup>, ...

To. 2) Against they pronounce those who, inspiring in the asepsis of the Spanish Constitution in this regard, consider that the regulation does not require legal permission to develop, complement or execute the dictated of a law (OF OTTO, I., GALICIAN ANABITARTE And MENÉNDEZ REXACH, FISH BEARD, G., ... ).

To. 1) Giving gone in to the first of the postures mentioned, the author to the one who definitely owes the construction (although mattered of Germany) and profusion of the theory of the legal habilitation is to the professor Eduardo GARCÍA OF ENTERRÍA.

This juridical construction comes from of the German doctrine developed in the 19th century (LABAND and JELLINEK) based in the preparation of a substantive concept of law, consistent in equating law in material sense with that disposal that contains juridical propositions. So that it would understand by material law all norm approved by the Parliament whose effects project on the sphere of the freedom and property of the citizens, that is to say, that had effects *ad extra* of the merely organisational relations of the Administration.

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<sup>139</sup> For a more detailed study of said theory can see: - GALICIAN ANABITARTE and MENÉNDEZ REXACH, "Comments ... ", ob., cit., págs. 192 et seq.; - OF OTTO, *Constitutional right* ..., ob., cit., págs. 230 et seq.



Like this, said law would be "formal" in the measure in that it approved by the Parliament, but also material "" by reason of his content (*Rechtsgesetze*). By the contrary, those laws that, in spite of approving equally by the representatives of the village, affected to the relations of organisation of the legal person of the State, were formal laws but no material (administrative laws: *Verwaltungsgesetze*)<sup>140</sup>.

The laws in material sense, habida explains of the transcendence of his content (matters reserved to law) would need of legal habilitation to be susceptible of development by means of regulation, whereas, to sensu contrary, the administrative regulations depended exclusively of the will of the Monarch. Requirement that that, as it saw, remains on purpose tipificada in the article 80 of the Fundamental Law of Bonn. In said legal habilitation has to fix the content, purpose and extension of the habilitation conferred.

On line with the exposed dogmatic construction, GARCÍA OF ENTERRÍA, And.<sup>141</sup>, it defends that concerning all those matters reserved to law, the regulation only has fit like development or execution of the same (executive regulation), for whose existence will have to produce a legislative reference or habilitation of the law to the regulation so that it develop it or complement it<sup>142</sup>.

To his time, by *the effects that such statutory disposals cause* the author mentioned distinguishes go in: juridical or normative Regulations and administrative Regulations. The first are those whose effects project in the sphere of the rights and freedoms of the citizens. With regard to his content, regulate, with general character matters that exceed of the internal or domestic field of the Administration, creating right and obligations to the citizens. Even more: in the supposed that it treat of administrative questions, as for example the called special relations to be able to, whenever of his regulation derive a limitation, modification or suppression of the substantive rights of those who integrate it, will not have fit the independent regulation, but by the contrary, the regulation whereas complementary disposal of a law<sup>143</sup>.

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<sup>140</sup> Regarding this matter it can see SANTAMARÍA PASTOR, *Foundations ...*, ob., cit., págs. 703 and ss, and BATHROOM LEÓN, J. M<sup>a</sup>, *The constitutional limits ...*, ob., cit., pág. 45..

<sup>141</sup> - *Course of Administrative Right*, ob., cit., págs. 192-193

- *Legislation delegated, statutory authority and judicial control*, ob., cit., págs. 213 et seq.

<sup>142</sup> It affirms OF OTTO, I., that according to this theory the only that practically is not reserved to law are the own organisational relations of the Administration, whenever they do not affect to the rights and freedoms of the citizen, in whose case would have to be developed by executive regulation. *Constitutional right ...*, ob., cit., pág. 234.

<sup>143</sup> A wider comment regarding this matter can see in GARCÍA OF ENTERRÍA and TOMÁS-RAMÓN FERNÁNDEZ, *Course of Right ...*, ob, cit., págs. 197-199. In the page 198 quotes to LÓPEZ BENÍTEZ for the

Like this then, the juridical regulations project his field of performance, with general character, in the external relations to the Administration (*adextra*). Now well, whereas they affect to the rights and freedoms of the citizens, creating new rights or modifying the already existent, said regulations can not understand but as complementary of the law, so that it always will be necessary that in these cases exist: 1.- A law that carry out the primary regulation of the subjects; 2.- Legislative reference of the law to the regulation in all and each one of the suppositions in that it do use of the same. Therefore, as sure enough it concludes in this regard, according to this doctrine “the juridical regulation is not possible more than as executive regulation, and besides, enabled; the administrative regulation, instead, is or can be independent and spontaneous regulation”<sup>144</sup>.

After the alluvium of opinions doctrinales poured by a sector of the administrative and constitutional doctrine with regard to the matter treated, José M<sup>a</sup> BATHROOM LEÓN<sup>145</sup>, sustains openly –although matizando some extremes- the theory of the legal habilitation like condition *sine qua non* so that the regulation can develop matters reserved to law, going out like this to the step of the main critical that, next will see, have formulated him to the theory of García of Enterría. In synthesis, makes compatible the authority originaria of the statutory power (derived of the Spanish Constitution) with the thesis of the derivative statutory authority of the habilitation of the law to take part in the matters reserved to the legislative, since the CE awards to the legislator the primary political decision. To his seem, can not speak of a statutory authority “originaria” in the fields reserved to law, because this would involve that the Government would have power to delegate in Ministers or inferior organs the statutory development, all time that would have to establish a priori the material field of the statutory reservation. Therefore, the permission or habilitation of the law to the regulation is indispensable requirement so that the regulation can take part in those matters reserved to law.

Without spirit to be exhaustive in his exhibition, yes can quote other authors partícipes of the theory of the legal habilitation so that the regulation can develop matters reserved to law. To

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one who the concept of special relations to be able to could reduce to the civil servants, to the soldiers, to the prisoners, to the confined in public centres of health and to the pupils or students of public centres.

<sup>144</sup> OF OTTO, I., *Constitutional right ...*, ob., cit., pág. 237.

<sup>145</sup> *The constitutional limits ...*, ob., cit., pág. 32 et seq.

know: SANTAMARÍA PASTOR<sup>146</sup>, GARRORENA<sup>147</sup> or, also, SÁNCHEZ MORÓN, the one who understands that to the light of the article 97 of the CE has to exist a previous legal habilitation so that an administrative performance was correct, having to besides adjust to the form and ends that explicitly determine in the enabling legal norm<sup>148</sup>.

**To. 2)** Against of the theory of the legal habilitation explicitada, some authors disagree concerning the need that for the statutory development of those matters reserved to law was prescriptive legal habilitation. In this sense, OF OTTO, I<sup>149</sup>, questions seriously the thesis that in the CE exist a general reservation to regulate the matters that affect to the freedom and to the property, construction that does not understand but like reminiscence of the German theory of the law in material sense. The key of vault that sustenta his dogmatic construction consists in the constitutional foundation of the statutory authority, from here that, if this finds in the CE same, does not need legal habilitation, what only would have felt if said authority was something different of the executive authority and besides, lacked constitutional foundation.

Author that arrives more far, even, when affirming that when there is reservation of law, the regulation is vedado, this is, the fact that a regulation was subjected to reservation of law means that the regulation is illicit constitutionally to regulate said matter, so that if possible his statutory development is because his content does not affect to the that is reserved to law<sup>150</sup>.

In the same sense, other authors<sup>151</sup> criticise the consistent thesis in that the Law “enables” to the Government to dictate Regulations, «as equivale to keep *that the normative power of the Government to apply and develop the laws is a power “delegated” by the Courts*», alleging that the CE of 1978 attributes directly to the Government the statutory authority «by what this

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<sup>146</sup> *Foundations of Administrative Right*, ob., cit. págs. 783 et seq.

<sup>147</sup> GARRORENA, *The place of the Law in the Spanish Constitution*, C.And.C., Madrid, 1980, pág. 100.

<sup>148</sup> SÁNCHEZ MORÓN, “Notes on the administrative function”, in *The Spanish Constitution of 1978*, directed by To. PREDIERI And GARCÍA OF ENTERRÍA, And.

<sup>149</sup> OF OTTO, I., *Constitutional right ...*, ob., cit., págs. 234 and 237 to 240.

<sup>150</sup> Only it recognises the need that it exist habilitation when of the same structure of the reservation, for basing in the binomial base-development, require a previous law and reduce like this the regulation to a to executive or complementary function. OF OTTO, *Right ...*, ob., cit., pág. 239.

<sup>151</sup> GALICIAN ANABITARTE and MENÉNDEZ REXACH, “Comments to the article 97 of the CE”, ob., cit., pág. 193.

*can exert always (“in accordance with the CE and with the laws”) without need of “habilitation” any, save, of course, when the law the prohiba».*

Like this also, FISH-BEARD, G., for the one who of the statutory authority gubernativa planned in the article 97 of the CE does not fit to infer the need of specific habilitations, as the quoted precept “what demands is an administrative performance subjected to the fundamental norm and to the primary norms, that is to say, in accordance with the juridical legislation, but no the need of specific habilitations”<sup>152</sup>.

### *b) Content of the called independent Regulation*

Following with the thread argumental that chairs this section, our interest centres now in the study of the material field of the independent regulation. This is, exists a band of subjects of prescriptive statutory regulation?, it is defendible the performance of the executive to regulate any one of the no reserved matters to law?.

Also in this point the controversy is served. In essence, they are observable two currents doctrinales. To know: those who defend that they exist susceptible own fields of regulation gubernativa (b.1) and, by the contrary, the authors that defend the possibility that the Government dictate regulations in all those no reserved matters to Law (b.2).

**b.1)** A rooted tradition doctrinal proclaims the existence of a circle of own matters of the independent regulation, that can concretise in which they follow:

- The authority autoorganizativa of the Administration.
- The special relations of subjection.
- The positive provision of the public Administrations to the administered.

In the present, a meant sector doctrinal, GARCÍA OF ENTERRÍA and FERNÁNDEZ RODRÍGUEZ, NUÑEZ-VILLAVEIRAN, sustentan the theory that the independent

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<sup>152</sup> FISH-BEARD, G., *The Spanish Constitution of 1978*, ed. Fernando Torres, Valencia, 1981, pág. 104.

regulations only have to regulate the relations *ínsitas* in the administrative organisation, as well as the called special relations to be able to, whenever these do not affect to the basic rights of the citizens<sup>153</sup>. His dogmatic construction comports implicit the idea that that that exceed of the internal field of the Administration has to be regulated by law to the *incidir* in the rights and freedoms of the citizens<sup>154</sup>.

But, no implicitly, but explicitly it pronounces in this regard FISH-BEARD, G., the one who does not recognise spaces *exentos* of upper Right, neither ordinary legitimacy in favour of the Administration. “It is unsustainable the category of the independent regulation –affirm- if this supposes the existence of empty spaces, of areas *exentas* to the upper Right in which the administrative norm can move with whole freedom, since it prevents it the principle of constitutionality”<sup>155</sup>.

**b.2)** they Are many the authors that, by the contrary, disagree on the existence of a circle of matters reserved to the executive. The common denominator to all they is that the independent regulation can regulate all those no reserved matters constitutionally to law, since the article 97 of the CE does not restrict the field of the statutory authority. Against of the theses of the professor GARCÍA OF ENTERRÍA, denies *tajantemente* the possibility that the three matters mentioned *supra* (organisational authority of the Administration, special relations of subjection and positive provision of the Administration), belong to the objective field of the statutory authority of the Government, for finding constitutionally reserved to Law. Like this, among others, CAR FERNÁNDEZ-VALMAYOR and GÓMEZ-FERRER MORANT<sup>156</sup>, GALICIAN ANABITARTE and MENÉNDEZ REXACH<sup>157</sup>, SANTAMARÍA PASTOR<sup>158</sup>, BATHROOM LEÓN<sup>159</sup>.

Sure enough, it is unquestionable that the greater part of these questions are reserved to Law. In the first case, “organisational field of the Administration”, because like this it has it the article

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<sup>153</sup> GARCÍA OF ENTERRÍA and FERNÁNDEZ RODRÍGUEZ, *Course ...*, ob., cit., págs. 192-193, 197-198.

<sup>154</sup> In alike sense OF OTTO, *Constitutional right ...*, ob., cit., pág. 234. This excessively wide interpretation of the subject fundamental rights to reservation of law can see in NÚÑEZ-VILLAVEIRAN, “Delegations and legislative permissions in the Spanish Constitution”, in *The Spanish Constitution and the sources of the Right*, ob., cit., pág. 1549.

<sup>155</sup> FISH-BEARD, Gregorio, *The Spanish Constitution of 1978*, ob., cit. Pág. 103.

<sup>156</sup> “The statutory authority of the Government and the CE”, ob., cit., págs. 188-194.

<sup>157</sup> “Comments to the article 97...”, ob., cit., págs. 190-191.

<sup>158</sup> *Foundations of Right ...*, ob., cit., págs. 791-794.

<sup>159</sup> *The constitutional limits ...*, ob., cit., págs. 203 et seq.

103.2 of the CE, that prays: “The organs of the Administration of the State are created, governed and coordinated in accordance with the Law”. In the second quoted supposition, “special relations of subjection”, the greater part of the same if no all they, equally supeditan his existence to legal regulation<sup>160</sup>. For example, the statute of the public civil servants (art. 103.3); Statute of the Strengths and Bodies of Security of the State (art. 104.2); Statute of the Judges and Magistrates (art. 122.1) and the one of the Public prosecutors (art. 124.3), etc<sup>161</sup>.

NOTE: In spite of the apparent contradiction of this theory with the theses of García of Enterría with regard to the field typical of the independent regulation, that this last author only conceives to regulate the organisational relations of the Administration (including as a lot in the same the suppositions of regulations of the relations of special supremacy), is to certify that, according to the professor Of Enterría: 1. In no case said regulation will have to affect the basic rights of the interested and, 2. These organisational relations are reserved to the Law in the article 103.2 CE. But the Administration, by means of organisational regulations, exercises a faculty of autodisposición on himself same to fulfil the public ends that by the CE assign him (art. 103.1). It can not forget it affirms “that the own Constitution bills some rules of administrative organisation (arts. 97, 103, 104, 107, etc.).

And it concludes: “inside this constitutional and legal frame the Administration autodispone of his own device when configuring his organisation, does use of a “authority organizatoria” that is consustancial to his political responsibility”<sup>162</sup>.

Finally, also in the third quoted case (“positive provision of the public Administrations to the administered) can observe said reservation of law, although with lower intensity. Since it treats to regulate the “rights of economic and social character” that the CE recognises, seem the own that, at least, the basic regulation of rights so important like the planned in the Chapter III of the Tít. I of the same “Principles rectoros of the social and economic politics” make by means of Law<sup>163</sup>.

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<sup>160</sup> It does not happen us careless that, as it affirms BATHROOM LEÓN,, “1º. It can not speak without jumping to the rigour of a juridical category designated “special relations of subjection”, because there is not any common denominator in these relations that allow to build a peculiar juridical diet. 2º. The general rule is that in each one of the called special relations of subjection governs the reservation of law”. *The constitutional limits ...*, ob., cit., pág. 207.

<sup>161</sup> Vineyard. SANTAMARÍA PASTOR, *Foundations of Administrative Right*, ob., cit., pág. 793.

<sup>162</sup> *Course of Administrative Right*, ob., cit.

<sup>163</sup> See the reasoned justification that on this point make CAR FERNÁNDEZ-VALMAYOR and GÓMEZ-FERRER MORANT, “The statutory authority ...”, ob., cit., págs. 191 to 193.

Under this same prism, some studios of the subject refer to the problem through the study of the **horizontal distribution of matters between law and regulation**. His conclusions, in the subject that affects us, consist in admitting the possibility of the independent regulation to regulate all those matters no on purpose attributed to the law, that have not been regulated by norms of such rank<sup>164</sup>.

OF OTTO, I., author that equally knows on the theories of the horizontal and vertical distribution of matters between Law and Regulation, concludes tajantemente that, since the statutory authority of the Government comes on purpose recognised in the CE, this has constitutional permission to regulate by himself same any matter whenever there is not a legal reservation, neither neither prevent it a law<sup>165</sup>. Whenever, it abounds, “it have not produced or it produce the formal reservation when being regulated by law (freezing of rank)”<sup>166</sup>.

In the same sense can read to BAENA OF FORTRESS And GÓMEZ-FERRER<sup>167</sup>, all time that to BASSOLS COMA, the one who going more far understands that although for the legitimacy of the independent regulations demands that the Constitution have not subjected determinate matters to absolute or relative reservation of law, fits to admit the called independent regulations in those matters in that it exists a reservation of improper law, or initial preference of law, regulation that caducará from the moment in that it interpose the law<sup>168</sup>.

By his part, PAREJO ALONSO, JIMÉNEZ WHITE and ORTEGA ÁLVAREZ, confirm the existence of the independent regulation no circumscribed to the organisational or domestic circle of the Administration, since the article 97 of the CE, does not restrict the field of the

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<sup>164</sup> GALICIAN ANABITARTE, MENÉNDEZ REXACH, “Comments ...”, ob., cit., págs. 190-191.

<sup>165</sup> *Constitutional right ...*, ob., cit., pág. 236.

<sup>166</sup> CAR FERNÁNDEZ-VALMAYOR and GÓMEZ FERRER, “The statutory authority of the Government ...”, ob., cit., pág. 194.

<sup>167</sup> BAENA OF FORTRESS and GÓMEZ FERRER, “Reservation of law and statutory authority in the new Spanish Constitution”, in *The Spanish Constitution and the Sources of the Right*, I.And.F., Vol. I, pág. 285.

<sup>168</sup> BASSOLS COMA, M., “The diverse demonstrations of the statutory authority in the Constitution, RAP, number 88, 1979, pág. 130.

statutory authority<sup>169</sup>. The independent Regulation –consider- is an ordinary phenomenon, that exists in the reality, and is a constitutional and legal norm, whenever it respect the planned limits in the Spanish Constitution and in particular, the planned in the article 23.3 of the Law of the Government<sup>170</sup>.

In view of the important dispersion doctrinal, suit with SANTAMARÍA PASTOR<sup>171</sup> that the subject is still pending of a frank “treatment and in depth”. The solution could come of the hand of the contentious jurisprudence-administrative and constitutional, as it aims he same. However, until the moment, neither the High court neither the Constitutional Court have followed a uniform line in the time, seeding an important confusion and causing that the authors support in ones or others of his demonstrations in function that they adjust in elder or lower measure to his own interpretations. In the following question analyse said jurisprudential guidelines.

#### **4.2 Jurisprudential Doctrine (Contentious-administrative and Constitutional).**

##### **To) On the concept of executive regulation and his scope**

The relation of existent complementarity between the Law and his administrative norm of development, the executive regulation, is put of self-evident reiteradamente by the contentious jurisprudence-administrative. In his approaches stands out like common denominator the conceptuación of the regulation whereas norm always subject to the law and to the rest of the juridical legislation; I complement indispensable for the correct execution of the law, that, in occasions, will be able to go further to be mere executor of the same (STS 18 January 1997).

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<sup>169</sup> “Before on the contrary –they affirm these authors- his quotation together with the general and primary function of the executive power: the direction –in addition to the external- of the inner politics, of all she without exclusions, bends to a contrary interpretation to such restriction”. *Manual of Administrative Right*, ob., cit., pág. 260.

<sup>170</sup> Said extremes are:

- No regulation of matters object of reservation of law (“*to contrary*, then , the matters that are not object of such reservation are accessible to the statutory norm”).
- No typification of norms with rank of law.
- No typification of crimes, lacking or administrative infringements, neither establishment of penalties or sanctions, neither neither imposición of tributes, canons or other loads or personal provision or patrimoniales of public character, without prejudice to his function of development or collaboration regarding the law”. *Course of Right ...*, ob., cit., págs. 261-262.

<sup>171</sup> SANTAMARÍA PASTOR, *Foundations ...* , ob., cit., pág. 749.



To elder abundamento, is observable how the High court bets by the paper of the executive regulation always folded to the law, that, in function, of course, of the problems posed in each one of these sentences, goes further of a simple application of the law, as like demonstration of the executive power (headline of the statutory authority), the regulation serves to articulate the development and complement of the law (SSTS of 23 June 1970, 1 June 1973, 18 July 1981, 12 March 1982<sup>172</sup>, 28 October 1995<sup>173</sup>, 18 and 28 January 1997<sup>174</sup>, 19 February 1997, 7 April 1997<sup>175</sup>, 12 June 1997<sup>176</sup>).

In this line arrives more far the Constitutional Court in Sentences of 30 June 1982<sup>177</sup> and 4 May 1982, assuming inside the concept of “development” the note of the “innovation”<sup>178</sup>.

So much the High court like the Constitutional have admitted, in occasions, the theory of the legal habilitation according to which the executive regulation dictated developing of a precise law of a habilitation or previous permission by part of this. Like this, they can see the Sentences

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<sup>172</sup> Considering 3º. “That proceeding the Regulation of the Organ that has attributed the statutory authority, and being this a discretionary authority, has to recognise to the Administration a full freedom to dictate these disposals, and thus, while no infrinja the Law that develops, will be able to or dictate a General Regulation, or several Regulations that regulate each one of the skilled educations, always and in when such Regulations save the restrictions that the Law imposes, in this case concrete, ... “.

<sup>173</sup> Considering 8º. - “The statutory authority that to the Government confers the article 97 of the Constitution has to be exerted in accordance with this and with the Laws, understanding by these neither only the positive right neither only the norms of upper rank, but the juridical Legislation like system, ... “.

<sup>174</sup> 1. a) The executive regulation is that that develops a law, or complements it (Foundation of first Right, STS 28-1-1997).

<sup>175</sup> Foundation of Right 8º.- “(...). The statutory norms, like normative product subordinated to the law, no only do not have to contradict the forecasts of this (in virtue of the principle constitucionalizado of normative hierarchy), but they have to keep, functionally speaking, in the field of the normative group that come to complement or develop, chaired by the law cabecera of said group, without that it can therefore the regulation be used for, desbordando said field, resolve extraneous problems to the own object of his material regulation”.

<sup>176</sup> Foundation of Right 1º.- “(...). The regulation complements to the Law that develops in all that that allow to ensure the suitable application of the law”.

<sup>177</sup> “The coincidence of material regulations in the relation Law-Regulation, in which this assumes the normative development, that complements or details the text of the law, does not mean the negation of the note of “it innovativo” like one of which preach , rightly, to define what is regulation and no execution, as innovator is also, from the perspective calificadora that study, the development of previous norms” (Juridical Foundation 11).

<sup>178</sup> It sentences 39/1982, of 30 June: “that the coincidence of material regulations in the relation Law-Regulation in which this assumes the normative development, that complements or details the text of the law, does not mean the negation of the note of “innovativo” like one of which preach rightly to define what is the regulation and no the execution, as innovator is, also, from the perspective calificadora that study the development of the previous norms. Normative development, distinguishes of application in the diagram of the distinction between regulation and act”.

of the High court of 11 April 1981<sup>179</sup> and of 12 June 1997<sup>180</sup>, all time that the following pronouncements of the Constitutional Court: Sentences 18/1982, of 4 May<sup>181</sup>; 35/1982, of 14 June<sup>182</sup>, 42/1987, of 7 April. This last, doing echo of the S. TC 83/1984, of 24 July affirms that “The reservation of Law does not exclude the possibility that the Laws contain references to statutory norms, but yes that such references make possible an independent regulation and no clearly subordinated to the Law, as this last would suppose to degrade the essential guarantee that the principle of reservation of Law comports, like form to ensure that the regulation of the fields of freedom that correspond to the citizens depends exclusively of the will of his representatives”.

#### **b) On the independent regulation and questions conexas**

With base in the controversy on the possible effects that generates the regulation very *adextra*, very *ad intra* of the Administration, the STC of 11 April 1981, revalidating the thesis mattered in Spain by GARCÍA OF ENTERRÍA, distinguishes between juridical or normative regulations and administrative regulations, in function of the effects that of the same derive, doing depend the degree of autonomy of the statutory authority of the Administration, “as it exert *ad intra* (that is to say, with ends purely autoorganizativos) or *ad extra* (what sucede when it regulates abstractamente right and obligations of the citizens in situation of general subjection)”.

According to this theory it would be necessary to distinguish, of a side, those regulations that project his effects further of the domestic field of the Administration; norms that, whereas they

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<sup>179</sup> CDO. 3º.- “(...), as in the first case will be able to dictate the designated independent regulations, that are those that do not found in a previous legal habilitation, and govern in the internal or domestic field of the administration, whereas in the second will find us in front of the executive regulations, characterised because they develop a previous law... “.

<sup>180</sup> Foundation of Right 1º. “(...). But the fault of reservation in favour of the statutory authority, does not prevent that the Administration can dictate regulations, previous legal habilitation.

<sup>181</sup> Juridical foundation 4º.- “This appearance of collaboration between the law and the regulation in the ordination of a matter, however, only purchases true virtualidad in relation with those regulations in which it stresses the idea of execution or development of the law, and at the same time the requirement of a more specific legal habilitation.”

<sup>182</sup> In this Sentence and in the previous (18/1982, of 4 May) the High court assumes the vertical distribution of matters between Law-Regulation.

affect to the rights and obligations of the citizens, require of a primary regulation with rank of law, being able to dictate for his development executive regulations (previous legal habilitation) and, of the another side, would remain limited the material field of the independent regulation to the internal field of the autoorganización administrativa, more the relations of special subjection. This scope conferred to the independent regulation revalidates in back Sentences of the same jurisprudential Organ dated in: 31- of October and 2 December 1986, 27 February 1997.

Nonetheless, it is not this a doctrine that have done mella in the generality of the jurisprudential pronouncements, but, by the contrary, a cast of Sentences of the High court defend a distinct approach of the material scope of the independent regulation. Like this, under a wider conception in this regard, sustains that this will be able to regulate all those no comprised matters on purpose in the field of the constitutionally attributed reservation to Law (SSTS 10-3-1982, 12-2 and 12-11-1986 and 28-1-1997). So that “The Public Administration can exert said authority (statutory) no only developing of the laws or legislative principles, but also when it do not exist a norm of upper rank on the matter, because it is not possible infringir a non-existent law, and when the Administration regulates a no governed matter by legal norms, neither subject to legal reservation, no infringe any principle of normative hierarchy and acts, therefore, legitimately”<sup>183</sup>.

More far it arrives, in this line argumental, the Sentence of the TS of 28 January 1997 when affirming that “The independent regulations by the contrary regulate matters no comprised in the field of the reservation of Law: from here that the scientific doctrine more qualified teach that the independent regulations serve to regulate all the relative to the administrative organisation, as well as to regulate the exercise of powers that to the Administration was them conferred discrecionalmente”<sup>184</sup>. Like this also the Constitutional Court in Sentence 108/1986 of 29 July, where refuta the theory that the unsuspecting statutory authority to the Government have determinate objective limits (statutory relations of subjection inside the Administration, organisational appearances or developments procedimentales and those matters that, by his cambiante nature or by the need of an adjust newspaper to the reality can not be frozen in a rank

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<sup>183</sup> (Sentence of the High court of 10 March 1983, Considering 3°).

<sup>184</sup> Foundation of first Right.

of law of more difficult modification and acceptance), admitting, therefore, the validity of the regulation to regulate all those no reserved matters to law.

**4. Implicaciones of the theory of the legal reference. His application in the actuality. Follow-up of the same by the Spanish valid Jurisprudence, especially by the Constitutional Court and by the High court.**

In consequence with all the previous, position us in favour of the theory that defends the legal habilitation so that the regulation can regulate matters reserved to Law, then , without leaving of desconocer that the statutory authority is originaria of the Government (art. 97 CE), is not less true that the Letter Magna awards to the legislator the primary political decision. In this sense, the Law has to superimpose to the performance of the executive in all those appearances that are him reserved, and, in his case, if they require of concretion, development, complement, the same Law will have to contain a reenvío formal or reference to the regulation, so that this can exert such functions, clearing the material principles of his regulation and having the scope of his development. They are, therefore, arguments in pro of our position, the following:

1.- The Law is the main source of the juridical Legislation, habida explains the existence of the principle of the legal primacy, key of vault of the State of Right and only conditioned by the CE. Principle that complete with the one of normative hierarchy tipificado in the article 9.3 of the Letter Magna.

2.- The Article 97 of the CE attributes the statutory authority to the Government. Therefore, it is a direct authority or originariamente conferred, but next establishes the diction of this precept that the same will have to exert as the foreseen in the CE and in the Laws. What means the subordination of the Regulation to the CE and to the legal disposals, so that, will not be able to go direct neither indirectly against the had in the same, having to attend, likewise, to his dictated.

3.- In our Constitution does not exist constitutional reservation of Regulation, this is, does not consecrate a reservation of matter to the statutory authority as it has said the TC in Sentence of 4-5-1982. Before on the contrary, recognised the primacy of the Law, like expression of the popular will, that can regulate all the matters have been or no object of

reservation of law<sup>185</sup>. By the contrary, the Letter Magna yes collects on purpose the principle of reservation of Law, as it is very known.

Unfortunately, and as we have had opportunity to do concrete references, in our juridical system of sources of the Right does not foresee the theory of the legal reference to the regulation to develop matters reserved to Law (understood like a species of the "legislative delegation"). Recapitulando, according to the pointed theory, if a matter is reserved to law, so that the regulation can take part in his regulation will be necessary: 1.- That the law contain the material regulation of the subject, 2.- That remit to the regulation so that this develop and complement the matter.

Still when it is true that this second requirement had plasmación in the juridical Legislation (art. 41 it PRAISE and ancient 11 LGT), the need that the Law, anyway, contain the material regulation reserved to Law does not have received formal in the same. Like exception to the rule, have seen that was the today derogated article 11 of the LGT. Without prejudging cost it juridical of the precept, that is evident, his application is very restricted since only it refers to the permissions and delegations to regulate the essential elements of the tribute, when they exist another cumulus of financial matters reserved equally to Law by the CE, and when -besides- his legal location is in an ordinary Law. Thus, it would not be of more than it extrapolated this rule -as minimum- to the rest of matters that the Constitutional Letter reservation to Law. His importance can not desconocerse because, de facto, is the thesis in that they support the Courts of Justice to accommodate the requirement of the reservation of Law to the current circumstances, of a world cambiante where increase the qualitative and quantitative difficulties in the application of the tributes, and where every time is more required the collaboration of the regulation, habida explains the complexity of the financial phenomenon.

Underline, therefore, that his traslación has made by the Jurisprudence in two subjects of crucial importance:

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<sup>185</sup> CAR FERNÁNDEZ-VALMAYOR and R. GÓMEZ FERRER MORANT, "The statutory authority of the Government and of the Constitution", RAP, number 87, pp. 184 and 187.

1.- With regard to the collaboration of the Regulation for the regulation of the matter tributaria reserved to Law by the Constitution<sup>186</sup>. Like this, the Constitutional Court, in diverse previous Sentences and others of force *rabiosa* does to rest the possibility that also in the supposition of the essential elements of the tribute (base imponible, type of gravamen) and in another provision patrimoniales of public nature (quantities), the Regulation can collaborate in the regulation of these subjects, whenever the one who remit formally to the regulation the regulation of the same, contain the substantive criteria and limits, limiting the performance of the same<sup>187</sup>.

2.- No less important is the subject of "The statutory authority of the Minister and of the organs jerárquicamente inferior to the same". The last Jurisprudential tendency, whose brecha opens the famous Sentence 185/1995 allows that also the organs *infralegales* have statutory authority, although derivative, so that in front of a previous thesis to this date that limited the performance of the statutory authority of the Minister to the field of his Department, the T.C. It confirms the authority of the same to dictate Ministerial orders of direct development of laws, accommodating like this Law to reality, as it was done fed up frequent in the practice that, likewise; it finds recent protect juridical in the article 12.2.To) of the LOFAGE. All the previous, and is here where want to put the accent, will not be possible but like consequence of the application of the theory of the legal reference, to tenor of which the Law will have to contain a reference to the norm *infralegal* for the development and execution of the matter, all time that the material regulation of the subject.

The problem is that neither the Jurisprudence consolidates a general theory in this regard, but, by the contrary, limits to resolve "case to case", with which, only making an analysis detailed of the same extract, as common denominator, that the Courts of Justice<sup>188</sup> to resolve on the legality of the regulations and other statutory disposals of execution of the subjects, apply -of a form or another- both criteria<sup>189</sup>.

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<sup>186</sup> The STJ of Madrid of 8-3-2000 considers valid the regulation impugned when existing previous legal habilitation to dictate said norm and not considering *rebasadas* the terms established in the enabling norm.

<sup>187</sup> Vineyard. Epigraph II.5 "constitutional Doctrine on the reservation of law in matter tributaria: relations between Law-Regulation".

<sup>188</sup> See epigraph III.6 "constitutional Doctrine on the reservation of law in matter tributaria".

<sup>189</sup> From here our insistence with regard to that his formulation find location in our Juridical System of sources of the Right, of analogous way to what sucede in other European countries.

3.- By ultimo, also with regard to the statutory authority of the called Independent Administrations, the legislative reference to the regulation offers an invaluable support.

## **It SPLITS II. THE REGULATION IN MATTER TRIBUTARIA**

### **1. The marked leadership of the Regulation in matter tributaria. Dissociation between “theory and praxis”. Thesis of the Constitutional Court on the “technical complexities”.**

In harmony or perhaps with greater intensity of the qu and sucede in the rest of the juridical system (saving the penal order), in which the Law constitutes the angular stone of the juridical system, maximum expression of the popular will, andn Financial Right the Law is the more ideal and important course that has the mentioned discipline to manifest . Our aim will be, in consequence, analyse which is the margin of performance of this secondary source of the Right in the Financial field and Tributario, discipline in which it exists an important cumulus of matters reserved constitutionally to law; Reservation, characterised for being especially intense<sup>190</sup>.

Now well, if of a side are in front of a reservation of law especially stressed no only by the quantity of matters covered but also by the content of the same, have to warn that, simétricamente, the statutory authority in financial matter earns an importance inusitada. De facto, the normative authority constitutes one of the juridical springs with which explains the fiscal Administration for the fulfillment of his ends and possibly as it has said “the one of greater transcendence”<sup>191</sup>.

At all we discover when affirming that in Financial Right and Tributario, from antaño, the Regulation has constituted a figure of meant importance and of use reiterated<sup>192</sup>, although the legislative technician of his preparation has gone varying. From those literal repetitions of the Law by part of the Regulation, has happened –partly or big part to the Law 1/1998- to statutory texts thinned that procure not repeating literally the billed of the law.

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<sup>190</sup> Like this also authors like SÁNCHEZ MORÓN, for the one who the reservation of law in matter tributaria is “very intense”. *Administrative right*, 2011, ob., cit., p. 198.

<sup>191</sup> DÍEZ MORENO, “The statutory authority and the General Law Tributaria” in *Studies of Right Tributario*, Vol. I, IEF., M. 1979, p. 271.

<sup>192</sup> “...The utilisation of this instrument is so frequent ... that surprises have not been already object of complete studies and theorists that allow a handle and guaranteed and suitable application”. DÍEZ MORENO, “The statutory authority ...”, ob., cit., p. 271.



With general character for the group of the juridical legislation is constatable the marked dissociation of which speaks us the Professor Tomás FERNÁNDEZ RODRÍGUEZ between the modest paper that the Constitution awards to the Regulation and his effective use in the reality. This is, the dissociation between “theory and praxis”, habida explains “in the daily reality are far from to be this modest and substantially innocuous norm”, working rather like “a normative product so important or more than the own law”<sup>193</sup>. With particular character or specific in matter tributaria can affirm that the previous aserto takes letter of nature. It exists a very stressed predominance of the leading paper of the regulation tributario and even more, of administrative disposals that do not have statutory rank (see the Resolutions of the ICAC), where often skews, ignores or degrades the principle of reservation of law tributaria. Where many times vulnera this principle of reservation of law tributaria, in plough to other interests, to other games, the more than the political times in pro of the interests of the Executive power of the State<sup>194</sup>. Arriving like this to the regrettable situation that describes the professor FERREIRO when affirming that the regulation in matter tributaria “becomes considered with frequency the only norm to apply with forget, no already of the Law in that it has to base, without even, in occasions, of the own Constitution”.

The reason that adduces with elder forces like foundation or base that justifies this leadership that earns the Regulation in our juridical Legislation is the theory of the technical complexity of determinate matters. And between them, one of the most excellent paradigms definitely is the financial matter and tributaria.

The special technical complexities that revisten some matters for his regulation erige as well as reasoning last that find in our Right, understood in his wider sense, to justify the inusitado leadership of the Regulation in financial matter and tributario.

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<sup>193</sup> FERNÁNDEZ RODRÍGUEZ, T. “Reflections around the statutory authority of the Government”, Basque Magazine of Public Administration, n. 34 (11), 1992, pp. 34 et seq. In the same sense FERREIRO LAPATZA, J. It highlights “the existent contradiction between the modest paper that the Constitution ... seems to reserve to the regulation and the evident leadership that the regulation exerts in the financial juridical life especially in the sphere tributaria. Institutions. Course of Financial Right, 25 edition, 2006, ob., cit., p. 56.

<sup>194</sup> Regarding this matter it can consult ANDRÉS AUCEJO And. “The statutory authority of the Government in matter tributaria”, Chronic Tributaria, n. 114, 2005.

Only it does lacking to make a somero combed by the Sentences of the Constitutional Court to ratify the aserto previous. In effect, it exists a reiterated constitutional doctrine about the prominence of the regulation when it treats to regulate matters that revisten technical complexities receiving successively the thesis of the regulation as ***I complement indispensable in matter tributaria reserved to law*** in those matters that like this advise it habida explains the technical difficulties of his preparation.

Between others are to quote the following Sentences of the TC. To Know: S. 99/1987, of 11 June, in which it affirms that “even in regard to the fields reserved by the Constitution to the regulation by Law is not, as impossible an auxiliary or complementary intervention of the Regulation, but whenever these references are such that restrict, sure enough, the exercise of this authority to a complement of the legal regulation, that was indispensable by ***technical reasons*** or to optimise the fulfillment of the purposes proposed by the Constitution or by the Law”. Or also the Sentence 185/1995, of 14 December, where can read that “although the criteria or principles that have to govern the matter have to contain in a law, results admissible the collaboration of the regulation, whenever “it was indispensable ***by technical reasons*** or to optimise the fulfillment of the purposes proposed by the Constitution or by the own Law” and whenever the collaboration produce “in terms of subordination, development and complementarity”. In sentence 102/2005 the TC when referring to the reservation of law in matter tributaria establishes that “it results admissible the collaboration of the regulation, whenever it was indispensable ***by technical reasons*** or to optimise the fulfillment of the purposes proposed by the Constitution or by the own Law, and whenever it produce in terms of subordination, development and complementarity (between other SSTC 185/1995, of 14 December, F. 5 and 150/2003, of 15 June, F. 3, for example)”.

With everything, determinate authors question frontalmente that when it treats to justify the prominent paper of the Regulation allude to answers as, the technical complexity of some regulations, the fault of preparation of this character of the Parliaments, the rapidity of answer that sues today the solution of the problems, etc. “All this –says Tomás Fernández Rodríguez- has sounded me and follows me sounding to pure rhetorical”.

Better, encircle us to the literal words of the one who has identified the *crux of the matter* of form inmejorable: “it is not, then , a problem the difficulty of preparation, since in any case, Law or Regulation have a same origin in the cabinets of study and centres of decision of the Administration. The option is always political and has to see the more than the times with the eagerness of the Executive to reserve an additional freedom of manoeuvre, of not remaining tied by the legal text, to retain a quota of discrecionalidad greater, of a problem of power in a word”<sup>195</sup>. In alike sense, already of the year 1987 date the words of the professor FERREIRO

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<sup>195</sup> FERNÁNDEZ RODRÍGUEZ, T., the one who adds that in the suppositions of special complexity the regulation makes simultaneously with the law, although the formal processing of the regulation demore. “If the Law leaves

when it affirmed: “In front of this situation in fact, to which is not extraneous the eagerness of the power of the bureaucracy, protected many times in pretended technical needs, and that seems to ignore the force of a Constitution that establishes, of effective way, a system based in the indiscutida primacy of the Legislative on the executive, the jurists has to react with vigour”<sup>196</sup>.

But, unfortunately, the situation since far of aplacarse has gone seeing sharpened. In right tributario the Administration tributaria has gone purchasing plots inusitadas of power in matter of normación statutory, no only by part of the Government (the one who has the statutory authority of way originaria) but also and what is graver by part of other organs infralegales.

This accuses of palpable form in matter of taxation societaria, where can appreciate a normative spiral of statutory character and infrareglamentario, legitimated legally ex article 10.3 of the valid Law of the Tax on Societies. Law 43/1995, in virtue of the cual in the diet of direct estimate the base imponible will calculate from the *countable result* found in accordance with the planned norms in the C. Of C. And other mercantile Laws, as well as in the disposals that serve them of *development*, all time that the article 148 concedes faculties to the Administration to determine the base imponible supporting in the norms of the quoted precept<sup>197</sup>.

Of course, with the support that offered in frame the High court by means of Sentence of 27 October 1997 in which it confirms the normative authority of the ICAC with backrest in the habilitation awarded by the legislator in the Law 19/1988, of Audit of Accounts (received by

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hollow or renunciation to be all the precise that the rights and freedoms to that affects demand (...) is not because it can not fill these gaps, but because the Government and the parliamentary majority that supports him have wanted on purpose leave them thin of conscious form the legal text in profit of the statutory norm ulterior, that the Government will be able to approve first and modify afterwards if like this it suits him when and how interest him”. “Reflections in lathe...”, ob., cit., pp. 41-42.

<sup>196</sup> FERREIRO LAPATZA, J. “The principle of legality and relate them Law-Regulation”, ob., cit., p. 884. Aiming -to elder abundamiento- that “whenever we speak of increase of the powers of the Executive in matter tributaria are seriously putting in danger the purity of the principle of legality, then , as so many times have observed, the traditional conception of the same offers numerous points of friction with the rapidity and agility that requires the performance of the Administration in these matters”. ARSUAGA OF NAVASQUÉS, J. “The principle of legality and the discretionary fiscal flexibility”, in XIX Week of Studies of Financial Right, Madrid, 1972, p. 484.

<sup>197</sup> With regard to the quoted article 148 can see the article: "About the faculty of the Administration to determine the countable result to tenor of the article 148 of the Law 43/1995 of the Tax on Societies". PONT MESTRES, M., G.F., number 147, 1996, págs. 63 et seq., where arrives to a conclusion so sugerente as what follows: "It is as well as after the pages devoted to the precept of the article 148, no finish him to find justification neither lace. It outlines until here to way of odd body and like such perturbador in the Law" (pág. 69).

the D.F. 5<sup>a</sup> of the PGC). Specifically, in the article 2<sup>o</sup>.2.b) Of the quoted Law of Audit, which, when referring to the content of the report of said audit, says that it has to express -among others data- the opinion of the auditor on if they have prepared and presented the annual accounts, of compliance with the "principles" and "countable norms" that establish the ICAC.

With this quoted Sentence of 1997, the TS desestima the allegations poured by the TSJ of Madrid (that it had known previously of the subject, to our trial with better criterion<sup>198</sup>). The Sentence of the TSJ of Madrid<sup>199</sup> denied the competition of this Institute to issue resolutions of forced fulfillment, dictating the nullity of right plenary of some norms promulgadas by the ICAC whereas organ manifestly incompetent, since the statutory authority according to the article 97 of the Spanish Constitution recaee in the Government.

Nonetheless, by means of Sentence of the TS of 27 October 1997 bet by apuntalar all the acervo of resolutions of the ICAC generating de facto and of *iure* a prominence of the Financial Administration no only in the plane aplicativo but also in the countable normative plane and by reference in the fiscal plane.

In effect, fix in that with the Spanish regulation approved in 1995 by means of Law 43/95 of the Tax of Societies, the reenvío of norms of forced fulfillment for all the companies expands until the Resolutions of the ICAC by the game of the double habilitations. With this, to our modest trial, is awarding a power inusitado to the Financial Administration more typical of the British and North American Agencies that of the countries of continental court. But clear, repair in that in the models angloamericanos the norms dictated by the Administration yes are sources of the Right because the system of sources differs ostensiblemente of the ours. Instead in Spain has forced the system giving by result a predominance of the financial administration, no only in the plane aplicativo of the Right but also and what is more important and dangerous in the normative plane (unlike other countries as for example France where the *Consell d'Etat* shows very watchdog in front of the interferences of the Financial Administration) or also in Germany

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<sup>198</sup> In his moment pronounce us against of the theses that sustain the full validity of this doctrine- on the most vulnerable points of the Sentence of the TS quoted. Said valladares are: to) juridical Nature of the organ emisor, b) juridical Form of the resolutions, c) Matter object of regulation, d) juridical Procedure for his broadcast and and) Advertising. ANDRÉS AUCEJO, And. "On the statutory authority to dictate technical norms of development in countable matter". CRONICA TRIBUTARIA, No. 114/2005 (9-26).

<sup>199</sup> Sentence of 19 January 1994, of the Room of the Contentious Official, section ninth of the T.S.J., resource 959/92, which brings cause of a resource interposed by the Spanish Association of Leasing against agreed resolution by the president of the ICAC, of date 21 January 1992.

where exists a semillero of Sentences of the *Bundesfinanzhof* precisely for knowing the limits until where arrives the power of the Administration tributaria.

## **2. The principle of legality like limit to the statutory authority of the Government.**

The constitutional legitimacy of the executive power to dictate statutory normative disposals - in no case questioned- can not but interpret in the global frame of the juridical legislation, so that, far to be susceptible of acotación like a compartment –in this case authority- tight, independent of the rest of relations and juridical interactions-constitutional, has to tackle in coherencia with the rest of values<sup>200</sup> and constitutional<sup>201</sup> and legal principles. Of the relation of strengths and limits<sup>202</sup> that play in the configuration and also in the exercise of the statutory authority of the Government, the most important counterweight, definitely, constitutes it the expansionary strength of the law, with marked predicamento in the financial field and tributario.

Possibly it was, the principle of legality, the key of vault that sustenta and gives cohesion to a social State of Right. Nonetheless and in spite of the inusitada importance of this maximum, our Load Magna does not collect the content of the same. By all definition in this regard it contains an expression in the article 9.3 of the CE that has been tildada of “críptica and ambiguous”, limiting to guarantee his constitutional presence, seeming, therefore, be “remitted to what would have to be a clear term in the juridical language, that of some way gives of course. It occurs –as sharply it aims DÍEZ PICAZO- that is not like this”<sup>203</sup>. It suffice to mention here, the ingente literary production poured on a classical subject by excellence as it is the one of the principle of legality, treated at least by constitucionalistas, administrativistas,

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<sup>200</sup> Article 1.1 of the Spanish Constitution of 1978.

<sup>201</sup> Article 9.3 of the CE. On the value of the constitutional principles vineyard, among others, LUCAS VERDÚ, P., “Comment to the article 1º of the Constitution” in *Comments to the political Laws*, directed by Or. Alzaga, Volume I. Spanish constitution of 1978, Edersa, págs. 37 et seq.; CAZORLA PRIETO, L. M<sup>a</sup>, “The constitutional principles-financial in the new juridical order”, Magazine of Public Right, 1980, págs. 521 et seq. For MORTATI, the constitutional principles are “ideas-able” strength to collect or resumir around yes, in harmonic and coherent unit, all the successive action of the State”. *Istituzioni Gave Diritto pubblico*. Cedam, Padova, second edition, 1975, Págs. 322 et seq., quoted by Cazorla Prieto, in the quoted work, pág. 525.

<sup>202</sup> An exhaustive comment on the limits of the statutory authority of the Government in matter tributaria can see in: CALVO ORTEGA, R., “The Regulations tributarios in the state legislation Spanish”, HPE, n. 17, 1972.

<sup>203</sup> DÍEZ PICAZO, L. “The Spanish Constitution and the Sources of the Right” in *The Constitution and the Sources of the Right*, I.And.F., Madrid, 1979, vol. I, págs. 654-655.

tributaristas, ..., what exhorts us of his analysis in depth, but no of some considerations on his global approach and detailed in financial matter and tributaria.

His plasmación in these lines –knowingly of the self-evident difficulty of vaciar the innumerable formulations doctrinales poured regarding this matter- pretends to order and delimit –in the measure of the possible- some concepts of equal denomination and distinct content, of transcendence without pair. For example, the rabiosa equiparación between the principle of reservation of law and the principle of legality that impregnates the majority of the written tributaristas on the matter, *versus* the marked border line that trace the authors of Administrative Right distinguishing both terms; or also, between these last, the difficulties to distinguish “legality” of “juridicidad”; when no of this widespread tendency to equate legality with administrative legality. Plot this that, curiously excludes often of the legality tributaria, when it is the true that share identity of subject “the Public Administrations” without prejudice to the specificity of the object (financial matter and tributaria), subject, therefore, equally, to the designated “block of the legality”.

### **2.1.1. General considerations on the Principle of Legality**

Recent writings on the pretérito subject that occupies us, contain a definition of the principle of legality considered like “The subordination of all the legislative public –powers, judicial and administrative- to general and abstract laws that discipline his form of exercise and whose observance finds subjected to control of legitimacy by independent judges”<sup>204</sup>. This, understand, is a good formula for descifrar and concretise the manido ideal formulated in the article 9.1 of the CE that prays like this: “The citizens and the public powers are subject to the Constitution and to the rest of the juridical Legislation”.

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<sup>204</sup> It treats -as OF CAPE MARTÍN, C.-, of the “modern conception” principle of legality; *On the concept of Law*, ed. Trotta, 2000, pág. 62 the one who does reference to the book of L. FERRAJOLI, *Right and reason*, ed. Trotta, Madrid, 2000, pág. 856. Of CAPE, exposes the distinct meanings that in his opinion can stand out on the “principle of legality”, being the exposed the most modern that sintetiza besides to the previous.

It would be as that, the widest sense of the principle of legality<sup>205</sup>, that orders the subjection to the juridical legislation in the performance of the organs of the State. Well understood that the semantic content of the term “legality” extends here further of the rúbrica “Law”<sup>206</sup> to embrace according to happy expression coined by HAURIOU “The whole block of legality” (Laws, Regulations, general principles, habits)<sup>207</sup>.

Splitting of these initial propositions fits to extract at least the two following considerations: in first term, the cataloging of the *concept of “Legality” like expression wider than the term “Law”* in which also they include the regulations dictated by the Administration and, second, understand timely to underline the existence of *different meanings of the term legality*, in function of the matter object of reference (penal, tributaria, administrative, ...).

To) Giving gone in to the first of the questions mentioned, from a perspective of historical cut-temporary assist in a first moment to the formulation of the genuine principle of Legality understood this like the proclamation to ultranza of the empire of the Law. The British and later French revolutions will constitute a historical milestone when proclaiming a new concept of Law based in the popular sovereignty with positive translation pioneer in the Letter of Right English of 1689 and in the Statement of Rights

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<sup>205</sup> OF OTTO, I., *Constitutional right*, ob ., cit., pág. 157, it affirms: “In his wider sense the principle of legality demands that the performance of the organs of the State, in concrete the one of the Administration, by means of administrative acts and the one of the courts by means of judicial resolutions, carry out with subjection to the juridical legislation. The word legality does not designate here to the law, but to all the norms, included the regulations, to what designates the “block of the legality” and thus the principle of legality like this understood designates also principle of juridicidad”.

<sup>206</sup> On the distinct meanings of the term “law” can see OF CASTRO And BRAVO, F., *Civil Right of Spain*, ed. Civitas, Madrid, 1991, págs. 347 et seq.

<sup>207</sup> Concept of the that do numerous echo tratadistas. By all, GARCÍA OF ENTERRÍA and TOMÁS-RAMÓN FERNÁNDEZ, *Course of Right ... 2000*, ob., cit., págs. 435. By his part, PÉREZ MORENO, To., “The concept of juridical legislation in the Constitution”, in *The Constitution and the Sources of the Right*, vol. III, I.And.F., Madrid, 1979, págs. 1635-1636 it affirms that “The taking of consciousness of the insufficiency of the juridical positivism explicitará in the Spanish Right from 1956, in virtue of the penetration in the regulatory Law of the Administrative Contentious Jurisdiction of the concept of juridical legislation, received in our doctrine like exponent of the work of the big institucionalistas SANTI ROMANO and HAURIOU that, at the end of the first chamber of our century, had opened the road of superación of the narrowness desvitalizadora of a concept of the Right so slave of the normatividad”. Adding that the CE of 1978 has culminated this concept of juridical legislation superador of the juridical positivism when giving received to the “substantial values that have to chair the whole of the juridical legislation” and regulating a “system ordinamental of base principialista, that is to say, inspired by the general principles of the Right”. SANTI ROMANO, *The juridical legislation*, translated to the Spanish by MARTÍN-RETORTILLO, S and MARTÍN-RETORTILLO, L., Madrid, 1963. Vineyard. Also PASTOR RIDRUEJO, S., “Juridical System and Constitution” in *The Spanish Constitution and the sources of the right*, vol. III, I.And.F., Madrid, 1979, págs. 1569 et seq.

of Honour of the Man and of the Citizen of 1789<sup>208</sup>. The political confrontation between the Parliament and the Crown –as we have had occasion to analyse- will drive to a flexibilización in the conception of the principle of legality (happens of the “exclusivity” of the Law to the “supremacy” of<sup>209</sup>the same ) all time that to a gradual broadening of the circle of competitions of the executive, to the time that vary the political structures imperantes. Executive power<sup>210</sup>, initially mere executor of the law until converting -in our days- in producing source of norms, whose disposals with rank of law and with value subordinated to the same constitute part of the designated “block of legality”. This, that doubts fits, has to repercutir in the configuration of the principle of legality, as “it no longer can be identical to as it was when appearing because it has broken the exclusive monopoly of the Formal Law like creator of norms”<sup>211</sup>; what no obsta to proclaim openly the need to keep alive his spirit like stone basilar of a democratic State of Right, máxime when we move us in the world of the Administration and, in particular, of the financial Administration and tributaria<sup>212</sup>, in which the so resorted complexity of his norms<sup>213</sup>; the technical and economic circumstances that accompany it; his instrumentalización to the service of the economic politics; among others similar avatars, often do that it wobble our pyramidal structure of sources of the Right tributario carrying -many times- to the despropósito of an application of these norms inversamente proporcional to his juridical rank.

b) Splitting of the generic constitutional consecration of the principle of legality tipificada in the article 9.3 of the CE, are to underline the different parcellings of the

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<sup>208</sup> About the impulse that supposed for the European world the French revolution vineyard. Among others, GARCÍA OF ENTERRÍA, And., “The public Administration and the Law”, article already quoted.

<sup>209</sup> Concept –on the other hand- whose sustrato has remained incólume in our days, being able to oir today to insignes jurists enarbolar the idea of the “principle of legality” like “synonymous of supremacy of the law” or “what is the same, of subordination to the law of the others sources of the right”. DÍEZ PICAZO, L., “Constitution and Sources of the Right”, ob., cit., pág. 655

<sup>210</sup> Remember that the executive power in France after the revolution of 1789, as well as in other European countries, is not but the redoubt to be able to that the King goes recovering in the time once that it was deprived of his legislative normative power (asks number 1 of this work).

<sup>211</sup> RODRÍGUEZ OLIVER, “The consecration of the principle of legality like limit for the norms approved by the Administration”, ob., cit., págs. 1713 et seq., the one who studies the evolution suffered in the principle of legality.

<sup>212</sup> On The degradation of the Law or, in his own terms, “on the deterioration of the concept of law” in the relations between the Public Inland revenue and the taxpayers recommend the reading of the article titled “The primacy of the Right in the Relations between the Public Inland revenue and the taxpayers”, of the professor MARTÍN QUERALT, J., ob., cit., págs. 18 et seq.

<sup>213</sup> Arriving even to tildar of language for wizards and invidados”, in an article -classical in the matter-, titled “The object of the tribute” written by FERREIRO LAPATZA, J.J., REDF, number 10/1976, pág. 229.



same with formulation equally constitutional. In this sense and with very good criterion from our point of view, some authors aim the *distinct demonstrations* of the principle of legality in function of the matters on which project : it speaks like this of the different “dimensions of said principle” between them, the legality of the Administration<sup>214</sup>, or alludes to the subject requiring the specific applications of the same (legality of the crimes ..., legality tributaria ..., legality of the Administration ..., legality of the performance of the judges and courts ...) <sup>215</sup>; or also it alludes at the beginning of legality referenciándolo only to determinate sectors of the juridical legislation, as for example the legality in the penal right; in the financial right or tributario, or in the administrative right<sup>216</sup>.

### **2.1.2.- Brief outline on the administrative legality**

The Spanish Constitution of 1978 consecrates diverse precepts at the beginning of administrative legality<sup>217</sup>. Of generic way, this is, covering no only to the Administration but also to the rest of public powers, have reiterated how the article 9.1 proclaims the subjection of these to the Constitution and to the rest of the juridical legislation, tipificándose in the third section of the quoted precept the principle of legality; basic foundation of the constitutional legislation Spanish<sup>218</sup>. With character more restrictivo, the constituent reiterates this maximum limiting it to the field typical of the Administration, ordering his observanza in the distinct facets of the same. To know:

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<sup>214</sup> FISH BEARD G., *The Constitution of 1978*, Ed. Fernando Torres, Valencia, 1981, pág. 101.

<sup>215</sup> GARCÍA OF ENTERRÍA, And., “Principle of legality, material State of Right and interpretative and constructive faculties of the Jurisprudence in the Constitution”, REDC, 1984, number 10, pág. 11. It affirms this author: “The Constitution has given the supreme rank at the beginning of legality, formulated in general terms like one of the basic principles of the legislation in the article 9.3 ... . Apart from this general proclamation, the Constitution has required afterwards said principle of legality in several of his specific applications (legality of the crimes and the administrative infringements, article 25; legality tributaria and of the personal provision, arts. 31.3 and 133; legality of the Administration, articles 103.1 and 106.1; legality of the performance of judges and courts...”.

<sup>216</sup> TEN PICAZO, L., “Constitution and Sources of the Right”, ob., cit., pág. 655.

<sup>217</sup> Among others vineyard. BASSOLS COMA, M., “The principles of the state of right and his application to the Administration in the Constitution”, R.To.P., number 87, 1978, págs. 133 et seq., and of the same author, “The diverse demonstrations of the statutory authority in the Constitution”, ob., cit., pág. 323.

<sup>218</sup> To the limit, has arrived even to affirm that probably, what in the article 9 calls principle of legality is more than another thing the principle of legality of the public Administration defined in the article 103.1 CE. Like this, DÍEZ PICAZO, L., “Constitution and sources of the Right”, ob., cit., pág. 656.

To) *Requirement of the administrative legality in all his performances*. In virtue of the article 103.1 of the CE these will have to make with “full submission to the Law and to the Right”.

With I protect, precisely, in this article 103.1 mentioned, defends that our Letter Magna receives the designated “**principle of positive links**” (*positive Bandung*) of the Administration to the legality. Concepción superadora of the positivism legalista and tending to rescue the stigma that imperó in the revolutionary postulates French, characterised by a férrea subjection of the Administration to the Law without whose permission that could not act. In the actuality proclaims the positive links of the Administration to the legality, concretised in that all administrative performance has to have legal coverage,<sup>219</sup> “has to have his origin in the constitutional or legal norm that creates it”<sup>220</sup>.

*Note:* Known is that along the history of the public Administration, descuellan two fundamental interpretations on the links of the Administration to the Law<sup>221</sup>. To know: *positive links*: only they will be able to make valid administrative performances if have foundation in a norm that enable to the subject for this; and, *negative links*: the juridical norm becomes a limit or border that will not be able to rebasar the Administration, allowing that this make all those no forbidden performances by the law.

The conception originaria of the positive links brings cause of the French revolution and of the system of division of powers by her established, as which to the executive reserved him the mere function of execution of the Law, supposing this no only a limit, but also a foundation of his action, with what expressed the idea of positive links to the law (REBOLLO PUIG, “Juridicidad, legality, ...”, ob. cit., pág. 78). To the contribution of this full submission to the Administration contributed a lot the back contributions of MERKL, CARRÉ OF MALBERG And ZANOBINI<sup>222</sup>. The doctrine of the negative links to the law consecrates to beginnings of the sigol XIX in the German principalities (S. PASTOR, *Foundations...*, ob., cit., págs. 52-53) with the revival of the monarchic power which goes obtaining greater plots of performance and to the cual restores him a normative power like redoubt of the legislative power that had. Of this approach were profusores (MAYER-ANSCHÜTZ), consistent approach in that the Administration could make any activity that the Law does not forbid, constituting this an external limit to the activity of the Administration, and known like the doctrine of *the negative Bandung*, doctrine cercenada in a positivism legalista (GARCÍA OF ENTERRÍA and T.-R. FERNÁNDEZ, *Course ...* 2000, págs. 437 and ss).

A wide conception of the administrative legality understood like submission of the Administration to the block of legality comports to his equiparación with the theoretical

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<sup>219</sup> A clarificadora exhibition on these extremes can see in GARCÍA OF ENTERRÍA, And., and T.-R. FERNÁNDEZ, *Course of Administrative Right*, 2000, ob., cit., págs. 431 and ss, in particular, pág. 439, those who quote to BALLBÉ like pioneer between us of recapacitar lúcidamente on the mechanism of the positive links. Of the first author quoted vineyard. Also, “Principle of legality, material state of Right and interpretative faculties ...”, ob. cit., págs. 14 and ss, where compares the article 103.1 CE with his homónimo of the Fundamental Law of Bonn (art. 20.3).

<sup>220</sup> CAR FERNÁNDEZ-VALMAYOR and R. GÓMEZ-FERRER MORANT “The statutory authority of the Government and the Constitution”, ob. cit., págs. 162 to 164. “The Administration –conclude these authors- only can execute the authorities that have been him sure enough conceded by the Constitution or by the Law” (pág. 164).

<sup>221</sup> SANTAMARÍA PASTOR, *Foundations of Administrative Right*, ob., cit., pág. 52.

<sup>222</sup> CAR FERNÁNDEZ and GÓMEZ-FERRER, “The statutory authority...”, ob., cit., pág. 163.

principle designated of **juridicidad**, like this coined by MERKL<sup>223</sup> and accepted by big part of the doctrine<sup>224</sup>.

**b)** No only in his performance by singular road, but also in the exercise of his *statutory normative authorities*, the article 97 of the CE prescribes the forcing that they make “in accordance with the Constitution and the laws”.

A qualified sector of the doctrine administrativista -to effects to analyse the statutory authority recognised in the CE- consider convenient to delimit the outlines of the principle of legality collected in the art. 9.3: «Principle of legality –rush to underline- understood to the effects of our subject in the strict sense of confrontation of the authority of administrative training with the law and no in the widest of submission of the Administration to the “block of the legality” (or to the “principle of juridicidad, if it prefers use the expression of MERKL)»<sup>225</sup>. By his part, the professor LATHES BUT<sup>226</sup> puts special emphasis in distinguishing the principle of legality of the principles of legal reservation and of primacy of the Law. So that you relate them Law-Regulation have to explain with base in the principles of primacy of law and of reservation of Law and no by the Principle of legality that supposes the links of all administrative performance to a previous juridical norm.

Against of the authors that understand that the positive links of the Administration to the legality comports the need that it exist legal permission to dictate juridical regulations (by ej. REBOLLO PUIG<sup>227</sup>, the one who considers that the positive links imposes the need of legal permission so that the Administration can limit the freedom; it can interfere in the free development of the

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<sup>223</sup> Vineyard. His construction on the “Juridicidad” in his book *general Theory of Administrative Right*, ed. National, Mexico, 1920, págs. 211 et seq. By his part, JESCH, Dietrich, *Law and Administration*, ob., cit., pág. 44, appointment to Adolf MERKL, *Allgemeines Verwaltungsrecht*, to identify the principle of legality of the Administration with the one of Juridicidad of the same, that involves the dependency of all administrative activity of the Administration with respect to a norm of competitions and therefore “an apoderamiento global conferred to the Administration would be sufficient foundation of the juridicidad of the Administration”.

<sup>224</sup> OF OTTO, I., *Constitutional right*, pág. 157 and 159; BATHROOM LEÓN, J. M<sup>a</sup>, *The constitutional limits ...*, ob., cit., pág. 175. Quotation in this regard they do also –among others- LATHES MORE- “The relation between the law and the regulation...”, ob., cit., pág. 474; CAR FERNÁNDEZ-VALMAYOR and GOMEZ-FERRER MORANT, “The statutory authority of the Government and the Constitution”, ob., cit., pág. 162 et seq., among others.

<sup>225</sup> CAR FERNÁNDEZ-VALMAYOR and GOMEZ-FERRER MORANT, “The statutory authority of the Government and the Constitution”, ob., cit., pág. 162.

<sup>226</sup> “The relation between the Law and the Regulation ...”, ob., cit., págs. 474-477.

<sup>227</sup> “Juridicidad, legality, ...”, ob., cit., pág. 113. Author that makes an extensive comment about the consequences of the principle of legality and of juridicidad on the statutory authority of the Government.

rights)<sup>228</sup>, OF OTTO, I.<sup>229</sup>, it affirms: “there is not, however, base any to affirm some positive links in the sense that the regulation only can do that that the law allows him. It can not have some formal positive links, in virtue of which the regulation requires a legal permission, although it was in white, and this because in our constitutional right the statutory authority comes attributed by the own Constitution in the art. 97<sup>230</sup>.”

c) The previous facets reinforce in the article 106.1 of the CE, precept in virtue of the cual the Courts *control the statutory authority and the legality of the administrative performance, as well as the submission of this to the ends that the rustican.*

### 2.1.3. Thep rincipio of Legality Tributaria

Fed up known is that so much in our constitutional texts as in the majority of the Europeans, tributes and penalties have been reserved to the legislative power<sup>231</sup> the one who has entrusted the work of his regulation without possibility of abdication in other powers or organisms.

Nonetheless and analogously to what sucede with the general principle of legality, neither exists precept any of constitutional or legal court that define the semantic content of the expression legality tributaria or financial legality. Lack that, nevertheless, has seen suplida by an incessant work doctrinal and also, although in lower measure, jurisprudential. The reason that moves us to include his appointment in these lines, is not another that the narrow historical links and current that in financial matter has had and has the principle of legality with the principle of reservation of law, condicionamiento extraordinarily important of the statutory

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<sup>228</sup> And even for the suppositions out of the fields reserved to Law, also has defended that the Law has to contain a determinate regulation “whose contained the regulation can develop or complement in accordance with her – art. 97- and fully subjected to the same –art. 103.1-. This positive and substantial links involves the need that it exist always a previous law in accordance with which –permission- will be able to the Administration exert his usual and original authorities included the statutory authority”. VILLACOSTA MANCEBO, L., *Reservation of Law and Constitution*, ob., cit., págs. 194 and 195. Thesis, debatable whereas said concept of substantial legality would enervate the hypothesis of the independent regulation in any case, all time that supports excessively in the literal expression of the article 97 of the CE “in accordance with”, what interprets like an unambiguous claim to the support of a previous law to which develops or complements. In our opinion so that this was like this the constitutional text had had to say “supeditado to the necessary existence of a previous law”, sentence that does not say.

<sup>229</sup> *Constitutional right*, ..., ob., cit., pág. 240.

<sup>230</sup> By his part, J. M<sup>a</sup> BATHROOM LEÓN, desmitifica the idea of the positive links of the Administration to the Law, admitting his compatibility with the independent regulation.

<sup>231</sup> Vineyard. Dietrich JESCH, *Law and Administration. Study of the evolution of the principle of legality*, ob., cit., Chapter IV, I. “The penal reservation and tributaria like precursor of the general principle of legality”, págs. 131 et seq.

authority of the Administration, also and especially of the financial Administration and tributaria.

Thus, and still knowingly of the idea esteoritipada of the term “financial legality/tributaria” equivalent to the expression “reserves of financial law/tributaria”, suit timely to abound in the distinct approaches to focus the question.

### **5.3.1.- The principle of “legality tributaria” like synonymous of the Principle of “reservation of law tributaria”**

This is –very probably- the valid majority conception in the actuality with regard to the principle of legality in matter tributaria. It associates then , the “principle of legality tributaria” to the requirement to establish tributes and another public provision by means of law, this is, with the “legal reservation” for the regulation of the quoted matters. Legal reservation that, as we know, ours valid Load Magna tipifica in the articles 31.3 and 133.

Participes Of this feel are, among others, the authors: FERREIRO LAPATZA, J.J.<sup>232</sup>; Or PÉREZ ROYO<sup>233</sup>, the one who reiteradamente alludes to the “principle of reservation of law” or “principle of legality tributaria”; expression that subscribe also RODRÍGUEZ BEREJO<sup>234</sup>, SANCHEZ GALIANA<sup>235</sup>, MENÉNDEZ MORENO, To.<sup>236</sup>, ... .

Likewise CAZORLA PRIETO<sup>237</sup> in his *Comentarios to the articles 31.3 and 133.1 of the CE* determines that both precepts consecrate the principle of legality tributaria. LASARTE ÁLVAREZ, J.<sup>238</sup> It considers that “the precept in which the Constitution consecrates the principle of legality tributaria” is that that prays: “The tributes only will be able to establish with arrangement to a law”. Or, in resemblance felt authors eat: BELTRÁN FLOREZ<sup>239</sup>, REBOLLO

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<sup>232</sup> “The principle of legality and relate them Law-Regulation in the legislation tributario Spanish”, in *Studies of Right and Inland revenue*, Homage to César Albiñana, Vol. II, 1987, pág. 872-873.

<sup>233</sup> PÉREZ ROYO, F., - “The sources of the Right tributario in the constitutional legislation”, in *Inland revenue and Constitution*, I.And.F., Madrid, 1979, págs. 19 et seq.; - “Foundation and field of the reservation of law in matter tributaria”, H.P.And., number 14; pág. 207 - *Financial Right and Tributario. General part*, ed. Civitas, 2000, págs. 41 et seq

<sup>234</sup> “The principles of the imposición in the Spanish Constitutional Jurisprudence”, REDF, number 100, 1998, pág. 598.

<sup>235</sup> Coordinator. *Manual of Right Tributario*, ed. Comares, 2000, pág. 45.

<sup>236</sup> “Some reflections on the principles of capacity and legality like inspiring of the tributes and of the public prices”. *Studies of Right Tributario in Memory of C. Bun Arocena*, Ed. Basque Country, Bilbao, 1993, pág. 25. Equiparación That infers clearly of the reading of the text.

<sup>237</sup> “Comments to the article 31 and to the article 133 of the CE, in the collective work of GARRIDO FAILS, *Comments to the Constitution*, Civitas, Madrid, 1985, págs. 31 and 62 respectively. Of the same author, can see: “The constitutional principles-financial in the juridical order”, Magazine of Public Right, 1980, pág. 548.

<sup>238</sup> “The principle of legality tributaria in the project of Constitution of 1978, in *Inland revenue and Constitution*, I.And.F., Madrid, 1979, pág. 128.

<sup>239</sup> *Lessons of Fiscal Right*, ed. Lex Nova, 1965, págs. 27-28.

ÁLVAREZ-AMANDI, To.<sup>240</sup>, MARTÍNEZ LAFUENTE<sup>241</sup>. By his part, PÉREZ OF AYALA, J. L.<sup>242</sup>, matiza between the principle of administrative legality and the “principle of legality tributaria (reservation of law)”.

Such concepción has had –likewise- a deep raigambre between an eminent and consolidated Latin American doctrine (GIULIANI FONROUGE, VALDÉS COAST, GARCÍA BELSUNCE, HÉCTOR B. VILLEGAS; JARACH, ...<sup>243</sup>). And equally it has seen invoked by the Courts of our country<sup>244</sup>.

His formulation finds deeply rooted to the historical meaning and originario of the “Principle of legality impositiva”, very known that, of a side, his scope extended no only to the taxes but also to matter of public costs and, of another side, as we said, eminent tratadistas of our country, signal to OTTO MAYER progenitor of the term “reserves of law”, by what, this, would not see the light but until the 19th century.

Originariamente The “Principle of Legality impositiva” brings cause of the “consent of the súbditos” for the approval of the “public contributions” and his destination; concept that will extend later (to similarity of the article 23 of the Italian Constitution of 1947) to the of provision patrimoniales<sup>245</sup>. That “consent” conceives –equally- like foundation of the “modern Principle

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<sup>240</sup> “Appearances of the principle of legality tributaria”, *XIX Week of Studies of Financial Right*, Madrid, 1972, pág. 453, the one who, in the page 29 does a reference to the wide sense of the principle of legality like “submission of the public Administration to the Right”.

<sup>241</sup> *Right Tributario. Studies on the Jurisprudence Tributaria*. Civitas, 1985, pág. 38 it affirms: “This principle – legality tributaria- comes to mean, as it is known, that the regulation of the tributes has to do by Law”, although it makes some terminological precisions with regard to the quoted principle that will comment next.

<sup>242</sup> “The sources of the Right Tributario and the principle of legality”, RDFHP, 1976, 1, pág. 364 and 371 et seq. Distinction that also makes PÉREZ ROYO, F., when it alludes to the matters tributarias no dominated by the principle of legality tributaria, “although yes, of course, by the principle of legality of the administrative activity”, “The sources of the Right Tributario ...”, ob., cit., pág. 34. Distinction that makes also in the successive editions of his manual of *Right Tributario. General part*.

<sup>243</sup> See references of all they in: GIULIANI FONROUGE, *Financial Right*, Vol. I, ed. Depalma, Buenos Aires, 1982, págs. 300 et seq. and HÉCTOR B. VILLEGAS, *Course of finances, financial Right and tributario*, ed. Depalma, Buenos Aires, 1992, págs. 190 et seq.

<sup>244</sup> Sentences TS 20-1-1975; 7-4-1978; 11-6-1979, ..., etc.

<sup>245</sup> About this matter vineyard., BERLIRI, “Apunti sul fondamento and il contenuto dell'art. 23 della Costituzione”, ob., cit., pág. 154, where affirms in relation *l'art. 23 della Costituzione* that “the sua sfera d'applicazione and molto più vast of the field tributario comprendendo, oltre alle prestazioni tributarie, anche tutte quelle personali and tutte quelle patrimoniali che, pur essendo coactivamente imposte, non sono tributi”; or of the same author, *Principles of Right tributario*, vol. I, ed. Financial right, Madrid, 1964, pág. 50; D'AMATI, N., *Right Tributario. Theory and critical*, ed. Of Financial Right, publishers of right gathered, Madrid, 1989, págs. 33 et seq.; SAINZ OF BUJANDA, F., *Inland revenue and Right*, vol. I, ob., cit., págs. 429 and 430.

of legality”<sup>246</sup>, saving –clear is- the exceptions that comports to happen of a political model of assemblies estamentales to the modern representative Parliaments<sup>247</sup>.

Attending to the historical evolution of this Principle of Legality in matter impositiva, suits to underline how in *the Medievo* “the spoiled character of the tax” appeared justified “in his existence and quantity, by the cost that went allocated to cover”<sup>248</sup>. Consent –therefore- loaned so much to the tax as to his purpose or destination. The principle of legality arises as –it affirms SIMÓN PUTS TO BED- as something inseparable of the entry and public cost and does to his time that the entry can not conceive without the cost, configuring like this, from the strictly juridical point of view the unitariedad that always had the financial phenomenon”<sup>249</sup>.

In *back periods* will lose virtualidad the requirement of the specific affectation of the consent loaned to the entry to satisfy a determinate cost<sup>250</sup>, all time that the extraordinary or sporadic character of the that had done gala the tax in the mediaeval period<sup>251</sup>. SAINZ OF BUJANDA, F., it aims like causes the increasing needs of the Monarchy for sufragar periodic costs<sup>252</sup>. The consequences –to the effects that here interest- will be, parafraseando to VILLAR PALASÍ “the

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<sup>246</sup> Like this also JESCH, Dietrich, *Law and Administration ...*, ob., cit., pág. 135. In the same sense, concludes PÉREZ ROYO, F., that from the protagonists of the first constitutionalism until our days has repeated machaconamente (affirmation that revalidate already in the first note on foot of this work), the conceptualización of the “principle of legality tributaria like direct heir of the mediaeval principle of ‘autoimposición’ or of consent by part of the mediaeval Assemblies (Courts, General States, ...) to the ‘requests’ of the Monarch”. “The principle of legality tributario in the Constitution., in *Studies on the project of Constitution*, Centre of Constitutional studies, Madrid, 1978, pág. 395.

<sup>247</sup> “... It constitutes an error –in which it has fallen all a copiosa line historiográfica- the establish, in accordance with these texts, in which, however, the political function premium on the one of historical knowledge, a filiación direct between the functions of the modern representative Parliaments and the fiscal prerogatives of the Assemblies estamentales. It does not have felt to speak of vote of the taxes by the representatives of the Nation in relation to some Assemblies whose function, anyway, was the composition of interests of the diverse political powers (Crown, Gentlemen, cities) existent in the feudal society.” PÉREZ ROYO, F., “The principle of legality tributario in the Constitution”, in *Studies on the project of Constitution*, ob., cit., págs. 396-397.

<sup>248</sup> RODRÍGUEZ BEREIJO, To., *Introduction to the Study of the Financial Right*, ob., cit., págs. 82-83; On these subjects can see also: GONZÁLEZ GARCÍA, And., “The principle of legality tributaria ...”; ob., cit., págs. 991 and ss; PÉREZ OF AYALA, “The sources of the right tributario and the principle of legality”, RDFHP, 1976, I, págs. 382 et seq.

<sup>249</sup> SIMÓN ACOSTA, And., *The Financial Right and the Juridical Science*. Publications of the Real School of Spain, Bolonia, 1985, pág. 204: “In his mediaeval origins, the tax or service that voted the Courts did not have regular character or newspaper, but it produced every time that the King directed his *petitum* to the representative Assembly of the estamentos taxpayers, and this *petitum* had to be justified in the need to make determinate concrete costs”.

<sup>250</sup> CAZORLA PRIETO, L. M<sup>a</sup>, “Considerations on the power tributario: his structure in the General Law of 28 December 1963”, in *Studies of Right Tributario*, Vol. I, IEF, Madrid, 1979, pág. 97, it affirms: “The principle of consent of the mediaeval assemblies like title last of legitimación in the requirement of the tributes would suffer a very uneven path along the Modern Age. Generally and almost with the alone exception of England, the creation of the national State, the absolute Monarchies and the same concept of sovereignty ... determined that it broke the tradition tributaria of the consent”.

<sup>251</sup> Of a side, the tribute will happen to have the character of ordinary and, of another side, will leave to be affection to the specific need that it has to cover, when conceiving like a “abstract provision”, desconectada of his “specific cause”. VILLAR PALASÍ, “Fisco versus Administration. The theory nominalista of the tax and the theory of the administrative provision”, quoted by SIMÓN ACOSTA, *The financial Right and the Science of the Right*, ob., cit., págs. 205 et seq. Vineyard. Also SAINZ OF BUJANDA, *Inland revenue and Right*, I., ob., cit., págs. 237 et seq.; and RODRÍGUEZ BEREIJO, *Introduction to the study...*, ob., cit., págs. 82 and ss.

<sup>252</sup> It explains this author how to the time that appear these ordinary taxes, existed also extraordinary services or income requested by the Monarchs to attend costs “really exceptional”. *Inland revenue and Right*, I., ob., cit., pág. 237.

disintegration of the bond entry-cost<sup>253</sup>, also expressed like the split of “the connection between the right to consent the taxes and the right of budgets” in terms of OTTO MAYER<sup>254</sup>; arriving, anyway, –according to famous expression of the professor BUJANDA<sup>255</sup>- to the “Bifurcation of the principle of financial legality”, that guarantees the right to the collection tributaria without need of periodic approvals of the annual Budgets. Events, that – however- did not prevent that it prospered and consolidated a conjoint treatment of the institution<sup>256</sup>. In our country -with the approval of the Letter Magna of 1978- the connection between income and public costs of functional or instrumental character purchases a juridical dimension-constitutional; stone basilar, by the other, of the construction of the modern Financial Right and tributario been born after the Spanish transition of finals of the decade of the seventy.<sup>257</sup>

Restarting, then, the thread argumental precedent, of irrefutable can tildar the fact that the exaction of gravámenes and contributions have constituted an authentic “horse of constant” Troy in the diverse States from remote times. In the emergent constitutionalism from the 19th century, the principle of legality tributaria will constitute a true bastion consolidador of a just democratic State, as to his favour the citizens see protected in his rights of “freedom” and “property”<sup>258</sup> in front of possible injerencias of the public powers<sup>259</sup>.

The extraordinary transcendence of the matter impositiva carries to that in determinate European states regulate “the reservation of law tributaria before that the general legal

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<sup>253</sup> Quoted by RODRÍQUEZ BEREJO, *Introduction ...*, ob., cit., pág. 83.

<sup>254</sup> *Administrative right German*, Depalma, Buenos Aires, 1973, pág. 238. On the “historical roots of the dissociation between income and public costs” aims as it causes determinant “the distinct significance that the budgetary law happened to have in relation to the income tributarios, when the pervivencia of these in the system did not hang of the revalidación of the budgetary Law”, without prejudice to other facts that contributed to that this occurred. For his exhibition vineyard. MARTÍN QUERALT, J., “The Spanish Constitution and the Financial Right”, H.P.And., number 63, págs. 102 et seq.

<sup>255</sup> Among others texts of the same author that refer to this notable question, *Inland revenue and Right*, I, ob., cit., pág. 238; *Lessons of Financial Right*, 8ª edition. Ed. Faculty of Right, Universidad Complutense, Madrid, 1990, pág. 7.

<sup>256</sup> To trial of the professor MARTÍN QUERALT has been D'AMATI between the foreign doctrine the one who more rightly has put of relief the connection between income and costs. “The Spanish Constitution and the Financial Right”, ob., cit., pág. 103.

<sup>257</sup> Whose analysis, in spite of his meant importance, exceeds of the object of this writing. Regarding this matter, we remit us to our “Educational Project and of Investigation”, University of Barcelona, 2001, págs. 68 et seq.

<sup>258</sup> On the concept of “property”, in Germany (“in the sense of the Fundamental Law of Bonn”), can see GÜNTER DÜRIG, *Homage to Apelt*, Munich, 1958, pp. 13 et seq., also Ernst RUDOLF HUBER, *Deutsche Verfassungsgechichte SEIT 1789*, vol. I, Stuttgart, 1957, pág. 348. Quoted in JESCH, Dietrich, *Law and Administration...*, ob., cit., pág. 134. Likewise we recommend the reading of the article “The constitutional protection of the private property like limit when can tributario”, written by PALAO TABOADA, C., in *Inland revenue and Constitution*, I.And.F., Madrid, 1979, págs. 277 et seq., where questions if “The imposición” constitutes or does not constitute an attack to the constitutional right of property, analysing the theories of the German authors: Friedrich Klein and Put Selmer. It concludes of the examination doctrinal “that only the taxes intervencionistas can affect to the fundamental right of property, in his appearance of subjective juridical situation”, being besides necessary “that the gravamen represent an aggression to the goods of the taxpayer equiparable to the deprivation expropiatoria.

<sup>259</sup> “The principle of legality was –reiterates SAINZ OF BUJANDA, F.- A dogma of the constitutional State, because it thought that the tax constituted a limitation to the freedom and to the individual property, that could not decree without the aquiescencia of the national representation, to which corresponded also approve the destination of the public discharges”. *Inland revenue and Right*, I, ob., cit., pág. 434.



reservation”<sup>260</sup>. It does not suppose an exception our country, where the importance of the principle of reservation of law tributaria is such that historically has tipificado constitutionally with specific character, without prejudice to the widest reservation that affects to rights and public freedoms<sup>261</sup>.

**B) The principle of “legality tributaria” like principle that informs so much the “normative sphere” like the “administrative sphere” of the institution.**

This is, in synthesis, the position kept by the professor And. GONZÁLEZ the one who conceives the principle of legality tributaria like informador of all the institution, so much in his normative sphere, in whose case the principle of legality designates more properly “reserves of law”; as in his administrative sphere or principle of administrative legality. It abandons like this the conception restricted of the principle of legality tributaria equated to the requirement of law for the establishment of “sacrifices patrimoniales” with the end to tackle a wider study of the quoted principle that differentiates the planes mentioned: the normative in matter tributario (principle of reservation of law) and the principle of legality tributaria in the sphere aplicativa<sup>262</sup>.

It is not the author referenciado only exponent of the conception seen. In such line argumental are also to quote BAYONA OF PEROGORDO and SOLER ROCH<sup>263</sup>, those who distinguish the “two appearances that shuts the expression ‘principle of legality’: by a part, the principle of reservation of law, and by another, the principle of legality of the Administration”. To such terminological precisions equally devote his attention the authors: AMORÓS, N.<sup>264</sup>; MARTÍNEZ LAFUENTE<sup>265</sup>; SIMÓN ACOSTA<sup>266</sup>; or CHECA GONZÁLEZ<sup>267</sup>, for the one who has to distinguish the principle of legality and the one of reservation of law since have a distinct meaning, “although a good part of the doctrine and of the Jurisprudence use them like synonymous”.

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<sup>260</sup> JESCH, D., *Law and Administration...*, ob., cit., pág. 136.

<sup>261</sup> CAZORLA PRIETO, L. “Considerations on the power tributario ...”, ob., cit., pág. 101.

<sup>262</sup> GONZÁLEZ GARCÍA, And., “The principle of legality in the Spanish Constitution of 1978”, ob., cit., págs. 971 et seq.

<sup>263</sup> *Financial right*, 1989, ob., cit., pág. 201 et seq.

<sup>264</sup> *Right Tributario*. Publisher of Financial Right, Madrid, 1970, pág. 87. It affirms this author: “Principle of legality wants to say as much as submission of the activity tributaria to the Law. The financial Administration only can do what the Law on purpose allows it and can not extend to more although the law do not forbid it. (...). The principle of reservation of law establishes that the regulation of some matters has to do necessarily by the formal Law is a limit to the statutory power of the Administration”.

<sup>265</sup> *Right Tributario. Studies on the Jurisprudence tributaria*, ob., cit., pág. 39.

<sup>266</sup> *The Financial Right and the Juridical Science*, ob., cit., pág. 203.

<sup>267</sup> “The principle of reservation of Law in matter tributaria”, in *Studies of Right and Inland revenue*. Homage to C. Albiñana, Vol. II, 1987, pág. 795

#### 2.1.4. The principle of legality tributaria in wide sense

In our opinion does not present inconvenient the preservation of a strict and bounded conception of the principle of legality tributaria understood like maximum that orders the establishment of tributes and another provision patrimoniales of public character by means of law, very known –nonetheless- that such formulation, originaria and impregnated of a strong dose of historical rooting, is not the only that fits to shelter. By the contrary, and on line with “the modern conception” that analyse when tackling this section<sup>268</sup>, could formulate a principle of financial legality and tributaria in wide sense, equivalent to a “Principle of Juridicidad Financial and Tributaria (extrapolating the terminology of MERKL to the matter referred), consistent in *the adecuación and subjection of the financial power-tributario to the block of legality*. Affirmation that are supported by sustento constitutional, as our Letter Magna protects a generic meaning of “Legality” tipificada in the article 9.3 (that it consecrates on purpose the “principle of legality” like the first of the principles that have to regentar our constitutional state), all time that tipificado also in the article 9.1, precept that proclaims the subjection of the public powers to the CE and to the rest of the juridical legislation. Of such luck that, this last constitutional mandate projected in penal matter, administrative, ... , etc., would reach also to the order tributario and financial, as strike question the condition of the financial power political power public<sup>269</sup> and therefore subject to the Constitution and to the rest of the juridical legislation, as it orders on purpose the quoted third section of the Constitution.

In consequence with the exposed would fit to speak of a Principle of Legality (Juridicidad) in financial matter and tributaria, characterised by the subjection of the financial power and tributario to the block of legality, of the that would form splits amen of the Constitution and the Laws, the regulations, and the no written sources: general principles and the habit<sup>270</sup>.

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<sup>268</sup> Vineyard separated 4.1.- *On the Principle of Legality*

<sup>269</sup> Vineyard. The documented work of the professor CAZORLA PRIETO, L. M<sup>a</sup>, *Can tributario and Contemporary State*, I.And.F., Madrid, 1981, pág. 87 et seq., where bases the following affirmation: “One of the demonstrations of the political power public is the power tributario”.

<sup>270</sup> On line with the exposed by GARCÍA OF ENTERRÍA and FERNÁNDEZ RODRÍGUEZ, *Course of Right...*, 2000, ob., cit., pág. 435. This links directly with the important subject of the Sources of the Right tributario, studied by tratadistas of Right Tributario. For PÉREZ OF AYALA, J.L. Also the no written sources (general principles and habits) are source of financial right. Regarding this matter, it is to review –likewise- the article: GARCÍA AÑOVEROS, “The sources of the Right in the General Law Tributaria”, R.D.F.H.P., n. 54, 1964, among others.

### 2.1.5. Concretion of principle of legality in financial matter.

The first and more important limit of the statutory authority in financial matter is the principle of financial legality and tributaria to the that already have referred us in the chapter I of this Work and by extension the principle of reservation of financial Law and tributaria.

Principle of legality, constituted like the key of vault of the building of sources of the Right in this field tributario, parafraseando to the professor Fernando PÉREZ ROYO<sup>271</sup>. It exists, therefore, a situation nítida of authentic primacy of the Law on the Regulation in this field; character prevalente that, however, does not enervate the collaboration of the Regulation whenever this produce in terms of regulation of secondary appearances, of development of the points that the Law like this establish it, without that it can in case any justify the intromisión of the statutory disposal in matter reserved. The regulation can not access to regulate matters reserved to law, can not go against of the Norm creator, having to respect jealously, abstaining to regulate the essential appearances of the plot reserved. The regulation will know of matter tributaria when a law delegate it to him to collaborate and carry out the purpose of the same and when it was indispensable to be able to carry out said purpose. It justifies like this the intromisión of the regulation in the field reserved to law of form sustentadora or auxiliadora of what establishes the Law creator, always subordinated to the Law and confining to the task of complement, no of substitute. No of alternative, no of innovation.

Obviously the statutory authority of the Administration tributaria no only is subjected to the empire of the Law but to the juridical legislation in his group, as it studied .

Fed up known is, that so much in our constitutional texts as in the majority of the Europeans, tributes and penalties have been subjects reserved to the legislative power, the one who has entrusted the work of his regulation without possibility of delegations to other powers or organisms. In Spain the CE of 1978 collects the principle of financial legality, whose concretion and effectiveness materialises through the reservation of law with protect equally constitutional<sup>272</sup>. In this way it consecrates the principle of autoimposición preserving to the

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<sup>271</sup> *Financial right and Tributario. General part*, Publisher Thomson, 2011, p. 21.

<sup>272</sup> Without spirits to elaborate on us the individual, so only will stand out the fact that although the greater part of authors and the jurisprudence identify the principle of legality tributaria with the institute of the reservation of

citizens of imposiciones arbitrary of the political power, all time that guaranteeing a uniform treatment of the same in front of the loads tributarias<sup>273</sup>. Andl institute of the reservation of law constitutes a border line that delivers the normative activity between the legislative power and the executive power<sup>274</sup>. In fact, and by what to us respect, interests to a large extent stand out that the referred institute is a limit infranqueable for the headlines of the exercise of the statutory authority<sup>275</sup>.

The constitutional precepts that stand out to the law like source of the financial legislation and that reserve to the legal norm the regulation of the matters ínsitas in his circle, finds so much in the field of the income of public right as in the one of the costs of equal nature.

Regarding the *income of character tributario*, exists, as it is very known, a simultaneous constitutional –reservation in his articulated- so that his creation and exaction only can make adjusting to the imperative of the law. In this sense are to quote the known articles 31.3, 133.1, and 133.3 of the CE, that consecrate the general frame of the reservation of law in matter tributaria. Amén of the foreseen for the state field, the article 133.2 of the CE establishes that the CCAA and the Local Corporations will be able to establish and demand tributes in accordance with the Constitution and the Laws<sup>276</sup>.

Without prejudice to the reservation of law constitutionally established to arbitrate public income of nature tributaria, the need that his normación produce by Law coexiste for other

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law tributaria (by all RODRÍGUEZ BEREIJO, To. “The principles of the imposición in the Spanish constitutional jurisprudence”, REDF, number 100, 1998, in whose pág. 598, it contains the following epigraph “The principle of legality tributaria or of reservation of law”), no sucede like this with the principles of administrative legality and reservation of law. To know: S. It PUTS TO BED, *The Financial Right and the Juridical Science*. Publications of the Real School of Spain, 1985, pág. 203, it notices 303, MARTÍNEZ LAFUENTE, *Right Tributario. Studies on the jurisprudence tributaria*, ed. Civitas, Madrid, 1985, pág. 39, quoted by CHECA GONZÁLEZ, C., “The principle of reservation of law in matter tributaria in *Studies of Right and Inland revenue*, Vol, II, Madrid, 1987, pág. 796.

<sup>273</sup> By MARTÍN QUERALT, J., -“Comments to the article 2 of the LGT”, in *Comments to the Laws Tributarias and Financial*, ed. *Financial right*, edersa, 1982, págs. 20 et seq., and -“The constitutional ordination of the Decree-Law in matter tributaria, REDF, number 24, 1974.

<sup>274</sup> Vineyard. PÉREZ ROYO, F., “Foundation and field of the reservation of law in matter tributaria”, HPE, number 14, 1972, p. 207.

<sup>275</sup> CALVO ORTEGA, R., it makes an interesting dogmatic construction on the limits of the statutory authority, for the one who, a first group of such limits “comes given by the principles of reservation of law, preference of law and normative hierarchy”, “The regulations tributarios in the state legislation Spanish”, HPE, number 17, 1972, págs. 52 et seq.

<sup>276</sup> Regarding this matter vineyard. The interesting article of the professor MARTÍN QUERALT, J., “normative Authorities of the CCAA in matter tributaria”, in *the CE and the Sources of the Right*, IEF, Madrid, 1979, vol. II, págs. 1324 et seq.

susceptible juridical institutes to generate income of the same nature, although with different structural characteristics. We refer us, in particular, to: -to the *Right of the public credit*, matter in which it governs the reservation of law in the article 135.1 of the CE, to whose tenor: “The Government will have to be authorised by law to issue public debt or contract credit”; -to the *heritage of the State*, whose regulation, administration, defence and conservation will have to make by Law (art. 132.3)<sup>277</sup>; and in lower degree, to the possibility of legal reservation that establishes the article 128.2 CE in *case of monopoly*<sup>278</sup>. In general, the reservation of law will have to cover the establishment of all type of provision patrimoniales of public character<sup>279</sup>.

By the side of *the public Cost*, also exists a rúbrica constitutional that reserves to the General Courts the examination, amendment and approval of the General Budgets of the state, once elaborated by the Government of the nation (art. 134.1 CE)<sup>280</sup>, compeliendo the article 133.4 to that the public administrations only can contract financial obligations and make costs in accordance with the laws.

## 2.2. The principle of reference of law in matter tributaria

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<sup>277</sup> In virtue of the article 132.3 of the CE: “by Law will regulate the Heritage of the State and the National Heritage, his administration, defence and conservation”.

<sup>278</sup> Article 128.2 CE: "By means of Law will be able to reserve to the public sector resources or essential services, especially in case of monopoly and likewise agree the intervention of companies when like this it demanded it the general interest".

<sup>279</sup> RODRÍGUEZ BEREIJO, To., “The principles of the imposición in the Spanish constitutional jurisprudence, ob., cit., pág. 599, it affirms in this regard: “The constitutional concept of the provision that result covered by the reservation of law does not coincide with the one of tribute, as this is understood by the LGT, but has a wider scope, that covers all personal provision or patrimonial of public character coactivamente imposed and whose reason or foundation is contributory. Therefore, the constitutional concept comprises not only the tributes (taxes, taxes and special contributions), but also another provision like cotizaciones of the Social Security, canons, prices of public services, public prices ..., that manage to extramuros of the right tributario and, very often, to the protect of the phenomenon of the ‘parafiscalidad’ ”. Argument that, as it clears the author, supports in the SSTC 37/1981 and with more rotundity in the recent Sentences 185/1995 and 182/1997 of the same Organ.

<sup>280</sup> As it affirms TEJERIZO LÓPEZ, “in this precept –134.1 CE- has to understand included the norm on the normación in matter of monetary Right place that is the Budget the one who fixed the competitions and limits in the broadcast of the coin”. “The sources of the Right to the light of the constitution”, in *The Spanish Constitution and the sources of the Right*, vol III, IEF, Madrid, 1979, pág. 1997.

It produces a situation of “preference of law” when by means of ordinary law reserve to determinate legal regulation appearances or matters. To the same situation arrives in the supposed that the normación of a determinate subject carry out by means of law<sup>281</sup>.

The fact that such reservation, well foresee, well make, by means of ordinary law, comports his own availability by part of the ordinary legislator the one who will be able to desvincularse of<sup>282</sup>the same. But, no other organs infralegales to which is them vedada this matter from the moment in that the Parliament reserves his regulation to Law.

The basic aim of the preference of law in matter tributaria is the concretion of the generic principle of legality tributaria constitutional<sup>283</sup>, máxime when his formulation carries out by means of the regulatory law of the basic principles in matter tributaria, cual is the General Law Tributaria, and taking into account that, besides, the desvinculación to the same requires that his plasmación develop by the timely formal course that follow the parliamentary Cameras to approve or modify laws.

In matter tributaria the preference of law has played a stellar paper, as of “basic” fits tildar his contribution with a view to concretise and determine the content of the matter tributaria reserved constitutionally to law. Given the parquedad with that the Letter Magna pronounces in this regard, the article 8 of the LGT (that it substitutes to the ancient article 10 of the LGT of 1963) has contributed loablemente –without desmerecer, of course, the meritoria work doctrinal<sup>284</sup>

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<sup>281</sup> Regarding this matter see, among others: CALVO ORTEGA, R., -“The regulations tributarios in the state legislation Spanish”, HPE, 17, 1972, pág. 55 et seq.; -“Considerations on the delegation ...”, ob., cit., págs. 258 et seq. CHECHA GONZÁLEZ, C., “The principle of reservation of law in matter tributaria”, ob., cit., pág. 797; PÉREZ ROYO, F., -“Relations between primary norms and secondary norms”, in *The Spanish Constitution and the sources of the Right*, vol. III, DGCE, IEF, Madrid, 1979, págs. 1660 et seq.; -Foundation and field of the reservation of Law in matter tributaria, H.P.And., number 14. SAINZ OF BUJANDA, *Inland revenue and Derecho*, IEPol, Madrid, 1979, pág. 168 et seq. GONZÁLEZ GARCÍA, And., “Comments to the art. 6 LGT”, in *Comments to the Laws Tributarias and Financial*, vol I, Edersa, Madrid, 1982, págs. 66-67. DIÉZ MORENO, F., “The statutory authority and the LGT”, in *Studies of Right Tributario*, vol I, IEF, Madrid, 1979, pág. 300.

<sup>282</sup> “It suits to remember –affirm PÉREZ ROYO, F.- That to the preference of law results assimilated, in his effects, the ‘reservation of improper law’, that is to say, established in an ordinary law: the effects that produces this ‘reservation of improper law’, -whose example clearer have it in diverse sections of the articulate 10 LGT- is the one of the ‘freezing of the legal rank’ of the matters reserved. The function that fulfils the legislative permission is simply ‘descongelar the rank’.”, “Relations between primary norms...”, ob., cit., pág. 1664.

<sup>283</sup> CALVO ORTEGA, R., it aims that the preference of planned law in the article 10 of the antigua LGT is beneficial for the normative stability and brakes his modification by the ordinary legislator. *Right Tributario. General part*, Civitas, 2000, pág. 97.

<sup>284</sup> And without prejudice to the constructive criticisms formulated by the authors on the legislative technician of the previous article 10 LGT. Like this GARCÍA AÑOVEROS, J., it affirms: “In the eleven sections of the previous article 10 LGT, enumerate matters tributarias that “anyway, will regulate by Law”. Such matters do not constitute a development of the requirements of the fundamental principle of legality tributaria, as si between them there is

and jurisprudential- to determine and concretise the scope of the precepts 31 and 133 CE, juridical frame of the Reservation of constitutional Law in the field tributario. In following sections develop the appearances of the article 8 of the LGT related with the subject that occupies us, as well as other legal precepts that collect the reservation of formal law in matter tributaria.

### **2.3. The principle of normative Hierarchy in matter tributaria.**

The normative authority that has the Government is an *authority subordinated* to the constitutional prescriptions and to the empire of the Law<sup>285</sup>, materialised –to our effects- in the principles of reservation of law and primacy of the Law. Nonetheless, said subordination reaches a radius of greater performance, as the same observes no only with regard to the CE and to the Law, but also with regard to the rest of the juridical legislation by mor of the art. 9.1 CE that subject genéricamente the performance of the citizens and public powers to the CE and to the rest of the juridical legislation; very known that, this power limited of the public powers to the that alludes of general form in the article 9 of the CE, sections 1 and 3, reiterates and concrete specifically for the performance of the Public Administration in the article 103.1 of the same constitutional text that orders full submission of the administrative performance to the law and to the Right<sup>286</sup>.

Originariamente The one who has attributed the statutory authority to dictate general disposals with normative efficiency is the Government and, besides, these disposals will have to be approved by means of R.D. Adopted by the Council of Ministers and signed by the King<sup>287</sup>. It

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some that answer to the same, others are fruit of the application of diverse principles, tributarios and extratributarios”. “The sources of the Right in the LGT”, R.DFHP, number 54, March, 1964, págs. 327 and 328. In the same sense, vineyard. FALCÓN And TELLA, R., “The law like source of the ...”, ob., cit., pág. 213.

<sup>285</sup> Like this It Sentences of the TS of 19-7-91, and SSTs of 16-4; 7-4; 12-6 all they of 1997.

<sup>286</sup> On the meaning of the meanings “submission to Law”, to the juridical legislation and to the Right can see PABLO L. MURILLO OF THE CAVE, “Observations around the statutory authority of the Government”, fascicles of the Faculty of Right. University *Illes Balears*, number 10, 1985, págs. 113 to 115. On the delimitation of the principles of juridicidad and legality, vineyard., REBOLLO PUIG, M., “Juridicidad, legality and reservation of law like limits to the statutory authority, RAP, number 125, 1991, págs. 112 et seq.. In this regard iede see equally GUTIERREZ GUTIERREZ, I., *The controls of the legislation delegated*, ed. Centre of Constitutional Studies, Madrid, 1995.

<sup>287</sup> “The signature of the King in the Decrees -affirm GARCÍA OF ENTERRÍA and T.R. FERNÁNDEZ- that is missing in the Or.M. And inferior disposals, constitutes the mark of the general supremacy expressed in the objective Right and the one of his extension and general scope, including the mandate of fulfillment to the judges, that administer justice, precisely, for Rey, according to the article 117.1 of the CE”. *Course of Administrative Right*, ed., Civitas, Madrid, 1997, pág. 178.

suffice as remember here that "the statutory normative disposals, that is to say, the disposals with juridical effects "ad extra", dictates them the Government and approve by Royal decree. **The disposals dictated by inferior authorities to the same (under the name of resolutions, circular ...)** "They are not normative acts"<sup>288</sup>.

*"All the 'general disposals' then , in the sense of normae agendi or norms of behaviour for the citizens, distinct of the established by the Law, correspond like this to the Decree, inside his own limits, no to the individual Ministers, by means of Orders of his respective Departments"* (GARCÍA OF ENTERRÍA and T.R. FERNÁNDEZ), neither much less to organs infraordenados.

Like this then , in this global frame of constitutional principles in that they deploy the linder of the exercise of the statutory authority, is to have very in consideration the principle of normative hierarchy guaranteed constitutionally in the article 9.3, as well as the retroactividad of the penalizing disposals, the juridical security, the responsibility and interdiction of the arbitrariness of the public powers, foreseen –also- in the last constitutional precept mentioned<sup>289</sup>.

## **2.4 The reservation of Law in matter tributaria**

### **2.4.1. Nature of the reservation of law in matter tributaria**

The study of the nature of the reservation of law in financial matter carries us to focalizar the question in the traditional distinction between reservation of absolute law and reservation of relative law. As it is very known, the reservation of absolute law means that only the law can discipline the matters reserved with absolute character, whereas the criterion of relative reservation supposes that only the substantial or primary appearances have to be disciplined with primary norms of legal rank, allowing the concurrence of statutory norms to discipline appearances accessories and/or adjectives, always with secondary character.

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<sup>288</sup> SANTAMARÍA PASTOR, *Foundations of Administrative Right*, Ed. Centre of studies Ramón Areces, Madrid, 1988, págs. 764 et seq.

<sup>289</sup> Among others, PABLO L. MURILLO OF THE CAVE, "Observations around the statutory authority of the Government", ob., cit., pág. 113; DÍEZ PICAZO, "Constitution and sources of the Right", in *The Constitution and the Sources of the Right*, Vol. I, I.And.F., Madrid, 1979, págs. 653 et seq. GARCIA AÑOVEROS, J.: "The sources of the Right in the General Law Tributaria", RDFHP, 54, 1964, and his speech of closure "On the Constitution and the sources of the Right", in *The Spanish Constitution and the Sources of the Right*, Vol. III, IEF, Madrid, 1979; CAYÓN GALIARDO, "The interdiction of the discrecionalidad in the management tributaria", REDF, number 36, 1982.



In Right tributario, as we will develop in following epigraphs, the principle of reservation of law poses from a double point of view, concretising of a side in that nor all the matters tributaria is reserved to Law (exists a horizontal distribution of matters, since no all they are reserved to Law), and of another side in that even in the plots reserved to law, fits the collaboration of the regulation with character subordinated and restricted for the lower development of some of such questions (vertical distribution of matters reserved to law on the scope or degree of collaboration of the regulation with the matters reserved to law)<sup>290</sup>.

The foundation last on which said criterion rests, consists in the literal formulas that employs the constitution to the tipificar the distinct reservations. To know: “only by Law” (absolute reservation) in front of other formulas of relative reservation eat: “of agreement to law”, “the law will regulate”, “by means of law”, ... . Nevertheless they have aimed other justifications of important calado as it is the make possible mark the rhythm the principle of legality tributaria with the principle of the local financial autonomy collected in the article 142 CE<sup>291</sup>.

The thesis that distinguishes between reservation of relative and absolute law, of deep rooting between the administrative doctrine and very especially in the doctrine tributaria has been mattered of **Italian authors**. Regardingl field of the right tributario, the principle of “Reservation of relative law” constitutes what could tildar of “creed” so much in the jurisprudential doctrine as in the scientific doctrine, gone on down practically the unanimity of the authors that, along the years (pre and post CE 1978), have pronounced on the matter in texts, tratados and scientific magazines and also been still in a big number of sentences of the Constitutional Court.

The relative character of the reservation of law in matter tributaria has announced unanimously by the doctrine tributaria. Pueden Read, among others: - SAINZ OF BUJANDA, *Inland revenue and Right*, vol. IV, IEF, Madrid, pág. 169 ( author that refers to the flexible character of the reservation of law tributaria) and “Conclusions to the XIX Week of Studies of Financial Right”, Edersa, Madrid, 1972, pág. 348 or also in *Lessons of Financial Right*, Universidad Complutense of Madrid, Madrid, 1989; - In the same sense: FERREIRO LAPATZA, “The sources of the

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<sup>290</sup> Following the general theory of Public Right, the question therefore would place inside the horizontal distribution and vertical distribution of matters between Law and Regulation. In the doctrine tributaria some author refers to this matter considering that the reservation presents a double slope: from a quantitative point of view because the reservation does not affect to all the matter tributaria and from a qualitative vision because the reservation does not affect pr equal to all the matter. CUBERO TRUYO, To. “The double relativity of the reservation of law in matter tributaria. Constitutional doctrine”. REDF, 109-110, 2001, pp. 232 and 233.

<sup>291</sup> PÉREZ ROYO, F. “(art. 142 CE), that advises in this concrete field that the local Corporations enjoy of one some capacity of option, regarding the configuration of his own tributes, still inside the margins established by the Law”. *Financial right and Tributario. General part*. Civitas. Madrid, 1996, p. 46.

Financial Right in the CE”, in *The Spanish Constitution and the Sources of the Right*, IEF, 1979, Vol. II, pp. 918-919, although this author in recent writings entronca with a new line of thought, when considering that the reservation of law is not absolute neither relative, simply reserves of law, as we already have quoted; - CHECA GONZÁLEZ, C., "The principle of reservation of law in matter tributaria", ob., cit., págs. 799 and ss; MARTÍN QUERALT, J., it affirms: "In our legislation the reservation of law in matter tributaria has relative character". "Comments to the article 2 of the LGT", ed. Edersa, 1982, p. 22; *Finacial Jurisprudence and Tributaria of the Constitutional Court*, Civitas, 1983, pp. 132 et seq.; - PÉREZ ROYO, F., -"The sources of the Right tributario in the new constitutional legislation", in *Inland revenue and Right*, IEF, Madrid, 1979, pp. 20 and 34 and -"Foundation and field of the reservation of law in matter tributaria", ob., cit.; - PÉREZ OF AYALA and GONZÁLEZ, And., *Right Tributario I*, ed. Square University of Salamanca, 1994, p. 51 and pp. 146 et seq.; - GONZÁLEZ, And., "Comments to the article 6 LGT", in *Comments to the Laws Tributarios and Finacial*, ob., cit., págs. 64 et seq. And also: -"The principle of legality tributaria in the CE of 1978, in *The Constitution and the Sources of the Right*, IEF, vol. II, Madrid, 1979, pág. 978; - CAZORLA PRIETO, "Comment to the article 31.3 of the CE" in *Comments to the Spanish Constitution*", Direc. Garrido Fails, p. 40, - HERNANDO WASHED, To., "The statutory authority and the management tributaria. His control by the Administration and the Courts, in *Comments to the LGT and lines for his reform*. Vol. I, Homage to Sainz of Bujanda, IEF, M. 1991, p. 177; - CUBERO, To. "The double relativity of The reservation of law em materi tributaria. Constitutional doctrine", REDF, no 109-110, 2001.

- SÁNCHEZ GALIANA, Coord. *Manual of Right Tributario*, ed. Comares, 2000, p. 47; - CALVO ORTEGA, R., *Right tributario*. General part. Ed. Civitas, 2000, p. 95; - LOZANO SERRANO, C., the one who does echo of the unanimity of the doctrine tributaria in matter of reservation of relative law, "The sources of the Right in the doctrine and in the constitutional Jurisprudence: application to the financial legislation, R.To.P., number 99, 1982, pág. 122; BAILIFF MARÍ, M.P., "About the flexibility of the reservation of law in matter tributaria", REDF, number 101, pág. 5 et seq., GIMENEZ-REYNA RODRÍGUEZ, And., "The statutory and interpretative authorities in the L.G.T.", C.T., Number 50, 1984, pp 79 and 80.

The most significant Jurisprudence in this regard it is the one of the T.C., to know: SSTC 37/1981, 6/1983, 79/1985, 60/1986, 19/1987, 99/1987, 185/1995, 233/1999, 106/2000, 150/2003, 102/2005, Car of the Plenary of the TC 123/2009, of 28 April

Seated the previous, would like us go back to insist in that this criterion sorter that distinguishes reservation of absolute and relative law has been frontalmente questioned from does years by a sector of the scientific doctrine that puts in cloth of trial the solidest foundation on which rests said criterion, based in the literal formulas that employs the constitution. We remit us as to a previous epigraph where analysed this question<sup>292</sup> and where saw how the theses that refutan this criterion sorter, in general bet by specific and concrete analyses of each one of the constitutional reservations analysing like this case by case the substantive limits infranqueables of the reservation of constitutional law and by the contrary which are those plots in which it fits a greater intervention of the Regulation to regulate matters reserved to law. This will be precisely the iter that are still in the following sections analysing which matters tributarias fall inside the circle of matters reserved to law (horizontal distribution) and analysing also the

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<sup>292</sup> Vineyard. Chapter I, section 4.4.

degree or intensity with which the regulation can, in his case, develop in secondary terms, said matters (vertical distribution).

It was as it went and with independence of nominalisms on criteria sorters, can affirm that in matter tributaria governs the principle of reservation of law in all his expression, that besides to our trial –parafraseando to SÁNCHEZ MORÓN- treats of a very intense “reservation”, and whose application in the practice often does not do gala or recognition of the principle of constitutional Legality, extralimitándose with a lot of frequency the limits of the Executive power against of the hegemony that of his has to have the Legislative power. All this, without prejudice to that in financial matter, fit that the application of this principle can carry out of flexible way, having fit the intervention of secondary norms but always to discipline appearances accesorias or less trascendentes of these same matters<sup>293</sup>.

#### **2.4.2 The horizontal “distribution” of matters between primary and secondary norms in the field tributario: matters of court tributario reserved constitutional and formally to Law**

The examination of the reservation of law in matter tributaria carries us to require which cumulus of matters of order tributario deserve the qualification of substantive or primary so that only they can be disciplined by legal rank.

Therefore in this section of what treats is to delimit which matters tributarias yes are reserved to Law so much by the Spanish Constitution (material reservation) as by the legislation (formal reservation).

The direct effect that in Right tributario govern a principle of reservation of flexible “law” – parafraseando to Sainzof Bujanda -, tildado of principle of reservation of relative law as we have seen by part of the doctrine and the Jurisprudence, comports that no that no all the cumulus of subjects ínsitos in the same require to be disciplined by means of norms of legal or primary rank. Fact that translates in a greater margin of manoeuvre so that sources of secondary rank or infralegales award regulation to matters no reserved constitutionally to law.

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<sup>293</sup> By all SAINZ OF BUJANDA, *Inland revenue and Right*, ob., cit., p. 168-169.

Maximum that does not operate in the penal order, according to the traditional conception (today also questioned<sup>294</sup>); legislation that –governed by the principle of reservation of absolute law<sup>295</sup>- observes the need to be disciplined by norms of legal court, remaining reduced the paper of the sources subordinated to law to the mere regulation of the necessary detail for his execution<sup>296</sup>.

The doubts, however, arouse due to the fact that the constitutional references that foresee the reservation of law in matter tributaria do not require with accuracy what splits of the same require obligatoriamente a legal regulation.

The answer to these interrogantes –no always peaceful, by the other- comes of the hand of four sources of distinct knowledge:

- In the first place, of the own letter and of the own spirit of the constitutional norm that, in definite, sues a work hermenéutica of his precepts.
- In second term, of the task of concretion that makes the ordinary legislator specifying the appearances whose regulation reserves to the General Courts<sup>297</sup> and to the Parliaments of the CCAA<sup>298</sup>.
- In third place, of the incessant task of the skilled scientific doctrine in the matter.
- In last place –but no thus of lower importance- it will be necessary to be to the solutions that concerning the “case to case” adopt the courts of Justice between which, definitely,

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<sup>294</sup> BATHROOM LEÓN, J. M.

<sup>295</sup> On the distinct classifications of the types of reservation of law stood out by the Italian doctrine, vineyard. CALVO ORTEGA, R., “Considerations on the legislative delegation in matter of direct taxes”, R.DFHP, number 80, 1969, pp. 258 and 259

<sup>296</sup> MORATI, *Istituzioni gave Diritto pubblico* I, vol I, Cedam, Pavoda, 9ª ed., 1975, pág. 187 and SAINZ OF BUJANDA, *Inland revenue and Right*, Vol IV, ob., cit., págs. 168-169.

<sup>297</sup> In the article 10, separated to and b of the LGT concretises the reservation of constitutional law for the creation of tributes. In virtue of the quoted precept will have to regulate by law anyway: to) The determination of the fact imponible, of the subject passive, of the type of gravamen, of the become and of all the other elements directly determinants of the debt tributaria, except the established in the article 58; b) The establishment, suppression and extention of the exemptions, reductions and other bonuses tributarias. In addition to these sections, the article 10 foresees the preference of law for a listing of matters no reconducibles to the constitutional concept of “establishment of tributes or of fiscal profits”, but they allude “to other matters whose regulation by law has to found in distinct criteria, tributarios and extrapresupuestarios”. Like this FALCÓN And TELLA, R., the one who makes a more extensive comment on the sections contained in the reiterated article 10 LGT, in *the book Comments to the LGT and lines for his reform*, vol. I, Homage to F. Sainz Of Bujanda, IEF, Madrid, 1991, págs. 208 et seq. In the budgetary field the preference of law concrete in the article 7 of the LGP that orders the regulation by law of a cast of matters of Budgetary Right.

<sup>298</sup> We remit us as to the exposed in the section devoted at the beginning of preference of law in matter tributaria.

occupy a place meant the considerations formulated by the Constitutional Court in the frame of the functions that have been entrusted to him: “debug, concretise, require and clear, always inside the constitutional prism, institutions and basic concepts of aforementioned discipline”<sup>299</sup>. In fact the Sentences of the TC are very important to extract a general theory in the matter that occupies us.

**To) Reservation of law tributaria material.** Beginning by the own letter of the Constitution, can observe how the Letter Magna collects although with little concreteness which matters of financial character and tributario yes are reserved to Law<sup>300</sup>. In this sense already had occasion to study the matters of financial cut and tributario reserved by the Constitution to the Law. By his importance remember that in *matter tributaria* the tripod of constitutional sections that the Constitution reserves to law substance in the following articles<sup>301</sup>: art. 31.3 “Only they will be able to establish personal provision or patrimoniales of public character with arrangement to law”; article 133.1: “The authority originaria to establish tributes corresponds to the State, by means of Law” and 133.3 All fiscal profit that affect to the tributes of the State will have to establish in virtue of law”. Of where extracts that the CE reserves literally to law three important cores: the provision patrimoniales and personal of public character, the tributes and the exemptions.

- i) In relation to the “**Tributes**” is logical that if in the CE establishes that the tributes only will be able to create by law and so that it was born a tribute requires that they concretise the elements that configure it, the reservation will extend to all they. In this sense has pronounced eminent doctrine tributaria Spanish interpreting that the literal diction of the Spanish Constitution when it reserves the creation of the tributes to Law has to extend the group of the essential elements that configure so much the qualitative elements like the quantitative elements<sup>302</sup>.

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<sup>299</sup> CHECA GONZÁLEZ, C., “The principle of reservation of law in matter tributaria”, ob., cit., page 828.

<sup>300</sup> As it already affirmed the professor Javier LASARTE recently approved the CE, it is necessary to regret that this there is not been more explicit, being able to have alluded “to the need that the law regulate the establishment and juridical diet of the tributes or that the law regulate the establishment and his requirement, etc”. “The principle of legality tributaria in the project of CE of 1978”, in *Inland revenue and Constitution*, IEF, Madrid, 1979, pág. 140.

<sup>301</sup> FERREIRO LAPATZA, J. *Course of Financial Right Spanish. Institutions*. 2006, 25 edition. Barcelona. FALCÓN And TELLA, R. “A fundamental principle of the Right tributario: the reservation of law”. REDF, n. 104, 1999, p. 711.

<sup>302</sup> With big tarpaulin aims MARTÍN QUERALT, J., “... A law that pretended to limit to establish a tribute without establishing his signals of passive –subject identity, fact imponible, minimum elements of quantification- would not have established at least said tribute, but an entelechy. Establishment of a tribute, in definite, supposes what less define his essential elements. The contrary, amen of a sophism, supposes vaciar of content the constitutional mandate”. “Comment to the article two of the LGT”, in *Comments to the Laws Tributarias* ....., ob., cit., pág. 22. PÉREZ ROYO, F., it considers that the reservation of law covers all the essential elements that affect to the identity

With everything, one of the main critical formulated at the beginning of reservation of constitutional law in matter tributaria is that from a “technical perspective-juridical would have been convenient a greater precision in the terms of the Constitution, that had allowed to trace a less ambiguous picture of the reservation of law tributaria in the breast of a constitutional text”<sup>303</sup>.

Aserto That ascertains when observing how the fault of constitutional precision in this matter gives place to that in other juridical legislations that have a similarity in his respective Constitutions when regulating this matter, as for example the Italian Constitution, is interpreted by the doctrine tributaria Italian considering that the reservation only reaches to the qualitative elements of the tribute, this is, to those that allow individualizar the provision, varying a lot the approach in relation to the quantitative elements of the obligation tributaria<sup>304</sup>.

Like **corollary** can affirm that in the legislation tributario Spanish, the pointed sources –CE, ordinary legislation, doctrine and jurisprudence- coincide in that **the reservation of law for the establishment of a tribute means the ex creation novo of the same; the determination of his essential elements or configurators and the establishment of fiscal profits in general.** To know:

- *Constitutional jurisprudence*: The reservation of Law in matter tributaria demands that the ex *creation novo* of a tribute and the determination of the essential elements or configurators of the same have to carry out by means of Law (SSTC 37/1981, 6/1983, 45/1983, 51/1983, 79/1985, 60/1986, 19/1987, 99/1987, 185/1995, 203/1999, 102/2005, Car of the Plenary of the TC 123/2009, ...).
- *Doctrine*: The professor SÁINZ OF BUJANDA, F., it fixed that nor only the establishment or ex *creation novo* of the tribeto has to be object of the reservation, but also the regulation of all the essential elements or substantives of the obligation tributaria.. This is, toquellos that affect to the identity and to the entity –*the an and the quantum*- of the provision. On the same line they have pronounced among others, authors like MARTÍN QUERALT, PÉREZ ROYO, FERREIRO LAPATZA, FALCÓN And TELLA, CHECA GONZÁLEZ, etc. etc<sup>305</sup>.

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(presupposed in fact or fact imponible and subject passive) or to the entity of the provision (base imponible and the type of gravamen). "Foundation and field of the reservation of law...", ob., cit., pág. 233. By his part CAZORLA PRIETO understands that “when the number 3 of the article 31.3 alludes to the establishment of provision patrimoniales, does not contemplate only the creation of a tribute, but also the rest of the elements of the relation tributaria”. The constitutional principles-financial in the new juridical order”, in Magazine of Public Right, 1980, p. 545.

<sup>303</sup> LASARTE ÁLVAREZ, “The principle of legality tributaria in the project of CE of 1978”, ob., cit., p.

<sup>304</sup> BERLIRI, *Principi gawe Diritto Tributario*, Vol II, 1972, pp. 279 et seq. One of the maximum exponents of this theory in Italy is Andrea FEDELE, *Commentario all'art. 23 della Costituzione*, Zanichelli, 1978, pp. 97 et seq.

<sup>305</sup> Among others: -PÉREZ ROYO, F., “Foundation and field of the reservation of law ...”, ob., cit., págs. 207-208; MARTÍN QUERALT, J. "Comments to the article 2 of the LGT", in *Comments to the Laws Tributarias...*, ob., cit., pág. 22; -CALVO ORTEGA, R., “Considerations on the legislative delegation ...”, ob., cit., pág. 267, and in the same sense CHECA GONZÁLEZ, C., “The principle of reservation of law in matter tributaria”, ob., cit., pág. 802; Regarding this matter vineyard. Also FALCÓN And TELLA, R., “The Law like source of the legislation tributario”, ob., cit., pág. 210, in whose it notices number 7 collects a notable doctrine that pronounces in this regard (S. BUJANDA, LASARTE, GONZÁLEZ GARCÍA, PALAO TABOADA, FERREIRO LAPATZA, etc.). Amén of the already pointed authors can see, among others MENÉNDEZ MORENO, To., "Some reflections on the principles of capacity and inspiring legality of the tributes and of the public prices", in *Studies of Right Tributario*, in memory of C. Bun Arocena, Services ed. University of the Basque Country, Bilbao, 1993, pp. 27 et seq.; AGULLÓ AGÜERO, To., "The public prices: provision patrimonial of public character no tributaria",

ii) With regard to the “*Provision patrimoniales and personal of public character*”, tipifican in the article 31.3 of the CE which drafted in parallel with the article 23 of the Italian Constitution “*Nessuna prestazione personale or patrimoniales può essere impost non in basic alla legge*”. Of his literal diction reserve to the Law so much the provision patrimoniales like the personal provision always of public character.

The distinct nature of both types of provision has carried to that some author questioned the location of the personal provision inside the article 31 pleading because said precept 31 had received only to the provision patrimoniales in accordance with the rest of matters treated in the same<sup>306</sup>.

Between the personal provision establishes like paradigm the one of the military service, including also others in the frame of the Local Inland revenues and of Collaboration with the Administration<sup>307</sup>. In particular they are to quote the personal provision today foreseen in the articles 128 to 130 of the RDLeg 2/2004, object of disquisition in STC 233/1999, regulated in the articles 118 and 119 LHL.

It is of subrayar that the article 31.3 refers so much to provision patrimoniales as to personal provision. In consequence, whenever the formal obligations that accompany to the tributes constitute authentic provision patrimoniales on them will weigh the obligation that they are regulated by Law. In this sense, fix that without prejudice to that a very meant<sup>308</sup> doctrine understands that the formal appearances of the tribute do not go in in the reservation *tributaria* foreseen by the C.And. (That we do not put in doubt); it is of matizar that whenever such formal appearances concretise in personal provision of public character for the taxpayer, yes will be subject at the beginning of reservation of Law<sup>309</sup>.

Note: they are multiple the suppositions in which regulations tributarios establish authentic provision of personal character that inciden directly in the taxpayer, skewing like this the reservation of legal regulation of the same. For putting an example in the field of the Special Taxes, in concrete the tax on the alcohol in matter of exemptions of quantities of alcohol denaturalised or partially denaturalised in diet suspensivo<sup>310</sup>.

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R.And.D.F., number 80, 1993, págs. 562 and ss and also, -"The position of the Local legislation in the system of sources (statutory authority general and authority tributaria), in *Autonomy, plurality of legislations and principles of relation*, collection Institute of Autonomic Studies, number 29, 2000, págs. 154 et seq.

<sup>306</sup> “Comments to the article 31 of the CE”, in *Comments to the Spanish Constitution*, Direc. Garrido Fails, Civitas, Madrid, 1985, pp. 664-665.

<sup>307</sup> “Comments to the article 31 of the CE”, in *Comments to the Spanish Constitution*, ... ob., cit., pp. 664-665; RODRÍGUEZ BEREIJO, To. “The principles of the imposición in the Spanish constitutional jurisprudence”, REDF, 1998, n. 100, p. 598-600.

<sup>308</sup> Like this, SAINZ OF BUJANDA, F., it affirms that the formal appearances of the tribute are not protected by the reservation of law. *Inland revenue and Right*, Vol. IV, ob., cit., pág. 169. GARCÍA AÑOVEROS, J., it affirms: "Thus the principle of legality tributaria in strict sense affects to the creation of the strictly considered tribute and no to the performance of the Administration that manages the tribute". "The sources of the Right ...", ob., cit., pág. 326. PEREZ ROYO, F., "Foundation and field of the reservation of law in matter tributaria, H.P.And., number 14, pág. 233, esgrime: "it does not estimate , instead, comprised in the reservation the regulation of the formal appearances of the juridical Relation tributaria, since said regulation does not affect to the diverse functions that pretends to exert the principle of reservation of Law".

<sup>309</sup> Like this also FERREIRO LAPATZA, J. *Curs Or of Financial Right Spanish. Institutions-* 2006, ob., cit., p. 271.

<sup>310</sup> A development on these appearances can see in our work: ANDRÉS AUCEJO, And. “Settlements tributarias derived of the application of fiscal exemptions in matter of Special Taxes”, Fiscal Fortnight, number 7, 2009.

With regard to the provision patrimoniales of public character definitely the most important prototype is the provision tributaria, that no the only, as they specify also another type of provision like the consistent in cotizaciones to the social Security, payment of pharmaceutical provision, prices of public services, industrial, between others<sup>311</sup>.

The Jurisprudence of the TC has required in distinct pronouncements the outlines of this type of provision. Like this, it establishes the note of the coactividad like element definitorio of the provision patrimoniales public (STC 185/1995), or also the “unambiguous purpose of public interest” (STC 182/1997, FJ 14)<sup>312</sup>.

The distinction between provision patrimoniales public and private can find it in the STC 185/1995 where affirms that “the coactividad is the fundamental distinctive note of the concept of provision patrimonial of public character”. In said pronouncement stipulates when a provision patrimonial is coercive and, therefore, imposed by the entes corresponding. If the supposition in fact that gives place to the birth of the tribute has been “made of free and spontaneous form by the subject forced” then are speaking of provision of character deprived and vice versa, that is to say, if the supposition in fact is configured obligatoriamente of coercive form by the public organs, then speak of provision patrimoniales public.

Likewise, they are coercive also that provision that the relation of which is born the duty to pay was fruit of a free decision of the subject, but said freedom exists only formally, as it would be the case of the essential public services

- iii) In relation to **the exemptions**, already have seen like the article 133.3 tipifica lto reservation of law for “all fiscal profit” that affect to the tributes of the State. We coincide with the professor Fernando Pérez Royo in that the sense dand this quotation expresses is “to reinforce the scope of the reservation in this matter, of special sensitivity”<sup>313</sup>.

In matter of exemptions the principle of reservation of law purchases all his meaning. In essence, the basic argument that endorses it is that if a norm –the one of exemption-wants to alter the effects of a norm with rank of law- (definitoria of the suppositions taxed)- will have to have the same rank (SAINZ<sup>314</sup>OF BUJANDA ).

So that, being the exemption a fundamental appearance of the fact imponible “all he, in his integrity, subjects to the legal forecast, and in all his suppositions –exentos or taxed-“ (LOZANO SERRANO, C.<sup>315</sup>). In consequence, as it says also this author “modify or suppress the exemption is, also, modify or redefine the fact imponible”. Thus “apply the exemption is also a form to apply the tribute and any peculiarity reviste his juridical diet with regard to the of the suppositions in that the realisation of the fact imponible in his modalities taxed involves the birth of a duty of payment to the Public Inland revenue”. The establishment of the fiscal profits by means of law has been also fixed by the Constitutional Court in sentence of 4 February 1983. However, resulta at least chocante

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<sup>311</sup> “Comments to the article 31 of the CE”, in *Comments to the CE*, Direc. Garrido Fails, ob., cit., note on foot number 6.

<sup>312</sup> In this Sentence considers that it is subject to the reservation of the planned law in the article 31.3 of the CE the obligation to pay to the workers the provision by transitory labour inability in case of common illness or of accident no labour, in some circumstances. Said Sentence considers inconstitucional the article 6.1 of the RD. 5/92, of 21 July since it exists reservation of law of this provision patrimonial as in spite of not being of character tributario himself has to establish “with arrangement to law” (art. 31.3 CE).

<sup>313</sup> PÉREZ ROYO, F. *Financial right and tributario. General part*. Civitas, Madrid. 1996, p. 45.

<sup>314</sup> *Juridical theory of the Exemption*, pág. 386.

<sup>315</sup> Exemptions Tributarias and Rights Purchased, Tecnos, 1988, págs. 51-52



the controversy that generates the TC in this matter -duramente criticised by some authors<sup>316</sup>- when excluding of the field reserved to the law tributaria the suppression of exemptions or his reduction. Specifically, in the quoted Sentence (STC 6/1983, of 4 of faithbrero) the TC considers that the reservation of law includes the establishment of exemptions or bonuses tributarias, “but no any another regulation of them, neither the suppression of the exemptions or his reduction or the one of the bonuses because this last does not constitute an alteration of the essential elements of the tribute”. Amén of the previous can not desconocer that the CE also establishes a reservation of material law in relation to the rights and guarantees of the taxpayers with the Public Inland revenue, whose regulation will have to make by means of Law. Like this the Letter Magna contains an important cast of Rights of the citizens, which constitute a limit to the financial power Spanish<sup>317</sup>. They are to quote the following:

- a) **Fundamental rights and public freedoms.** Both categories link to all the public powers, having to be regulated by Law<sup>318</sup>. Like this as the Administration Tributaria, analogously to the rest of public powers will have to respect the rights and public freedoms in the exercise of his public authorities<sup>319</sup>. Inside the public powers -has said - stands out the prevalencia of the “Rights and fundamental Freedoms” of the citizen on the have to collected in the article 31.1 of the Spanish Constitution<sup>320</sup>. To the effects that occupy us –Relations between the Fisco and the taxpayers- have to underline the following Rights and fundamental Freedoms. To know: right to the equality, right to the freedom and to the security; right to the honour, to the personal and familiar privacy and to the own image; right to the free election of the residence; inviolability of the domicile; secret of the communications; right to participate in public subjects; right to the private property and to the inheritance.
- b) As it has established our Constitutional Court, the **principles computers of the system tributario of the article 31.1 are** at the same time **“limit and individual guarantee in front of the exercise of the power”**<sup>321</sup>. As it is known, the article 31 of the CE contains the material principles (generality, equality, economic capacity, progresividad, no confiscatoriedad) and formal (legality and reservation of law). All these premises have to govern and limit the act of the Administration tributaria<sup>322</sup>.

<sup>316</sup> Vineyard. LOZANO SERRANO, C., *Exemptions tributarias and rights purchased*, ed. Tecnos, Madrid, 1988, pp. 50 et seq.

<sup>317</sup> Vineyard. SÁNCHEZ SERRANO, L., *Treated of Financial Right and Tributario Constitutional I.*, ed. Marcial Pons, 1997.

<sup>318</sup> The interpretation of the fundamental rights and public freedoms will have to make of compliance with the Universal Statement of Human rights and the Treaties and international agreements on said matters ratified by Spain. Among others: CEDH/1950, ratified by Spain on 26 November 1979 and his protocols.

<sup>319</sup> As it affirms SÁNCHEZ SERRANO, L., “The CE and the rest of the juridical legislation –almost gives shame ter that remember it- are fully applicable, without derogation neither damage any, in the sense tributario, in the one of the rlaiones that arise between citizens and public powers with reason of the application of the tributes”. *The Spaniards, Súbditos fiscal?*, Taxes, 1990, II.

<sup>320</sup> SÁNCHEZ SERRANO, L., *The Spaniards, Súbditos fiscal?*, Taxes, 1990, II.

<sup>321</sup> (STC 82/1997, F.J. 6º). Also it can see Sentence of the Constitutional Court 76/1990 and the article of the professor SÁNCHEZ SERRANO, *The Spaniards, Súbditos fiscal?*, Taxes, 1990, II.

<sup>322</sup> Vineyard. SÁNCHEZ GALIANA, L., “The performances of the Agency Tributaria and the constitutional principles triutarios”, *Rev. Civitas*, n. 87.

Such material and formal principles of the legislation tributario has normative value (STC 8 July 1981 and 28 April 1992) and the rape of the same can base a resource or question of inconstitucionalidad against a law (art. 53.1, 161.1.To and 163)

- c) Finally it is to quote that in the articulated of the Spanish Constitution (CE) tipifican distinct **principles and rights of the citizens that constitute equally limits to the financial power**. To title of example:
- Allocation equitativa of the public resources according to the principles of efficiency and economy.
  - Submission of the Administration tributaria to the principles of efficiency, jerarquía, decentralisation and coordination.
  - The interdiction of indefensión and submission of the administration tributaria to the control jurisdiccional.
  - The right to the ordinary judge determined by Law; the right to the defence and assistance by Letrado.
  - The right to be informed of the indictment and to a public process with guarantees.
  - Right to use the means of proof pertinentes for the defence.
  - Right to not declaring against himself same, right to not to declare culprit, among others.

It is to underline that in relation to all these matters described of cut tributario and financial on which weighs the reservation of constitutional law, the Law constitutes a limit infranqueable for the executive.

It reserves to the legislator the function to establish the normative ordination of the matter, the criteria computers and the normative bases that they have to regulate the question. Any performance of the legislative abdicating such function will give like result a reference in white and therefore a violation of the principle of reservation of constitutional law, being able to abocar to the inconstitucionalidad of the aforementioned norm. And vice versa, all performance of the Government extralimitándose in the sense indicated will be able to drive to the illegality of the statutory disposal that invade the matter reserved to Law.

Amén of this, in virtue of the theses of the reference no recepticia in all these matters so that it can produce the opening of the same to the collaboration of the Regulation is necessary condition the legal reference of the legislative to the Government enabling him to fix the appearances adjectives and secondary of this regulation vedada to the Administration by mor of the own Constitution.

**B) Reservation of Formal Law in matter tributaria.** Finally it is necessary to comment that another limit infranqueable of the regulation in matter tributaria is the reservation of formal

law. Said reservation<sup>323</sup> derives so much of the fact that the ordinary legislator reserve the legal rank for the regulación of determinate matters as to a freezing of said rank when such matter comes being regulated by Law.

### **B. 1. Reservation of ex formal law article 8.1 of the General Law Tributaria.**

The legislador ordinary carries to the practice the principle of reservation of law in matter tributaria through the article 8 of the LGT, on line with what already established the previous article 10 of the derogated LGT of 1963, whose incorporation in the normative text by transcendence and importance has been tildada of fundamental. Varied are the questions that deserve to be stood out in this regard:

To) In the first place it is to signal that the reservation of formal law of the essential elements of the obligation tributaria foresees in the sections to), c) and d)

*Article 8. Reservation of Law tributaria. They will regulate anyway by Law:*

- a. The delimitation of the fact imponible, of the become, of the base imponible and liquidable, the fixation of the type of gravamen and of the other elements directly determinants of the quantity of the debt tributaria, as well as the establishment of presumptions that do not admit proof in contrary.*
- c. The determination of the forced tributarios planned in the section 2 of the [article 35 of this Law](#) and of the managers.*
- d. The establishment, modification, suppression and extention of the exemptions, reductions, bonuses, deductions and other profits or tax incentives.*

The legislator opts like this for reserving to law no only the qualitative elements of the tribute but also the quantitative elements for the determination of the obligation tributaria main. This quotation constitutes an important contribution for the juridical security, then , for example, in Italy, the interpretation of the reservation tributaria does not reach to the quantitative elements of the tribute, what does that it fit an intense intervention of the regulation in the determination of said appearances. Tendency that, on the other hand, has followed our Constitutional Court in some sentences carrying out an interpretation more laxa concerning the scope of the reservation of law tributaria on the elements of determination of the debt tributaria. Like this then , tto the and as it has signalled<sup>324</sup>, the article 8 of the LGT develops the principle of reservation of law

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<sup>323</sup> Vineyard. It asks number II.3: "Preference of Law in matter...."

<sup>324</sup> Reports of 2001 and 2003 of the Commission of experts of the Institute of Fiscal Studies.

tributaria (tributes and exemptions) in coincident terms with the effected by the Jurisprudence of our Constitutional Court.

b) Following with the comment of the essential elements of the tribute, incorporates in this new articulated in the section to) the quotation to the base liquidable (in the past omitted), that in definite does not contribute a lot, to the time that incorporates ex novo “the establishment of presumptions that do not admit proof in contrary”, on line with the recommendations poured in the Dictamen of the Council of State.

c) With regard to the subjective element, suppresses the passive subject expression and changes by the widest term of forced tributario that as we know includes no only to the subject passive of the obligation tributaria main but also to any physical or juridical person and to the entities to which the normative tributaria imposes the fulfillment of obligations tributarias (art. 35 LGT), with quotation expresses by part of the article 8 section c) to the managers.

d) The present article 8 of the LGT incorporate ex novo a new section b) that establishes that they will regulate anyway by Law: *The suppositions that give place to the birth of the obligations tributarias to make payments to account and his maximum amount*, following like this the recommendations of the Committee of Experts of the IEF that in his Reports of 2001 and 2003 plead for to complete the quotation of the essential elements of the obligation tributaria main incorporating also the suppositions that give place to the birth of the obligations tributarias to make payments to account and insisting also in that it left proof of his maximum amount (Report 2003 IEF)<sup>325</sup>.

## **B.2. The formal reservation in matter of rights of the taxpayer.**

The reservation of formal law in matter tributaria established in the LGT affects also to numerous precepts between which definitely project the precepts that develop the designated Statute of the Taxpayer, this is, the rights and guarantees of the taxpayers in front of the Public Inland revenue.

In the specific field of the Right Tributario, the “Rights” and the “Guarantees” of the taxpayers find tipificados in the Law 58/2003 of 17 December, General Law Tributaria 58/2003 (LGT).

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<sup>325</sup> Although such quotation has not been exenta of criticisms, having been tildada of “redundante”: “it Seems clear that the regulation by law of the obligations between resultant individuals of the tributes [letter j)] has to begin for defining the suppositions in that they are born such obligations. In consequence, the separate quotation in the letter b) of the suppositions of payments to account is redundante with the letter j)”. PALAO TABOADA, C. (Coord.). *Systematic comment to the new LGT*, 2004, CEF, Madrid, section 2.3.

It is important to underline that between the most important<sup>326</sup> aims that favoured the publication of this new LGT stands out the “**reforzamiento of the guarantees of the taxpayers and of the juridical security**”. And precisely to make possible this maximum, the LGT includes between his articulated a cast of Rights and Guarantees of the planned taxpayers in the article 34 (previously collected in the Law 1/1998 of Rights and Guarantees of the Taxpayers); it incorporates in his text other new rights that previously had not been tipificados and on the other hand, reinforces the guarantees of the taxpayers, fundamentally in headquarters of administrative procedure. To know:

- The Title II of the LGT (art. 34) it reproduces the listing of Rights and Guarantees of the Taxpayers.
- In the Title III of the LGT (arts. 85 to 89) it develops the duty of information and assistance of the Administration to the forced tributarios.
- In the following Chapters include the rights and common guarantees to the distinct procedures tributarios.
- Finally, in the juridical regulation of each one of these procedures tributarios (inspection, collection, ...) incorporate the corresponding rights of the taxpayers.

The general Rights of the taxpayers are collected in the article 34 of the LGT, as well as in other precepts of the articulated of said LGT, without prejudice to the exposed on the constitutional rights of financial type and the general rights of the administered recognised in the administrative laws. The editorial of this article 34 -in which it collects a generic catalogue of the distinct rights and guarantees of the taxpayers-, does not suppose big novelties if we take into account the following appearances: 1.- The article 34 limits to reproduce the list of rights that already had been collected in the LDGC (Law 1/1998), entering some new, that nevertheless, already were tipificados in the Spanish Constitution or in other laws of administrative nature; 2. Between this catalogue of rights, some are of type very general as for example the right to the information and to the assistance. The big majority of them are reproduction of the rights recognised to the administered in his relations with the Administration, as as it has put of self-evident by the doctrine, the rights of the taxpayers can not be less protected that the rights of the rest of the Public Administrations<sup>327</sup>; 3. Of the rights

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<sup>326</sup> Other aims were: adapt the rule of the administrative procedures to the new administrative legislation; modernizar the procedures administrativos; create mechanisms to reinforce the fight against the fraud; the control tributario and the debts tributarias, diminish the litigiosidad in the order tributario.

<sup>327</sup> MARTÍN QUERALT, J.,

that recognise in this article 34 some repeat later in the articulated of the Law, for example, diverse rights and guarantees of the procedures tributarios foreseen in the article 34 repeat later in the article 99 of the LGT.

With character sistematizador can make the following the catalogue of general principles in the following big groups: 1.- Right of Information and Assistance to the taxpayer; 2.- Right to the returns of undue income and repayment of guarantees; 3.- Right and common guarantees in the performances and administrative procedures; 4.- Other elementary rights of the taxpayers<sup>328</sup>.

### **B.3. Reservation of the formal law in relation to the formal appearances tributarios**

Endalmente is to ascertain that in spite of that the formal appearances of the tribute do not include in the reservation of law *tributaria* foreseen by the C.And., in the first place, “they find his natural lace in the principle of administrative legality”<sup>329</sup>; second, on part of them weighs a reservation of formal law foreseen in the article 8 of the LGT; and, in third place, observe a freezing of his legal rank whereas by ordinary laws regulate the lines and directrices basic in the matter. It is to quote in this last sense, so much the Title III dand the LGT rubricado “The application of the tributes”, whose Chapters I-V versan on the procedures of management, settlement, inspection and collection<sup>330</sup>), like the specific Laws of each one of the tributes and other notable Laws aplicables in matter tributaria: Law 30/1992, etc. Freezing of rank that extends –likewise- to the personal provision that accompany to the tributes<sup>331</sup>. In definite as it concludes the doctrine, the Law has to establish the “bases of the procedure of application of the tributes”<sup>332</sup> without prejudice to that it was precisely this field in which it fit a greater collaboration of the regulation with the Law.

#### **2.4.3 The vertical “distribution” of matters between primary and secondary norms in the field tributario**

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<sup>328</sup> For his study on the systematic development of such right vineyard. ANDRÉS AUCEJO, And. “Development of the constitutional rights and legal of the taxpayers in the juridical legislation Spanish”, in *Forums and Debates*, XXV Latin American Days and XXXIV Colombians of Right Tributario. Forums and Debates. Colombia, 2010, ILADT, pp. 551 et seq.

<sup>329</sup> RODRÍGUEZ BEREIJO esgrime that the duties of information and formal do not belong to the concept "provision patrimoniales of public character" (art. 31.3) rather they find his natural lace in the general principle of administrative legality (art. 9.3 CE) or of positive links of the Administration to the Law, so that the administrative performance has to explain, with a previous legal coverage". "The principles of the imposición in the Spanish constitutional jurisprudence", REDF, number 100, 1998, pág. 599.

<sup>330</sup> Regulated in Law of Economic Procedure-Administrative.

<sup>331</sup> Amén of the constitutional reservation established in the article 31.3 regarding this matter.

<sup>332</sup> FERREIRO LAPATZA, J. Institutions , ob. cit., p. 271.

Once delimited the horizontal distribution of matters tributarias reserved to law, will study in this section the vertical distribution of the same, this is, concerning those matters reserved to law will analyse if the regulation can take part and in his case with which degree of detail and in which conditions. In the very understood that in this section (vertical distribution) the question is more difficult to outline and concretise that in the previous supposition (horizontal distribution) since neither the CE neither the ordinary legislation concretise which is the margin of collaboration admitible by part of the regulation in matter tributaria. Thus, it has earned a special importance in these subjects the Jurisprudence of the TC and of the TS all time that the scientific doctrine.

Descending to the matter object of study is to ascertain that lto question of the determination of the constitutional concept of “establishment” of tributos or of fiscal profits observes voices discrepantes on the degree of intensity with which the law has to cover said appearances, that is to say; if this has to proceed to the whole regulation and in detail of the essential elements of the tributes or, if, by the contrary, would suffice with that it defined his essential shots without damage of the back statutory development.

Of this way, in front of a criterion of rigid interpretation on the normative scope of the law andn matter tributaria, conceived a form to evaluate the most flexible question, admitting, with nuances, the intervention of the regulation in the regulation of the elements of the tribute reserved to law.

We see to continuation which has been the criterion carried out so much by the scientific doctrine as by the Jurisprudence, fundamentally the one who comes from of the Court Constitucional.

Between the authors of this branch of knowledge can glimpse two positions doctrinales: a more bent to a criterion of strict interpretation or less permisivo with regard to the collaboration of the regulation in matter tributaria reserved to law<sup>333</sup>, whereas it exists another branch with clear

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<sup>333</sup> SAINZ OF BUJANDA affirms, “The structural elements or substantives of the tribute have to be primary or legal norms”. *Inland revenue and Right*, vol. I SAW, ob., cit., pág. 169; FERREIRO LAPATZA, J.J., “The principle of legality and the relations between Law-Regulation in the legislation tributario Spanish”, ob., cit., pág. 880.

inclination to a flexibilización of the matter<sup>334</sup>, posture on line with the criterion kept in some sentences of the Constitutional Court<sup>335</sup> and also by other Courts of Justice<sup>336</sup>, as we happen to expose to line followed.

And the Tribunal Constitutional in determinate pronouncements participates of a line of flexible interpretation when considering the scope of the collaboration of the regulation to regulate the essential elements of the tribute<sup>337</sup>. Bien Understood that when they have put of self-evident such subjects, the greater scope or minor of the regulation does not preach the same for the regulation of any essential element, neither of any juridical figure-tributaria, but, by the contrary, the quoted flexibility refers generally to the elements of quantification of the tributes and concerning the nature of the figures is used to centre in taxes, public prices, more accused in the local order.

This matter the dirime the TC under the following aserto: “The scope of the collaboration of the regulation will be in function of the diverse nature of the juridical figures-tributarias and of the distinct elements of the same”, can read in (SSTC 37/1981, 19/1987, 185/1995, 233/1999, etc.). Therefore the doctrine of the TC –especially marked by the Sentences 185/1995 of 14 December and 233/1999 of 13 December-, is that it admits elder flexibilidad for the collaboration of the Regulation with the Law in the appearances that follow, as we develop later:

1. In function of the nature of the juridical figures-tributarias.
2. In function of the distinct elements of the same.

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<sup>334</sup> LOZANO SERRANO, C., “The sources of the Right in the doctrine and in the Constitutional Jurisprudence: application to the financial legislation”, ob., cit., págs. 124 and 125; and years later also his disciple Pilar BAILIFF pronounces in the same sense: “About the flexibility of the reservation of law in matter tributaria”, quoted article. FALCÓN And TELLA, R., “The Law like source of the financial legislation”, ob., cit., págs. 216 et seq. According to LOZANO SERRANO, C., “The sources of the Right in the doctrine ...”, ob., cit., pág. 125, it affirms: “In this sense, plead for a more flexible approach of the reservation of law, that do not carry rígidamente to the exact determination of the essential elements of all tribute by the legislative organ, is not more than an attempt to accommodate the dogmatic constructions to the normative reality, to the time that would facilitate the taking of decisions by the legislative in the truly notable questions, salvaguardando like this the authentic sense of the institute of the reservation of law”.

<sup>335</sup> SSTC 37/1981, 179/1985, 19/1987, 221/1992, 185/1995, 233/1999

<sup>336</sup> SSTC 24-1-1996; 9-2-1996, 2-2-1996, 5-2-1996, 22-2-1999.

<sup>337</sup> “It remains like this opened a problem, by work of the constitutional jurisprudence –the determination of what has to understand by essential elements of the tribute- that had been resolved by the doctrine and on which can affirm with certainty that will see forced to go back the High Court”. SAINZ OF BUJANDA, *Lessons of Financial Right*, ob., cit., pág. 97.



Yes it would like us matizar that this special tendency to the flexibility of the collaboration of the Regulation with the Law has been very matizada and cleared in back sentences from the year 2001 until recent dates. We quote as you sentence referents the following: 63/2003, of 27 June, 102/2005, of 20 April 121/2005 and 101/2009 of 27 April.

In said Sentences, without leaving to recognise the relativity of the reservation of law and his flexible interpretation, insists in going back on the previous Sentences for example the 19/1987, of 17 February or 37/1981, of 16 November where, pose the subjects with big rigurosidad abounding in that the Law never can do references in white in favour of the regulation to the hour to configure the essential elements of the tribute and establishing that even in the subject of the quantities the determination in the law of a maximum limit of the provision of public character or criteria to fix it is absolutely necessary to respect the principle of reservation of law (like this for example in STC 63/2003, FJ 7).

In synthesis lace Sentence quoted supra refer to canons by administrative grantings portuarias (occupation of the port public domain) and prices by port services loaned in ports of competition of the State. The TC seats the doctrine that andn such suppositions are in front of provision patrimoniales of public character and therefore governs the principle of reservation of law tributaria. And the fact that in matter tributaria exist reservation of relative law (especially is the supposition of the quantities) can not desvirtuar the principle of reservation of constitutional law guaranteed and therefore can not justify wrong technicians of reference of the law to the reglamente in that it exist a desapoderamiento of the legislator for the determination of the essential elements in the definition of a tribute<sup>338</sup>.

It is doctrine of the TC that in the case of the determination of the quantity of the provision patrimonial (treating of port prices), the regulatory law can not limit to say that such quantities will fix and will update with subjection to the “economic politics-financial and of port prices fixed by the Government, that establish by a Ministry”. As this means to leave full freedom to the Government to determine an element essence of the provision (STC 101/2009, of 27 April), “what involves a so indeterminate habilitation that desborda the limits that for the statutory collaboration derive of the requirements of the reservation of law established in the articles 31.3

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<sup>338</sup> In this line can see the recent considerations of the professor Ferreiro (Institutions of Financial Right, 2010, p. 225), when to the treats on the reservation of law and question flatly the distinction between absolute and relative reservation (that in his opinion it has to be desterrada), says: “The absolute distinction-relative can drive, in this way, and in fact like this has sucedido, to a weakening of the requirements of the principle of legality collected in the Constitution”.

and 133.1 of the Spanish Constitution (STC 63/2003, of 27 June, FJ 7 and STC 101/2009 of 27 April, FJ 4). In sense very similar vineyard. SSTC 102/2005, of 20 April, FJ 7 and 121/2005, of 10 May, FJ 9).

From our point of view, the fact to leave in the air the greater or lower determination of the essential elements of the tribute in function of the parameters seen, can generate juridical insecurity. We consider that the law has to –necessarily- determine all the elements configurators of the tribute, as only in this way will fulfil the reservation of constitutional law in matter tributaria. And this without prejudice to that, although for the regulation of determinate elements configurators of the tributes or in particular , of some provision patrimoniales of public character, fits a greater collaboration by part of the regulation, his scope will have to require necessarily by means of Law, that will have to contain the juridical frame, criteria and especially the "limits" in that it has to develop the statutory performance; then , rúbricas like “the scope of the collaboration of the regulation will be in function of the nature of the juridical figures-tributarias and of the distinct elements of the same”, are dangerous by the high margin of discrecionalidad administrative that carry implicit, being able to end, to the limit, in a violation of the principle of normative hierarchy and interdiction of the discrecionalidad of the Administration, with the high degree of juridical insecurity that the same comport<sup>339</sup>. From here that we consider loable that in spite of these generic demonstrations of the TC inthe sent gone aforementioned, this organ there is exiggone -so that the regulation can complement to the law in the regulation of the essential elements of the tribute-, that the law that enable the entrance to the regulation contain the bases of the material regulation, foreseeing criteria and limits of said regulation, as the mere call to the regulation without the material regulation constitutes a deslegalización (STC 37/1981, quoted like reference in other back. To know: SSTC 63/2003, 102/2005 or 101/2009).

#### **2.4.4. Constitutional doctrine on the reservation of law in matter tributaria: Relaciones Between Law-Regulation**

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<sup>339</sup> Without prejudice to a wider comment that carry out in the questions that follow, is to repair in that, in spite of these generic demonstrations of the TC in the aforementioned sense, this organ demands -so that the regulation can complement to the law in the regulation of the essential elements of the tribute-, that the law that enable the entrance to the regulation contain the bases of the material regulation, foreseeing criteria and limits of said regulation, as the mere call to the regulation without the material regulation constitutes a deslegalización (STC 37/1981).

The Constitutional Court Spanish consecrates the principle of the reservation of law in matter tributaria, justifying –implicit or explicitly- his sense in the important ends that procures. To know:

“As it occurs with others of the reservations of present law in the Constitution, the sense of the here established is not another that the one to procure that the regulation of determinate vital field of the people depend exclusively of the will of his representatives... . This guarantee of autodisposición of the community on himself same, that in the state law enciphers (art. 133.1), it is also in our democratic State a consequence of the equality and, thus, preservation of the basic parity of position of all the citizens, with importance no lower, of the same unit of the legislation (art. 2 of the Constitution)” (S.T.C. 19/1987, of 17 February), in this sense also SSTC 185/11995, 233/1999.

On line with a rooted tradition doctrinal, so much the Constitutional Court like the High court assume the typology of the reservation of law that uses like criterion sorter the elder or lower margin that the CE has reserved to the ordinary legislator and that distinguishes, in consequence, between the reservation of absolute law and the reservation of relative law. Constitutionally, the financial matter is reserved to law, however, his formulation no planet with absolute character, but, by the contrary governs a flexible criterion or reservation of relative law, as they have had occasion to reiterate in successive occasions the quoted organs<sup>340</sup>. Immediate question to this, is to ask us which is the meaning of the principle of reservation of relative law in matter tributaria according to the interpretation of the Constitutional Court. To the light of his pronouncements arrive to the conclusion that the constitutional norm reservation to ordinary law the regulation of the financial matter of a flexible or no rigid way, in the measure in that:

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<sup>340</sup> SSTC 37/1981, 6/1983, 79/1985, 60/1986, 19/1987, 99/1987, 185/1995, 233/1999, 106/2000, 150/2003, 102/2005, 121/2005, 101/2009, Car of the Plenary of the TC 123/2009, of 28 April: “... the reservation of law established in matter tributaria is relative, or what is the same, limited to the ex *creation novo* of the tribute and to the configuration of the essential elements or configureoris of the same”. SSTs Of 22 January and of 18 March 2000 between others.

1.- With regard to the horizontal distribution of matters between Law and Regulation tributarios: in virtue of the doctrine of the Constitutional Court nor all the normación of any appearance tributario is reserved to law by the Constitution.

2.- In relation to the vertical distribution of matters tributarias between Law and Regulation, lto legal regulation of such questions does not exclude anyway the collaboration of the regulation, since it allows that this share the regulation of a matter, although, with character subordinated to Law, with the mission to develop it and complement it.

2.1.- Intimately related with the last question is the problem to determine which is –for the T.C.- The degree of admissible collaboration between Law-Regulation in matters reserved to Law by the Constitution.

The data that in the field tributario govern the principle of reservation of flexible law or of relative character, does valid the collaboration of the executive regulation, whose profiles of subordination, complementarity, and development, are, sometimes, of difficult assessment. And, “de facto”, the problems arouse with reason to determine the scope or degree of acceptable collaboration so that the regulation award regulation to matters reserved to law by the CE. Then , although it is clear that in no case will fit a legal reference in white to the regulation so that it determine the elements configurators of the tribute<sup>341</sup>, exist other more complex situations in which it argues the suitability of the regulation to quantify exactly determinate elements of the tribute or of the provision patrimoniales of public character (type of gravamen, base imponible and quantities respectively), in function of the nature of the juridical figures-tributarias.

We happen to develop the considerandos previous:

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<sup>341</sup> Appearance that constitutes a “deslegalización” contrary to the CE as it has declared the TC in sentence 37/1981, of 16 November, since it has produced a transfer to the Government of the attribution of the Basque Parliament to create tributes, as the requirement of the principle of reservation of law in matter tributaria orders that it was (in this case) the regional Parliament the one who determine the essential elements of the tribute, at least was with the flexibility that requires a tax of this gender.

**1.- Horizontal distribution of matters tributarias between Law and Regulation: Constitutional Jurisprudence and of the TS.** Such and eats saw lines backwards, the relative character of the reservation of law in matter tributaria derives partly of the fact that no all the regulation of this field is reserved to law. And in effect, like this it is, as when the organ constituent orders the principle of legality tributaria does not impose the need to regulate by law all the matters. Remember that the constitutional juridical frame that configures the principle of reservation of law in matter tributaria comes configured by the articles 133.1 for the strict field of the tributes; 133.3 with regard to the establishment of fiscal profits (including exemptions and bonuses) and 31.3, in general, for the provision patrimoniales of public character that they will have to regulate “with arrangement to law” and no imperativamente by means of law. It says the T.C. In this regard:

“... When the article 31.3 of the Constitution proclaims, in what here it interests, that only will be able to establish provision of public character *with arrangement to the Law*, is giving gone in the fundamental Norm no to a legality tributaria of absolute character –as it does not impose there that the establishment have to do necessarily by means of Law- but, with greater flexibility, to the requirement that it order the law the criteria or principles with arrangement to which has to govern the matter tributaria, and specifically, the ex creation novo of the tribute and the determination of the essential elements or configurators of the same” (STC 19/1987, of 17 February, F.J. 4°).

Therefore, by Law will have to regulate , anyway: - The ex creation novo of the tribute, - The determination of the essential elements or configurators of the same,- With general character, the criteria or principles with arrangement to which has to govern the matter tributaria. Appearances that already had signalled the own Court years before in Sentences numbers: 37/1981, of 16 of nov. (F.J. 4°), 6/1983 of 4 February (F.J. 4°), 179/1985, of 19 December; and that repeat in back years (SSTC 185/1995, of 14 December, 182/1997, of 28 October, 14/1998, of 22 January, 185/1995, of 14 December, 233/1999, of 13 December, 106/2000, of 4 May, 150/2003 of 15 June, 102/2005, of 20 April, 101/2009, of 27 April, Car of the TC 123/2009 of 28 April.

Derivative conclusion of the previous is that the reservation of law in matter tributaria will have to cover the appearances indicated but –does not say the same Court- “any type of modification tributaria” (STC 182/1997, of 28 October (F.J. 8°), in the same sense that the STC 6/1983, of 4 February (F.J. 4°).

Of explicit way collects –likewise- the *High court* the quoted doctrine:

“The reservation of law in matter tributaria is not determined with absolute character: only the authority originaria to establish tributes and the establishment of fiscal profits is protected by the reservation of law, but no the regulation of any one of these matters” (SSTS 3-7-1984, 18-4-1984, 29-5-1984).

## **2.- Vertical distribution of matters tributarias between Law and Regulation: Constitutional Jurisprudence and of the TS**

### *2.1 Conditions so that it produce the collaboration of the Law with the regulation in matter tributaria reserved to Law.*

Of the temporary succession of pronouncements made by the TC in the materito, fits to discern a posture proclive to accept the collaboration of the reglcatkin to regulate matters tributarias reserved constitutionally to Law and that justifies precisely in the relative character that chairs the formulation of the principle of reservation of law in matter tributaria. In this sense can see the STC 60/1986, of 20 May in which the Court protects in the relative character of the reservation of law, that the regulation of a matter share between “the law –or norm with strength and value of law- and the Regulation”<sup>342</sup>.

Very clarificadora concerning the paper that can take the regulation in the regulation of matters reserved to law is the STC 99/1987, of 11June, in which it signals (F.J. 3º):

“Even in regard to the fields reserved by the Constitution to the regulation by Law is not, then , impossible an auxiliary or complementary intervention of the Regulation, but always –as it said

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<sup>342</sup> It treats , in this case, of the reservation of law established in the article 103.2 CE, in which it contains the formula “in accordance with the law”. It says the T.C.: “...Given the formula contained in said precept –‘in accordance with the law’-, that is not another that the one of the call reserves relative of law that allows to share the regulation of a matter between the law –or norm with strength and value of law- and the Regulation, what has done the Decree-law impugned has been to elevate the normative degree and freeze legally good part of the matter of organisation that previously was deslegalizada, ...” (STC 60/1986, F.J. 2º).

in the juridical foundation 4° of the STC 83/1984, of 24 July- that these references ‘are such that restrict, sure enough, the exercise of this authority (statutory) to a complement of the legal regulation, that was indispensable by technical reasons or to optimise the fill of the purposes proposed by the Constitution or by the own Law’,”.

atisban In this paragraph that finish to transcribe the requirements and the reasons adduced by the Constitutional Court to accept the collaboration of the regulation in the regulation of matters reserved to law, on line with similar pronouncements of previous sentences, that will go reiterating and completing in back sentences. Like this, attending the SSTC 37/1981, of 16 November, 83/1984, of 24 July, 99/1987, of 11 June, 19/1987 of 17 February, 185/1995, of 14 December, and 233/1999, of 13 December, 63/2003, of 27 March, fits to conclude that this Court considers like necessary condition so that the regulation share the regulation of matters reserved to the law tributaria, that his performance produce in the following terms<sup>343</sup>: - Hisbordinación; - Development and - Complementarity.

Performance that, anyway, will have to come motivated by the following reasons: - That it was indispensable by technical reasons, or, - That it was indispensable for optimizar the fulfillment of the purposes proposed by the Constitution or by the own law.

Questions, as it saw , very questioned by the scientific doctrine<sup>344</sup>; of difficult precision and concretion in the practice, as of subtle has been lined the line that separates the difference between development-complement and innovation, and equally abstract is the need to optimise the constitutional and legal purposes.

*2.2. To thecance of the regulation in the regulation of the matters reserved to Law. Constitutional doctrine.* Vertical distribution of matters between Law and Regulation in matter tributaria. Doctrine of the Constitutional Court on the flexibility in matter collaboration of the regulation with the law.

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<sup>343</sup> Appearance that knows in the doctrine like the theory of the “complement indispensable” of the Law.

<sup>344</sup> Epigraph 1 of the Chapter II: The marked leadership of The marked leadership of the Regulation in matter tributaria. Dissociation between “theory and praxis”. Thesis of the Constitutional Court on the “technical complexities”.

It affirms the T.C. In Sentence 185/1995 of 14 December, that the scope of the collaboration of the admissible regulation to regulate matters reserved to law “will be in function of the diverse nature of the juridical figures-tributarias and of the distinct elements of the same”. Argument that sustains supporting in the appointment of his previous Sentences number 37/1981 (in which it questions the special flexibility of the reservation of law tributaria when it treats of the taxes) and 19/1987 (referred to the most intense collaboration of the Regulation to regulate the types impositivos of local tributes). And that keeps in other back like SSTC 221/1992, of 11 December, 185/1995, of 14 December, 233/1999, of 16 December, 63/2003, of 27 March, 101/2009 of 27 April, ... .

Precisely of east considering is of where extract the two lines of flexibilización by part of the TC in which it allows a greater collaboration of the regulation with the law in matter tributaria:

1. In function of **the nature of the juridical figures-tributarias**. Ciñéndonos To the pronouncements of the TC that see next arrives to the conclusion that, with regard to the figures that fits to preach a greater collaboration of the regulation, are: -Taxes, - public Prices, and, in general, local taxation (with greater profusion in taxes and public prices that in the taxes).
2. In function of the **distinct elements of the same**. Regarding the distinct elements of the susceptible tribute of legal regulation shared with the regulation, admits a greater degree of collaboration of the Regulation with the Law with regard to the regulation of the component of the “quantities” (especially in taxes and another provision patrimoniales coercive of public character, as well as in public prices), type of gravamen (in taxes, basically local) and in some sentences alludes also to the component of the base imponible.

Centring us in the different components of the tribute, is to underline the impossibility that by means of regulation can determine the "fact imponible", "subject passive" or the "become". So that any regulation that pretend on the



question will have to respect the legal configuration of the respective component, without that the subtle question to differentiate between development and innovation (appearances many times difficult to separate) do to run the risk to alter the legal definition of such elements.

“Like this we said it in the STC 221/1992 when expressing that ‘the reservation of law in matter tributaria does not affect by the same to all the integral elements of the tribute. The degree of exigible concretion to the law is maximum when it regulates the fact imponible’. ‘But the concretion required to the law is menor when it treats to regulate other elements’, like the type of gravamen and the base imponible (FJ 7). (STC 63/2003, FJ 4)”.

With regard to the basic “component imponible” the Constitutional Court has allowed that his exact determination make by means of regulation, whenever the criteria and parameters for his quantification are predetermined by the Law. The main justification is that such fixation requires, in occasions, complex technical operations<sup>345</sup>. Anyway, we think that it is important to insist in that the Law will have to fix the quantitative parameters for his determination, so that it do not fit place to that the regulation can, without restrictions, quantify his volume. As it affirms in STC 221/1992 “in the determination of the base imponible admits with greater flexibility the statutory collaboration, since his corantificación can be due to a plurality of factors of very diverse nature that requires, in occasions, complex technical operations, what enables to the statutory norm for the withc reción of some elements configurators of the base, in function of the nature and object of the tribute that it treat

The element of the “quantity” is the one who, as we said, has allowed greater margin of manoeuvre to the executive (SSTC 15/1995, FJ 5 and 233/1999, FJ 19c), however, his regulation would require of a detailed analysis. Like this for

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<sup>345</sup> In this sense, in the STC 221/1992, of 11 December, after warning that “also the base imponible is an essential element of the tribute and, in consequence, has to be regulated by Law”, puntualiza: “it can not desconocerse, however, that in a system tributario modern the base imponible can be integrated by a plurality of factors of very diverse nature whose fixation requires, in occasions, complex technical operations. This explains that the legislator remit to statutory norms the concrete determination of some of the elements configurators of the base” (F.J. 7º). Argument that equally does serve in STC 233/1999, F.J. 24.

example, in *state Taxes and of the CCAA*, given the reservation of existent law in the matter in favour of the General Courts and regional Parliaments, the fact that the Law can limit for example to fix the marginal inferior, leaving to the regulation his concrete determination hardly covers the reservation of law tributaria, as inside the possible fluctuations that can suffer the type, is evident that to the taxpayer interests him situate in the inferior point, and, if his concretion leaves to the integer arbitrio of the executive, this can attend to his needs, done that it could neutralise the important function of the legislative to preserve to the citizens of imposiciones arbitrary and to guarantee a uniform deal in front of the loads tributarias<sup>346</sup>.

In Sentences 63/2003, 102/2005 and 101/2009 the TC seats the need that to respect the principle of reservation of law tributario “is absolutely necessary” to fix the maximum limit of the provision of public character or the criteria stop fix it: “The determination in the law of a maximum limit of the provision of public character, or of the criteria to fix it, is absolutely necessary to stop respect the principle of reservation of law”.

The situation changes, nevertheless, in the supposition of the *Local Taxes*, habida explains the entes that manage it have subject financial –autonomy to the CE and to the laws- but do not possess legislative authority. What could justify that in the frame of his constitutionally attributed competitions (arts. 137, 140, 133.2) they enjoyed of autonomy so that, without exceeding the alícuota maximum that would come given by the state law, could determine the exact quantity of the local tax<sup>347</sup>. In this sense, the STC 19/1987 establishes that the

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<sup>346</sup> “Like this, if it treats of own taxes of the State or of the CCAA, entes both with legislative power, the ordinary law has to determine the alícuota with precision and accuracy, not existing any reason that advise diverse solution, since, as it affirms the professor Calvo Ortega, the subject active of the obligation tributaria is only (the State or the respective Autonomous Community) and his financial needs perfectly known, by what does not appreciate foundation any so that a so essential element of the tax, like the alícuota, leave in hands of the statutory authority of the Public Administration”. CHECA GONZÁLEZ, C., “The principle of reservation of law ...”, ob., cit., pág. 803.

<sup>347</sup> We add us like this to the opinion of CALVO ORTEGA, R., *The determinazione dell'aliquota tributaria*, quoted by CHECA GONZÁLEZ, C., “The principle of reservation of law ...”, ob., cit., págs. 803-804. By the transcendence of his content bring here the appointment on foot of page number 23, pág. 218 of the article “The reservation of law like source of the legislation tributario”, already quoted, written by the professor FALCÓN, R.: “The possibility that the Local Corporations regulate, inside some limits, his own tributes, has been defended in

legislator will be able to define the partial regulation of the types of the Tax, biasing criteria or limits for his ulterior definition by each Local Corporation, those who, on the pointed legal frame, will determine the type of gravamen that have to be applied. In any case, is important to stand out that said municipal autonomy will not be able to exceed of determinate limits. As it underlines the STC 179/1985 does not fit that the law establish like type of gravamen a “only percentage”<sup>348</sup>, since the City councils lack legislative authority and can not with total and absolute discrecionalidad and without being conditioned by limit any, fix by himself alone which have to be this only percentage<sup>349</sup>.

The quoted flexibility to the hour to determine the degree of collaboration of the regulation in the determination of the “quantity” of the tribute, has preached equally concerning the figures of the *Taxes and Public Prices* and with greater profusion in the Local *order* that in the State *order*. His justification does rest in “the need to take into account the characteristics, often environmental, of the service or administrative activity that constitutes in each case the fact imponible”<sup>350</sup>. Anyway, the requirement that will not be able to obviar is the forcing that the law incorporate the criteria or limits to proceed to the exact determination of the provision patrimoniales coercive of public character. That the law incorporate a “maximum limit of the provision of public character or of the criteria to fix it” (STC 101/2009, FJ 4, with appointment in SSTC 63/2003, 102/2005 and 121/2005).

In consequence, in sight of the pronouncements of the TC said statutory collaboration for the regulation of these appearances never will be able to exceed of the limits and criteria fixed by

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relation with the exemptions (C. Lozano, “The granting of exemptions of municipal tributes”, R.ed.F., no. 44, 1984, págs. 533 and sigs.), the type of gravamen (Simón Acosta, “The principle of sufficiency in the local inland revenue”, in *Autonomy and finance of the municipal Inland revenues*, I.And.F., Madrid, 1982, págs. 488 and following; C. Checa, *The principle of reservation of law ...*, cit., pág. 803), and even, the own fact imponible (J.J. Ferreiro Lapatza, *The principle of legality...*, cit., págs. 886 and sigs.; J.R. Ruiz García, “Some considerations on the autonomy tributaria venue”, R.And.D.F., number 46, 1985, pág. 243”.

<sup>348</sup> The tribute whose constitutionality poses is a recargo local applied on a state tax. See a more extensive comment in the epigraph that follows.

<sup>349</sup> Regarding this matter it can see, ALONSO GONZÁLEZ, “constitutional Jurisprudence in matter of Local Inland revenues”, in *Treaty of Financial Right and Tributario Local*, Marcial Pons, Madrid, 1993, págs. 62 et seq.

<sup>350</sup> FALCÓN And TELLA, R., “The Law like source of the legislation tributario”, ob., cit., pág. 217.

Law. Like this, it does not suffice with that the Law that it treat make a call or award a habilitation to the Government with the end that this regulate the essential elements, but the own law autorizante will have to contain criterion, principles and limits that limit the performance of the regulation.

We see his pronouncements attending to the figures impositivas alluded and to the essential elements whose regulation questions :

### **To) Local Taxation:**

Cgoing in the attention in *the local taxation*, our Constitutional Court has deepened reiteradamente in the game of strengths that have to establish go in: of a side, the reservation of state law and, of another, the derivative statutory authority of the entes local. Like this, very known that the local Corporations, in effect, possess constitutional autonomy (art. 137 and 140 CE) and statutory authority (art. 133.2 CE, art. 6 LGT, art. 106.2 LBRL and art. 15.1 LRHL) of derivative character, the TC procures the integration of said statutory authority of the entes local with the derivative requirements of the principle of reservation of state law. Circumstance that appreciates with big sharpness in Sentence 233/1999, on line with the established in other previous (for example in Sentence 19/1987), in which it carries out the tackled previous saying that the field of decision of the entes local on the own tributes of the Municipality has derivative limits of the principle of reservation of law. To know:

- In the first place, because the reservation of state law has also like end "the preservation of the unit of the legislation and of a basic equality of position of the taxpayers- that guaranteed by the Constitution of the way that says his article 133.2, do not allow, manifestly, present to the municipal Agreement like substitute of the Law for the adoption of some decisions that only to her, because like this it wants it the Constitution, corresponds to express".

- Second it corresponds to the legislator, according to the art. 133.1 and 2 of the CE integrate "the derivative requirements of the reservation of law in the order tributario and of the autonomy of the Local Corporations -of the municipalities, in the present process- to take part, in accordance with the same Constitution and with the laws, in the

establishment or in the requirement of his own tributes" (F.J. 4º STC 19/1987 and S.T.C. 233/1999).

Descending to the concrete problems that on the question have aroused in front of the Constitutional Court, can extract the following considerations:

In matter of **local Taxes** and particularly with regard to the regulation of the *type of gravamen*, in sentences 19/1987 and 179/1985 this Organ understands that the local body does not have authority to determine by himself same the type of gravamen. This is, the Law that it treat can not enable to the Local Corporations for the free "fixation" of the quantities, essential element of the tributes. Of this way "criteria and limits" for the determination of the types by part of the entes local have to come limited by Law (S. 19/1987), not being able to the City councils, that lack legislative authority, establish the type of gravamen with *discrecionalidad*, as it would owe the Law fix the "maximum limits and minimum" or the "criteria" to which have to adjust the determination of the applicable percentage like type of gravamen (STC 175/1985)<sup>351</sup>.

"In definite, the determination in the Law of a maximum limit of the provision of public character, or of the criteria to determine it, is absolutely necessary to respect the principle of reservation of law"<sup>352</sup>.

Also in matter of Local Taxes, but with regard to the component of *the base imponible*, the Constitutional Court has said that the reference of the Law (in this case LHL) to the regulation for the determination of the "quantum" of the provision tributaria will be able to be regulated with a special collaboration by part of the regulation, but is necessary that the law establish a "quantitative limit maximum", so that the Law do not abdicate the regulation in the Government delegating the fixation of the quantity of the tribute (F.J. 24, S.T.C. 233/1999 and also S.T.C. 221/1992).

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<sup>351</sup> Like this for example when the LHL regulates the quantity of the IAE establishes the criteria for the determination of the quota, however, in the supposition of the IBI the own LHL already establishes the type of gravamen of the tax (4% or 6%), as it treat of goods of nature rústica or urban.

<sup>352</sup> STC 233/1999, F.J. 19.

**Impuestos Local: Comment of Sentences.** The subject object of debate has posed with occasion to determine the degree of collaboration that can have the Entes Local in the definition of the essential elements of the tribute. They are to quote in this sense the SSTC 19/1987, 179/1985 and 233/1999.

In the first quoted Sentence -19/1987-, the Court poses the inconstitucionalidad of the article 13.1 of the law 24/1983, of 21 December, as which “from the one of January of 1984 the respective type of gravamen of the Territorial Contribution Urbana and of the Rústica and pecuaria will be able to be fixed freely by the City councils in relation with the corresponding goods classified of urban nature or rústica sitios in his municipal term”.

It treats, then, to determine if the City councils have authority to fix the **type of an own Tax**, or if by the contrary of this form vulneraría the principle of reservation of law constitutionally established. It is important the appointment of these sentences in the measure in that in her contains a general theory on how have to interpret the derivative requirements of the reservation of state law, on the one hand and, of the territorial autonomy, by another. In this sense the T.C. It reiterates the so many quoted times need that so much the *ex creation novo* of the tributes like the establishment of his essential elements determine by law (SSTC 6/1983, 37/1981, 179/1985,... , ) and, in definite, the need to recognise the principle of reservation of law consecrated in the article 31.3 of the CE.

However, -and here it is where want to put the accent- the previous can not understand without cohonestarlo with the territorial autonomy, that concrete, with general character, in the articles 137 CE (system of territorial autonomies) and 140 CE (autonomy of the Municipalities). In the order tributario the article 133.2 CE establishes the possibility that the Autonomous Communities and the Local Corporations establish and demand tributes in accordance with the CE and with the laws.

Still when the same Court does not foresee how aunar both requirements with a generic character<sup>353</sup>, himself the concrete in the case of the establishment of the type of gravamen in local taxes. Of way such that, in spite of recognising that in previous sentences declared that the determination of the essential elements (and therefore of the types impositivos) corresponds necessarily to law, adds this organ, that in the case of the **tributes of local character** the legislator has to “*recognise to the Local Corporations an intervention in the establishment or in the requirement of those*”. And it continues: “*it Can the state legislator do a partial regulation of the types of the tax, biasing criteria or limits for his ulterior definition by each local Corporation, to which will correspond already, in the exercise of his autonomy and in attention to the peculiarities of his own inland revenue, the precision of which was the type that, in accordance with the legal frame, have to be applied in his respective territorial field*”.

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<sup>353</sup> “This Court can not, as it is obvious, define in general terms and abstract how have to integrate, in each case, the derivative requirements of the reservation of law in the order tributario and of the autonomy of the Local Corporations –of the municipalities in the present process- to take part, in accordance with the same constitution and with the Laws, in the establishment or in the requirement of his own tributes. Neither it can –neither it would be necessary now- determine the different scope of the legal reservation, as it was in front of the creation and ordination of taxes or of other figures tributarias” ( STC 19/1987, FJ 4º).

*Conclusion:* in the local tribute (territorial contribution rústica and urban) the distribution of competitions for the establishment of the type of gravamen has to be:

- *Legislator:* it corresponds him define the legal frame, being able to do a partial regulation of the types of the tax, biasing *criteria or limits for his ulterior definition by each Local Corporation.*

- *Local body:* it will agree, of compliance with the legal frame, the type that have to be applied in his respective territorial field, in attention to the peculiarities of his own Inland revenue.

NOTE: whereas the art. 13.1 of the Law 24/1983 comports a plenary desapoderamiento of the legislator in favour of the municipal autonomy for the establishment of an essential element of the tributes, declares inconstitucional.

Later, in **STC 179/1985** poses the violation of the principle of reservation of constitutional law due to the fact that the Law 24/1983 no fixed all the elements of the recargo municipal applied on a state tax (income tax). In effect, this Sentence estimates “contrary to the reservation of law in matter tributaria the reference in white that the law impugned (arts. 8º.1 and 9º.1) it does to the agreements of the City councils, regarding the fixation of the **type of gravamen** to apply”, due to the fact that although in this recargo determines the base on which has to apply the recargo (liquid quota of the income tax according to the article 8º.1), “it does not occur the same with the type, of the that only says that it will have to consist ‘in an only percentage’, with what will have to be the City councils, that carecen –unlike the Autonomous Communities- of legislative authority those that will have to fix by himself said percentage with total and absolute discrecionalidad and without being conditioned by legal limit any, since the precepts indicated do not establish any criterion to the that those have to adjust, neither neither at least the maximum limits and minimum between which have to remain comprised such percentage”.

By his part, in **Sentence 233/1999 the Constitutional Court** treats equally, without prejudice to other appearances, the problem of cohonestar the reservation of state law (art. 31.3 CE) with the autonomy of the Local Corporations, adducing that in the case of tributes that constitute own resources of the local Corporations, the reservation of law will have to operate necessarily through the state legislator (art. 133. 1 and 2), “while the same ‘exists also to the service of other principles –the preservation of the unit of the legislation and of a basic equality of position of the taxpayers- ...’ (STC 19/1987), (STC 233/1999)”.

Affirmation that the own organ matiza in both quoted sentences when esgrime:

“... Concerning the own tributes of the municipalities neither the reservation has to ‘extend until a point such in which it deprive to the same of any intervention in the ordination of the tribute or in his requirement for the own territorial field’, neither ‘neither will be able to the ordinary legislator abdicate of all direct regulation in the partial field that like this reserves him the Constitution’.”

In the Juridical Foundation number 24 of the STC 233/1999 solves the possible inconstitucionalidad of the article 68.2 LHL, which foresees that in the case of the Tax on Goods Real estates, the value of the terrains rústicos will calculate “capitalising to the interest that in accordance with the regulations establish, the real incomes or potentials” of the terrains, to effects to calculate the base imponible<sup>354</sup>. In this regard, the problem poses because the article 68.2 LHL contains the regulation of **the base imponible of the IBI**, questioning if the reference that does the Law of Local inland revenues to the regulation for the determination of one of the components that determine “the quantum” of the provision tributaria –the value of the terrains of urban nature– contradicts the principle of legality contained in the articles 31.3 and 133.1 CE.

The TC considers that no vulnera the principle of reservation of state law, but it produces a more intense collaboration of the regulation in the determination of the quantities, that this same organ admits in Sentence 185/1995 by technical reasons or to optimise the fulfillment of the constitutional or legal ends. Therefore, it admits the constitutionality of the quoted precept with base in the following arguments:

- It exists a technical difficulty to value the terrains rústicos and thus it is legitimate that the legislator opt by the system of capitalisation of the real incomes and potentials of the same to the interest that in accordance with the regulations establish
- There is not an abdication of the regulation in the regulation, but the state law foresees criteria and limits in the matter, as the article 66.2 of the LHL establishes like value of the goods real estates the cadastral value of the same, that will fix taking like reference the value of market of those, without that, in no case, can exceed of this”. So that the quantitative limit maximum of the base imponible will be the “value of market”.

## **B) Taxes**

In matter of **T roast**, already in 1981 the Constitutional Court, in Sentence of 16 November (37/1981) alludes to the special flexibility of the reservation of law tributaria that chairs this type of tributes. In the case of cars, poses the competition of the Basque Parliament for the creation of taxes, concluding the Court that the Law 3/1981 of the Basque Parliament does not respect the reservation of law tributaria established in the articles 31.3 and 133 CE because it limits to do a reference in white to the corresponding regulation for the fixation of the tax, when said regional Parliament would have to have determined the essential elements of the tribute “at least was with the flexibility that a tax of this gender requires, so that although his concrete establishment remain remitted to a statutory disposal, this have to produce inside the limits fixed by the legislator. The Law impugned, that limits to do a

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<sup>354</sup> The base imponible of the IBI is constituted by the cadastral value of the goods real estates (art. 66.2 LHL) and, in the ones of nature rústica, will be integrated by the value of the terrain and the one of the constructions (art. 68.1).



reference in white to the corresponding regulation; as before it signals , it does not respect, certainly, this constitutional reservation". "In definite, the reservation of law does not give by satisfied when the legislator does not define the essential elements of the tribute"<sup>355</sup>.

It is evident, says the TC in Sentence 37/1981 -referred to taxes imposed by the Autonomous Community- "that the law limits to award a habilitation to the Basque Government so that this determine the elements of a tax (...). This habilitation constitutes a deslegalización, a simple transfer to the Government of the attribution of the Basque Parliament to create tributes".

Also in matter of taxes, are to quote the SSTC 150/2003 and **233/1999**, of 13 December. In this last, the Court, doing echo of Sentence them numbers 37/1981 and 185/1995 alludes to the different scope of the legal reservation as it was in front of the creation and ordination of taxes or of other figures tributarias and, especially, to the greater flexibility of the reservation of law tributaria with regard to the taxes, without prejudice to that such flexibility does not operate of the same way in relation with each one of the essential elements of the tribute. The concretion by part of the regulation is greater when it treats to regulate elements like the type of gravamen and the base imponible (STC 221/1992). And in the case of the provision patrimoniales of public character, when it treats of the fixation and modification of the quantities (STC 185/1995 and 233/1999, F.J. 9°).

In particular, this Sentences number 233/1999 refers to the regulation of the fact imponible of the taxes foreseen in the article 20 LHL, that "limits to do a synthetic definition of the taxes so that, as they warn the recurrent, will be the diverse City councils those who, by means of the approval of the corresponding Ordenanzas fiscal (arts. 15 to 19 LHL), will carry to effect the imposición and concrete ordination of each one of them by those services or activities of municipal competition that fulfil the planned requirements in the articles 20 and 21 LHL" (F.J. 10).

After an extensive motivation, the TC understands that the precept questioned no vulnera the principle of reservation of state law constitutionally tax when delimiting the LHL the fact

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<sup>355</sup> MARTÍN QUERALT, *Financial Jurisprudence and Tributaria of the Constitutional Court*, Civitas, 1983, pág. 135.

imponible of the taxes in terms sufficiently precise as to circumscribe the decision of the municipalities:

“It is not possible, in definite, detect a full renunciation of the legislator to all encuadramiento normative of the taxes, a plenary desapoderamiento of this in favour of the entes local for the determination of an essential element of the tribute (the fact imponible), but, by the contrary, the LHL, respecting the local autonomy, guarantees at the same time the essential uniformity of deal that demands the principle of reservation of law when establishing in his art. 20 an abstract definition, although sufficiently fimbriated, enclosed, of the taxes” (F.J. 10, STC 233/1999)<sup>356</sup>.

**C) Another provision patrimoniales of public character: administrative grantings and prices by port services.**

In this matter deserve a special comment the recent Sentences of the Constitutional Court 63/2003, of 27 June; 102/2005, 20 April; 121/2005 and 101/2009 of 27 April, that versan on the financial diet of the planned Ports in the Law 18/1985 on financial diet of the Spanish ports.

In the first of them -STC 63/2003- puts in cloth of trial the article 9 of the Law 18/1985 in virtue of the cual the prices by the services by canons and administrative permissions of the ports fixán and updateán with subjection to the economic politics-financial and of port prices of the Government, being the Ministry of Public Works and Urbanismo the one who has to establish the maximum limits and minimum of the corresponding prices (also impugns the Transitory Disposal of the Law). The Constitutional Court seats the base that the canons by administrative grantings (occupation of the state port public domain) are provision patrimoniales of public character and therefore are subject at the beginning of reservation of constitutional law.

In STC 102/2005 of 20 April, poses the constitucionalidad or inconstitucionalidad of the article 70.2 of the Law 27/92 according to which the Minister of Public Works and Transports will establish to proposal of Ports of the State and heard the Associations of users of state field directly affected, the minimum limits and maxima of the prices by the port services loaned inpuertos of competition of the State. “Well, as it can ascertain, the norm questioned does not

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<sup>356</sup> In coherence with this line argumental can see AGULLÓ, To., "statutory Authority general and authority tributaria", in *The position of the Local legislation in the system of sources*, ob., cit., pág. 167.

establish any implicit maximum –limit or explicit- to the quantity of the prices by port services, but it leaves to the whole freedom of the quoted Minister the fixation of what, as we come saying, constitutes without any doubt one of the essential elements of the financial resource enjuiciado: the quantity of the provision. And already we have warned that such prices are provision patrimoniales of public character. Even more, we have concluded that, in toto that coercive provision that satisfy to the entes public with the purpose to sustain the public costs, constitute tributes that, as such, are subjected to the reservation of law that establish the arts. 31.3 and 133.1 CE”.

In Sentence 101/2009 plant the constitutionality or inconstitucionalidad of the articles 9 and 10.1 to) of the Law. “In effect, according to the art. 9 of the Law 18/1985, the ‘prices by general and specific services and the canons by grantings and administrative permissions will fix will update annually with subjection to the economic politics-financial and of determinate port prices by the Government, and to the general rule and annual aims of management that, in execution of this politics, establish by the Ministry of Public Works and Urbanismo’, having to establish said department “the maximum limits and minima of the corresponding prices”.

Common doctrine in all they is that the TC in the first place treats to determine the juridical qualification of the institute tributario (administrative canons and port prices), so that if we are in front of a provision patrimonial of public character (art. 31.1 CE) then the reservation of law is inexcusable and has to fulfil in all his expression. This concrete in that:

- If we are in front of a provision patrimonial of public character this does not exclude references to norms infraordenadas but whenever such references do not cause by his indeterminación a degradation of the reservation of law formulated by the CE in favour of the legislator. Therefore, if the law that it treats does not contain the ideal criteria to determine the “quantity” of the provision tributaria will go against of the reservation of ley tributaria and therefore is legal norm will contravene the article 31 of the CE
- The fact that it exist reservation of relative law and therefore flexible in no case can carry to a “plenary desapoderamiento of the legislator in favour of distinct organs for the determination of an essential element n the definition of the tributes (63/2003 with appointment in S. 19/1987, of 17 February).

- “Lto determination in the law of a maximum limit of the provision of public character or of the criteria to fix it, is absolutely necessary to respect the principle of reservation of law (STC 101/2009 with appointment in SSTC previous).
- In the quoted Sentences of reference enjuician some articles of determinate laws related with the financial diet of the ports. All these articles in definite what do is to leave in hands of the executive, generally of the Ministry of Public Works and Transports:
  - . The fixation of canons by administrative grantings (occupation of the port public domain (art. 9 Law 18/1985)
  - . The prices of the port services loaned in ports of competition of the State (art. 70.2 of the Law 27/92), Sentences 102/2005.
  - . The prices by port services and canons by grantings and port administrative permissions (STC 101/2009).

The TC considers that in all these cases has not respected the reservation of law tributaria of the article 31 CE because the fact that it do not contemplate a maximum limit of the prestción or of the criteria to fix it, involves a so indeterminate habilitation that desborda the limits of the reservation of law of the article 21.3 and 133.1 CE.

D) Finally, also they pose problems of possible inconstitucionalidad concerning the **PUBLIC PRICES** to the light of his adecuación or inadecuación to the reservation of constitutional law.

In Sentence **185/1995**, of 14 December of the TC, questions –by what to us respecta- if the regulation that does in the Law of Taxes and Public Prices fulfils or does not fulfil the principle of reservation of constitutional law. The recurrent impugn, among others, the articles 1.b), 3.4 (both on delimitation of the fact imponible) and 26.1 and D.To. 2ª (with regard to the quantity

of the public prices) of the LTPP. We see in which terms and why reasons impugn the precepts mentioned:

The article 1.b Jointly with the article 3.4 of the Law of TTPP pose a question of deslegalización. The first does not arouse problems, as it limits to incorporate the financial juridical legislation the category of the public price. The conflict arises when putting it in connection with the precept 3.4 of the same Law, which empowers to the Minister of Economy and Inland revenue so that it propose to the Government or to the Minister of the bouquet the establishment of income of public Right. Of this way, as it affirms the Court, to tenor of “the established in the article 5 and in the Exhibition of Reasons, carries to conclude that the article 3.4 is recognising the possibility that well the Government well the Minister of the bouquet believe the public prices that estimate timely in application of the abstract figure designed in the Law of Taxes and Public Prices”. This poses a problem of deslegalización habida explains the principle of legality and the principle of reservation of law that weigh in matter tributaria. This constatación carries to the TC to declare inconstitucionales the subsections of the article 24 of the LTPP collected in the F.J. 4º (letter to, b, and subsections of the letter c) of the article 24.1 LTPP).

Repair in that the STC 185/1995 matiza the concept of public price splitting of the notion of “provision patrimonial of public right” (expression wider and generic that the one of the tribute) to that refers the article 31.3 of the CE and that remains subjected to the reservation of Law. In the concrete supposition that treat the problem that arouses is that, in such Sentence, the matter object of legal reference is the **quantity** of the public price, that constitutes an essential element of all provision patrimonial, with what, in principle would weigh a legal reservation (although relative) for his fixation and modification. From here that it impugn the constitutionality of the article 26 of the LTPP that allows to fix the quantity of the public prices by Ministerial order. However, the TC understands that no vulnera the principle of reservation of Law, because in spite of recognising the previous in his opinion, “this does not mean that always and anyway the Law have to require of direct and immediate form all the elements determinants of the quantity”. In this sense, the Court does an own interpretation of the article 31.3 CE establishing that the planned reservation in the same “does not exclude the possibility that the law can contain references to norms infraordenadas, whenever such references do not cause, by his

indeterminación, a degradation of the reservation formulated by the CE in favour of the legislator (STC 19/1987)” (F.J. 6º).

The TC considers viable the possibility that the Law attribute the regulation or fixation of the “quantity” to norms *infralegales* (as it is the Or.M.), *as long as it exist legislative habilitation and in the own law remitente contain a minimum of material regulation that orient the performance of the regulation and serve him of program or frame*. To know in what measured the statutory disposals will have to regulate such extremes will be precise to attend to the nature of the provision patrimonial that it treat . In our case, are in front of a public price, that by a part admits multiplicity of figures and, by another, comports the need to take in consideration technical factors. These reasons carry to the TC to consider fully constitutional the precept impugned (art. 26.1).

It interests us stand out how the TC moves the debate to the form in which the LTPP, in his article 25<sup>357</sup> establishes the referred material criteria and limits. So that, according to this Organ, yes fits the performance of the regulation to regulate the quantity, whenever it exist a legislation mark, appearance, this last that does not arrive to question by the demandantes. In this sense, - says the Court- “However, neither the recurrent impugn, from this perspective of the principle of legality tributaria, this article 25 neither contribute argument any about this question”. Fix, therefore, that, also incide in checking if really the Law contains the criteria and limits so that the regulation can regulate the subject treated, admitting, with the conditions exposed the narrow collaboration of the regulation for the regulation of the quantities.

Finally and regarding the impugnation of the Additional Disposal second of the LTPP by part of the recurrent (that it authorises the establishment by means of Royal decree of exactions with exclusive purpose to regulate the price of determinate products) the court desestima such pretence since the structure and configuration of such exactions presents substantial differences with the category of the public price; by what can not move the reasons adduced against the

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<sup>357</sup> “The public prices will determine to a level that cover, like minimum, the economic costs originated by the realisation of the activities or the provision of the services to a level that result equivalent to the derivative utility of the same”.

public prices and in the writing of demand do not contain specific arguments against of the same.

Likewise, the **STC 233/1999** refers to the problematic mentioned. In concrete, questions the constitutionality of the article 45 of the Law of Local Inland revenues whereas it does not establish any implicit maximum –limit or explicit- to the quantity of the public prices by public services or administrative activities, but only fixed a minimum limit –the cost- above the cual the Municipalities enjoy of whole freedom to fix what, without place to doubts, constitute essential elements in the definition of this –and any another- financial resource of the Local Inland revenues: the quantity of the provision<sup>358</sup>.

The TC supporting in the Juridical Foundations esgrimidos in Sentences 19/1987 and 179/1985, concludes:

**“In definite, the determination in the Law of a maximum limit of the provision of public character, or of the criteria to determine it, is absolutely necessary to respect the principle of reservation of law;** not establishing such limit the article 45.1 LHL for the coercive public prices by services or activities, said precept has to be declared inconstitucional. It is necessary, however, require, the concrete scope that it has to attribute to said statement. The art. 45.1 it contradicts the Constitution only in the measure in that it results applicable to the public prices by services or activities that have nature tributaria, this is, as we come signalling from the STC 185/1995, the exigible by services or activities of application or compulsory reception, of indispensable character or loaned in diet of monopoly” (F.J. 19, c in fine).

We consider meritoria the work of this Sentence, in the measure in that it establishes the need that the Law fix the maximum limit or the criteria to determine the quantity of the provision of public character.

Andn matter of public prices the TC in Sentence 185/1995 admits the constitutionality of the article 26.1 LHL that allows the establishment and modification of the **state public prices** by

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<sup>358</sup> Vineyard. F.J. 19.

Ministerial order and, in his case, the pertinent public organisms. As we exposed, after the constitutional doctrine dictated on the matter and the new editorial of the Law of Taxes and Precios Public (according to L. 25/1998) it dilutes the requirement of the reservation of law in the determination of the state public prices<sup>359</sup> and local<sup>360</sup>. De facto in STC 63/2003 the General Public prosecutor of the State considers that "the public prices are not tributes in the measure in that have voluntary character ploughs those who satisfy them" (FJ i). From here that, as it affirms the TC in sentence 185/1995, the one who the article 45.1 LHL establish a minimum limit for the quantification of the public prices "contradicts the Constitution only in the measure in that it results applicable to the public prices by services or activities that have nature tributaria, this is, as we come signalling from the STC 185/1995, the exigible by services or activities of application or compulsory reception, of indispensable character or loaned in diet of monopoly" (S. 233/1999, F.J. 19).

### **3. Nature of the regulations dictated in financial matter and tributaria. The Thesis of the "complement indispensable".**

A logical consequence that fits to give off of the points that have treated previously, is that extending the legal reservation, -material and/or formal- to practically all the financial matter and tributaria, the regulations dictated in this regard they will be, in his generality, regulations of development and execution of the Financial Laws and Tributarias. To I save they remain, nevertheless, the statutory disposals dictated in the internal field of the Administration whereas demonstrations of the domestic authority of the same, that in occasions document by means of Ministerial orders whereas, other times, do not reach the juridical rank of regulations but it treats of mere circular or instructions of use of organs jerárquicamente upper to his subordinated<sup>361</sup>.

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<sup>359</sup> Whose establishment or modification of the quantities will be able to do by Or.M. Or by the Public Organisms (art. 26 LTPP).

<sup>360</sup> Susceptible to establish by agreement of the Plenary of the Corporation (art. 48.1 LHL)

<sup>361</sup> "In Right tributario the regulation has to understand always, and save regarding the organisation of the Administration tributaria, like an instrument of execution of the Law needed always of a legal habilitation that serve him of base". FERREIRO LAPATZA, J. J., "The principle of legality and relate them Law-Regulation in the legislation tributario Spanish", in *Studies of Right and Inland revenue, Homage to César Albiñana*, Vol. II, Madrid, 1987.



The technician of the reference by part of the Law in favour of a normative determination of the Administration can observe distinct scope: total or partial. That is to say,

- It will exist a legal reference total of the law to the regulation when this contain the general principles of regulation and remit to the Regulation his whole development. Supposed, on the other hand, frequent in Right Tributario and that tipifica the previous article 17 of the LGT which established a reservation of regulation for determinate appearances, foreseeing -in this sense- that develop necessarily by Royal decree, the regulations dictated in execution of the laws tributarias, and the own regulations of each tribute.
  
- Also it fits that the reference make of partial form, so that the Law remit to the Regulation to regulate a determinate appearance that precise of development for his effective application. Anyway, the Law will not be able to abdicate in the Regulation the regulation of the matter object of development if on this weighs a material reservation. In this sense yes is lawful that, for example, the fixation of the coefficients of update of the value of acquisition make by the annual Laws of PGE. In other supposed the Law remits to the statutory text so that this concretise the base imponible or the quantities when they involve calculations complejyou; an example of the previous was the ancient artículo 12 of the LGT that attributed to the Govern competitions in fixation of the types, with all the problems that, as we will see in the following chapter generated so much his editorial, as his application in the practice.

The criterion of the "complement indispensable" coined by the doctrine<sup>362</sup> and jurisprudence<sup>363</sup> of the administrative legislation, earns, then , in the Financial Right and tributario, a big importance, of whose echo does constant reference the Jurisprudence. The fact that part of the matter was reserved to law by the CE reinforces the requirement that the regulation assume the

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<sup>362</sup> FERREIRO LAPATZA, J.J., "The principle of legality and relate them Law-Regulation ...", ob., cit., PALAO TABOADA, C., "Reservation of Law and Regulations in matters tributarias...", ob., cit., págs. 538 et seq.; FALCÓN And TELLA, R., "The Law like source of the Legislation tributario", already quoted.

<sup>363</sup> SSTC 83/1984, of 24 July, 99/1987, of 11 June, 37/1981; 6/1983; 83/1984; 79/185; 60/1986; 19/1987; 99/1987; 185/1995; 233/1999; 63/2003, ... .

paper of complement indispensable or necessary to guarantee the effective application of the juridical norm.

NOTE: it can observe in the legislator a greater sensitivity to the criticisms of the doctrine tributaria, that questioned the bad legislative technician of the diet that repeated entirely the norms of the Law<sup>364</sup>. Example was the R.D. 2631/1982 by which approved the Regulation of the Tax on Societies, or also the Regulation that develop the Law 19/1991 of the income tax (R.D. 1841/1991). By the contrary, in the actuality the new Regulations approved in both matters has special care in developing more than repeating the dictated of the Law that develop.

## **5. The independent regulation in matter tributaria**

After analysing the existent relations between the Regulation and the matters reserved to law in matter tributaria, will detain us now in the margin of performance that, in his case, have the statutory disposals to confer regulation to subjects or appearances no reserved neither material neither formally to Law.

Occasion had to expose how the general theory of public right formulated in the matter that occupies us, divides between those authors that limit the field of performance of the independent Regulation to the domestic field of the Administration and to the special relations of subjection and, by the contrary, those who, protecting in the generic statutory authority of the government attributed directly by the CE, defend the possibility that they can dictate regulations in all those no reserved matters to law.

It is not the world of the Right tributario an exception to the panorama described. His doctrine equally observes a disparity of opinions in this regard. Without fear to make a mistake us, can affirm that they are majority the voices that deny the origin of independent regulations in matter

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<sup>364</sup> Like this, FERREIRO LAPATZA, J.J., "The principle of legality and relate them Law-Regulation ...", ob., cit., pág. 881.

tributaria [FERREIRO LAPATZA<sup>365</sup>, SIMÓN ACOSTA<sup>366</sup>, LOZANO SERRANO<sup>367</sup>, HERNANDO WASHED<sup>368</sup>, (MARTÍN QUERALT/LOZANO SERRANO/ MARRIED OLLERO/TEJERIZO LÓPEZ)<sup>369</sup>, ... ].

Opinions these, in clear opposition to the ones of other authors that, by the contrary, do not find obstacle any in admitting the feasibility in our Right of the autonomous Regulations with regard to those no covered sectors by the principle of reservation of law (PÉREZ OF AYALA, J.L., and GONZÁLEZ GARCÍA, And<sup>370</sup>.)

Particularly we consider that the margin of performance that can have the independent regulation in matter tributaria is very restricted. And this because still splitting of the unquestionable fact that the statutory authority recae in the Government, because the CE like this attributes it to him directly (art. 97 CE), is not less true that such authority will have to exercise –according to the same fundamental Norm- in accordance with the CE and the laws. Which implications comports the requirement to exercise the statutory authority tributaria in accordance with the CE and with the laws?. The following:

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<sup>365</sup> “It does not fit, then , in regard to the tributes, speak of autonomous or independent regulations, to which, by the other, our Constitution recognises, as it has put of self-evident repeatedly doctrine and jurisprudence (...), a narrow field of action limited to the terrain of the administrative organisation and to the called special relations to be able to (e.g., civil servants, dealers, etc.)”. FERREIRO LAPATZA, J.J., “The principle of legality and relate them Law-Regulation ...”, ob, cit., pág. 880.

<sup>366</sup> “... The principle of legality prevents that the regulations can be independent of the law” (...). “The conclusion that fits to extract of all this is that (save in matters purely of autoorganización) does not have fit in our legislation the independent regulation or praeter legem”. SIMÓN ACOSTA, And, **TITLE** in *Treaty on the LGT*. Homage to the professor Álvaro RODRÍGUEZ BEREIJO. Direction ARRIETA MARTÍNEZ OF PISIÓN, HILL YURRITA, M.To. And ZORNOZA PÉREZ, J. pp. 302 and 302.

<sup>367</sup> This author admits the independent regulation of a transitory way “no conceivable when the juridical panorama was perfectly integrated with the timely legal norms. (...) In this sense, and saving these circumstances of pure adjust temporary, can conclude that, in effect, do not fit already autonomous or independent regulations in our right, being precise the performance in each case of the principle of preference of law”. LOZANO SERRANO, C., “The sources of the Right in the doctrine ...”, ob., cit., pág. 153.

<sup>368</sup> HERNANDO WASHED, To., “The statutory authority and the management tributaria. His control by the Administration and the Courts”, in *Comments to the LGT and lines for his reform*, Vol. I, I.And.F., Madrid, 1991, pág. 178.

<sup>369</sup> *Course of Financial Right and Tributario*, eighth edition ob., cit., pág. 186.

<sup>370</sup> PÉREZ OF AYALA, J. L., “The sources of the Right tributario and the principle of legality”, R.DFHP, 1976, number 1, pág. 403: “In matters reserved to the law tributaria only can exist executive regulations of this last. In the rest of the fiscal matters, there is not reason doctrinal to deny the possibility of autonomous regulations, whenever the authority to dictate them was attributed explicit or implicitly to the Public Administration by the Juridical Legislation”, and in the same sense, PÉREZ OF AYALA and And. GONZÁLEZ, *Right Tributario* I, ob., cit., pág. 58 and pág. 150.

-In the first place, the Letter Magna collects the principle of reservation of law in matter tributaria, what, according to the maximum organ of interpretation of the same means that they will have to regulate anyway by Law “the principles and basic criteria in the matter”, “the *establishment novo* of the tributes” and “the determination of his elements configurators.

-Second, with regard to the requirement that the statutory authority develop in accordance with the laws, is to repair in that practically all the matter tributaria enjoys of a preference of law, well because it establishes his reservation to law in ordinary legislation (art. 10 LGT: essential elements of the tribute and other appearances, between which exist matters of inspection and settlement), well because directly his regulation makes by means of Law, in whose case, produces a freezing of the legal rank of the same. Like this, the LGT collects in the Title III, “The management tributaria”, the Chapters I-VIII that versan on management, settlement, collection, inspection and review)<sup>371</sup>. Freezing of rank that extends –likewise- to the personal provision that accompany to the tributes, etc.

Therefore, nowadays, whereas the Law has taken letter of nature in all the plots of the juridical legislation and, most importantly also in Financial Right and tributario, limiting and ordering successively the regulation of all those appearances that over time have gone suing legal regulation<sup>372</sup>, consider forced to understand that it fit gap in matter tributaria to dictate independent regulations. Possibly, as it affirms the professor García of Enterría, have to constreñirlos to the circle of the domestic relations of the Administration and special relations of subjection<sup>373</sup>, but without forgetting that, even in these cases, the juridical frame that governs them is the legal by imperative constitutional, by what the feasibility of the independent regulation will be fruit of the authority of autoorganización that the own Constitution concedes to the Administration.

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<sup>371</sup> Besides, the article 9 LGT orders that the elements that develop these matters are executive regulations.

<sup>372</sup> Fix that this fact produces in general for all the disciplines, as even those that up to now have been considered like prototypes of independent regulations (code vial, customs, tobacco, etc.) today also observe a primary regulation awarded by the corresponding Laws in the matters.

<sup>373</sup> That in no case they will be able to affect to the rights and obligations of the administered.

## **It SPLITS III**

### **THE EXERCISE OF THE STATUTORY AUTHORITY OF THE ADMINISTRATION.**

#### **III.1.- The exercise of the statutory authority of the Administration in matter tributaria. Character originario or derived of his titularity.**

We saw, when speaking of the distinct types of regulations that exist, how the authority to dictate statutory norms is not *privativa* of the Government of the Central Administration of the State, but, by the contrary, the Autonomous Communities and the Entes Local equally are entes territorial empowered to approve statutory disposals. Given the object of the present work will centre the attention in analysing who or who have the faculty to dictate state regulations, whose juridical frame competencial concrete in the following legal texts: the Spanish Constitution of 1978; the Law of Juridical Diet of the Administration of the State (in the no derogated appearances by the Law of Organisation and operation of the General Administration of the State); the same LOFAGE; the Law of the Government, the General Law Tributaria and the Budgetary General Law.

In particular, the financial discipline and tributaria adopts and integrates in his own legislation the system of normative hierarchy foreseen in the general theory of the sources of the Right<sup>374</sup>. In the sphere tributaria is reference of prescriptive appointment (still in spite of his questioned constitutionality) the article 6.1 of the LGT, that prays like this:

“The statutory authority in matter tributaria corresponds to the Boss of the State, to the council of Ministers and to the Minister of Inland revenue, without prejudice to the faculties that the legislation of local diet attributes to the Local Corporations in relation with the Ordenanzas of exactions”.

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<sup>374</sup> Articles 6.1 and 9.1.d Of the LGT. Likewise, in the preamble of this legal text can read: "With a view to the hierarchy and to the sources of Right tributario concretise the disposals of the Title III of the LRJAE".

Of his prompt reading calls the attention, in the first place, the significant omission with regard to the statutory authority of the Autonomous Communities, fact that really no emepece the capacity of these to dictate statutory disposals, as we have seen and, that answers to that his date of editorial was previous to 1968 and, therefore, were not created the Autonomies. The reason has not modified later to the thread of the successive reforms of the LGT is the questionable.

Developing of the precept transcribed, know which organs have attributed statutory authority, his scope and his limits. The LGT contains some specialitys in the matter<sup>375</sup>, in the very understood that it will be necessary to be no only to the warned in the same, but also to the had on the subject in the group of the juridical legislation. Like this, in spite of that the article 6 of the Law Tributaria only does quotation of the following headlines of the statutory authority: - Boss of the State; -Council of Ministers; -Minister of Inland revenue; -local Corporations, will expose a wider approach of the subject that give received to the frame competencial to the that have referred us.

### **III.1.1.- Council of Ministers**

The authority to dictate state regulations corresponds, in virtue of the article 97 of the Constitution, to the Government. Immediate question is, in consequence, who conforms it and if his individually considered members, and even, other inferior organs to the same, are or are not enabled to carry out said tackled.

They integrate the Government –in virtue of the article 98 of the CE- the President of the Nation, the Vice-presidents in his case, the Ministers and the other members that establish the Law. The fact that the statutory authority attribute of way expresses and originaria to the Government<sup>376</sup>, enervates the hypothesis that they could be equally titled originarios of the same his isolatedly

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<sup>375</sup> In occasions hardly justifiable, as after the CE in the successive reforms of the LGT do not modify original precepts of the LGT.

<sup>376</sup> In the same sense, the article 23 of the Law 50/1997, of 27 November, of Organisation, competition and operation of the Government, prays like this: “The exercise of the statutory authority corresponds to the Government in accordance with the Constitution and with the Laws”.

considered members. This, without damage of the development that the ordinary legislation makes on the subject, as well as of the abundant and shoot jurisprudential interpretations.

It is, then, the Government, in his demonstration colegida, this is, the Council of Ministers<sup>377</sup>, the one who has attributed the authority *originaria* to approve Regulations of development and execution of the laws, previous dictamen favourable of the Council of State, as well as the other statutory disposals that proceed (article 5.1.h Of the Law of the Government)<sup>378</sup>. In principle, the statutory disposals approved by the Council of Ministers will adopt the form of Decrees, what occurs is that, by mor of the article 62.f) Of the CE that leaves valid the competition of the King to issue the agreed Decrees by the Council of Ministers, his correct denomination is the one of Royal decrees<sup>379</sup>. Affirmation that revalidates the article 23 of the Law of the Government<sup>380</sup>.

With regard to the rest of members that compose the Government, as it has said, possess a derivative statutory authority and no *originaria*, *ex constitutione*, required of an attribution expresses by formal law<sup>381</sup>.

#### *-The Royal decree in the field tributario-*

One of the most characteristic specialitys of the regulations dictated in matter tributaria is the planned obligation in the article 17 of the LGT with regard to that the matters that to continuation detail regulate necessarily by means of Decree to proposal of the Ministry of the

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<sup>377</sup> The article 1.3 of the Law of the Government establishes that “The members of the Government gather in Council of Ministers and in Commissions Delegated of the Government”.

<sup>378</sup> Like this also the article 10.6 of the Law of Juridical Diet of the Administration of the State of 1957, no derogated by the Law 6/1997, of 14 April, of Organisation and operation of the General Administration of the State.

<sup>379</sup> GARRIDO FAILS, F., *Treated of Administrative Right*, ed. Tecnos, vol. I, 1989, pág. 237, note on foot number 36 affirms: “During the period of the Spanish constitutional Monarchy, the statutory authority exerts *for the king*, by what the Ministerial orders were formally Real order. The new monarchic stage initiated with the designation of Rey Don Juan Carlos I has not supposed a turn to the practice of the Real Orders; instead, the decrees are *Royal decrees* in congruence with the article 62.f) Of the Constitution”.

*Article 23.3. The Regulations will adjust to the following norms of competition and hierarchy: 1º. - Disposals approved by Royal decree of the President of the Government or of the Council of Ministers.* Although it is true that this precept arrives more far as it has that they approve by Royal decree also the disposals of the President and no only the ones of the Council of Ministers.

<sup>381</sup> By all PAREJO ALONSO, JIMÉNEZ-WHITE and ORTEGA ÁLVAREZ, *Manual of Administrative Right*, ob., cit., pág. 273

Treasury. It exists, as it has coined by the doctrine a "authentic reservation of Decree"<sup>382</sup>. The referred questions are:

- a) *The General Regulations dictated in execution and development of the Laws tributarias*
- b) *The own Regulations of each tribute; and*
- c) *The regulation of exemptions, reductions and other bonuses tributarias.*

The purpose that leaves to glimpse the legislator by means of the diction of the quoted precept is the need to limit and reserve the matters tributarias more significant and important so that his regulation make by means of Decree approved by the Council of Ministers. Like this, still knowingly of the fault of legislative technician of the precept<sup>383</sup>, in the section to) sobreentiende by general regulations of development of the laws tributarias those that contain disposals of type tributario observable by the generality of the tributes, *versus*, the own regulations of each tribute that, unlike the previous, develop the specific norms for the application and execution of the distinct juridical institutes-tributarios.

In you plough to a greater concrecion see of which regulations in particular treats :

- a) *General regulations dictated in execution and development of the laws tributarias.*

Strike say, that in Right Tributario the regulatory General Law of the matter is the General Law Tributaria of 28 December 1963. Recently it has seen the light the Law 1/1998, of 26 February, that regulates the Rights and Guarantees of the taxpayers.

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<sup>382</sup> TEJERIZO LÓPEZ, "The sources of the financial Right to the light of the CE", in *The CE and the sources of the Right*, Vol. III, IEF, Madrid, 1979, pág. 2029.

<sup>383</sup> CALVO ORTEGA, R., "The regulations in the legislation ...", ob., cit., pág. 71, referring in this regard it affirms: "Since the laws of each one of the tributes are also laws tributarias, can result an identification between the regulations of those and the ones of these". However, it concludes, that according to a systematic and logical interpretation "By general regulations can not understand the dictated in execution and development of the laws tributarias, but of a law tributaria concrete: the General Law Tributaria".



To.1) general Regulations dictated in execution and development of the LGT.

In this sense is to quote the article 9 of the LGT, section 1.c) That affirms<sup>384</sup>:

Art. 9º.1. The tributes ... They will govern :

(...)

c) By the General Regulations dictated developing of this Law, especially the ones of management, collection, inspection, juries and procedure of the economic claims-administrative.

In spite of the force of the precept mentioned (perhaps by effect of the legislative inertia), of these regulations, any does not exist, well because it has not created still, like the demanded regulation of management<sup>385</sup>, or, because his substantial rule has disappeared of the LGT, what sucede with the abolition of the juries of our juridical system, by means of the Law 34/1980, of 21 June, of reform of the procedure tributario and; instead, others that do not quote are purchasing letter of nature like the regulation of return of undue income.

In any case, at present are general regulations of development of the LGT, the following: General Regulation of the Inspection of the Tributes<sup>386</sup>, General Regulation of Collection<sup>387</sup> and Regulation of Economic Procedure-administrative<sup>388</sup>.

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<sup>384</sup> An exhaustive comment on this precept makes GARCÍA AÑOVEROS, J., "The sources of the Right in the LGT", ob., cit., págs. 315 et seq.

<sup>385</sup> Without prejudice to that, in matter of management if it exists an important acervo of statutory disposals that develop concrete appearances. To know: R.D. 2402/1985, of 18 December by which regulates the duty to issue and deliver bill that incumbe to the employers and professional; - R.D. 2027/1995, of 22 December by which regulates the annual statement of operations with third people; R.D. 1041/1990, of 27 July by which regulate the statements censales that they have to present to fiscal effects the employers, the professionals and other forced tributarios, etc.

<sup>386</sup> R.D. 939/1986, of 25 April, by which approves the RGIT

<sup>387</sup> R.D. 1684/1990, of 20 December by which approves the RGR

<sup>388</sup> It is to remember that the matter on economic procedure-administrative was object of legal regulation to the margin of the LGT by work of the Law of bases 39/1980, of 5 July, on economic procedure-administrative, articulated by the RD Legislative 2795/1980, of 12 December, and reglamentada by the R.D. 1991/1981, of 20 August. At present it develops this matter the R.D. 391/1996, of 1 March by which approves the regulation of procedure in the economic claims-administrative. In matter of review also exists: - R.D. 2244/1979, of 7 September by which reglamenta the resource of previous replacement to the economic-administrative.; - R.D. 1163/1990, of 21 September by which regulates the procedure for the realisation of returns of undue income of nature tributaria.

## To.2) Regulations dictated in execution and development of the Law 1/1998

No with general character, but yes with partial *character*, has seen developed the Law 1/1998 of Rights and Guarantees of the taxpayers by means of the following regulations: -R.D. Number 136/2000, of 4 February, atinente, among others appearances, to the diet of performances of the inspection; -R.D. Number 1108/1999, of 25 June, in matter of collection of tributes, that regulates, in particular, the system of common account in matter tributaria.

b) Cleared the previous, fewer doubts arouses the concretion of the regulations dictated developing of the distinct tributes or "own Regulations of each tribute" as it designates them the LGT (arts. 17.1.b And 9.1 b of the LGT<sup>389</sup>). To title of example, are to quote, among others: -R.D. 537/1997, of 14 April by which approves the Regulation of the Tax on Societies, -R.D. 326/1999, of 26 February, by which approves the Regulation of the Income tax of no resident; -R.D. 1629/1991, of 8 November, by which approves the regulation of the Tax on Successions and Donations and, in general, all the regulations that develop the distinct juridical categories-tributarias.

c) Finally, and in relation to the reservation of Royal decree foreseen in the section c) of the article 17 of the LGT concerning the regulation of exemptions, reductions and other bonuses, have posed problems as still in spite of the preference of law established in the article 10 of the LGT, sections c) and f) on exemptions, reductions, bonuses, pardons, discounts, etc., his regulation -in occasions- has carried out by norms of inferior normative hierarchy<sup>390</sup>.

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<sup>389</sup> We do not overlook that although so much the article 17 like the article 9.1.b Of the LGT speak of "The own Laws of each tribute", is of matizar that a same tribute can be regulated by distinct legal texts. "Therefore, it wants to affirm simply, with this wrong expression, that the tributes govern by the legal norms that regulate them: it is clear that had been better the silence". GARCÍA AÑOVEROS, J., "The sources of the Right in the LGT", ob., cit., pág. 318. Anyway, the logical criterion is to understand by own regulation "the basic and main regulation of each tribute". CALVO ORTEGA, R., "The regulations in the Legislation ...", ob., cit., pág. 72.

<sup>390</sup> Appearance that can contemplate in diverse regulatory Ministerial orders of these subjects, eat: -Or.M. 31-5-65, on procedure of granting of exemptions and bonuses in determinate taxes; Or. Of 21 July 1964 on bonus to determinate centres of education; Or. Of 20 October 1966 on reduction of the fixed quota of the Contribution rústica in the diets of concerted Action; Or. Of 17 December 1966 on profits tributarios of the Familiar Heritage furniture and agricultural, etc. These and other examples can see in TEJERIZO LÓPEZ, J.M., "The sources of the Financial Right to the light of the Constitution", ob., cit., pág. 2029.

*-Others possible supposed of reservation of Royal decree-*

Against of what affirm some authors<sup>391</sup>, understand that the supposed contents in the articles 12 and 22 of the LGT do not collect properly reservations of Royal decree to effects of his regulation, but they contain a reference to the Regulation so that this, in his case, collaborate in the regulation of some subjects. Fix that, in front of the rúbrica of the article 17 of the LGT that affirms: "they will adopt necessarily the form of R.D. ...", the precepts supra mentioned adopt conditional formulas of the type that follows: "The Government ... *It will be able to* increase or diminish the types impositivos ..." (Article 12); or, "The field of application of the Laws tributarias Spanish ... *It will be able to* be modified by Decree ... (art. 22)<sup>392</sup>.

Regarding the **article 12 of the LGT**, in spite of that has posed his possible inconstitucionalidad by incompatibility with the reservation of constitutional law foreseen in matter tributaria<sup>393</sup>, his problematic frames in the determination of the acceptable limits of the degree of collaboration of the regulation with the Law to regulate matters reserved to Law by the Constitution.

On line with the theses kept along all this work think that the article 12 quoted is a perfect example of legislative reference to the Regulation, where poses his collaboration for the regulation of an essential element of the tribute: the type of gravamen, but establishes that the Government will have to act inside the limits and conditions signalled in each case by the Law, specifying besides in what supposed this is possible<sup>394</sup>. From here, that do not describe it like a supposition of deslegalización, phenomenon that would produce case that the LGT remitted to the Government the regulation of the types by means of Regulation without containing in the same one material regulation of the subject, in definite; without containing the criteria and limits

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<sup>391</sup> CALVO ORTEGA, R., "The regulations in the Legislation ...", ob., cit., págs. 65 et seq.

<sup>392</sup> An exhaustive comment on this precept makes CALVO ORTEGA, R., "The regulations in the Legislation ...", ob., cit., pág. 68 to 71. By his part CORTÉS DOMÍNGUEZ, affirms that "the art. 22 it constitutes a clear supposition of deslegalización in matter tributaria, since the subjection of the foreigners to the laws tributarias Spanish is matter reserved to Law, that here authorises to regulate by means of a statutory precept", *Legislation Tributario Spanish*, ob., cit., pág. 38.

<sup>393</sup> ANTÓN PÉREZ, *Comments to the Laws Tributarias and Financial*, Edersa, Madrid, 1982, pág. 116.

<sup>394</sup> Article 12 LGT. 1. The Government, with general character and inside the limits or conditions signalled in each case by the Law, will be able to increase or diminish the types impositivos or suppress even the gravamen: to) When recaigan on the imports or exports of products, commodities or goods in general; and b) When they tax the acts of traffic of goods.

to which has to adjust the exercise of the statutory authority of the Government. The problem, therefore, will be to know if the respective Law really contains said limits and conditions and what understands by such. In this sense, remit us to all the problematic legal, doctrinal and jurisprudential already aimed in this regard.

With everything, is the true that the Jursiprudencia has admitted an intense collaboration of the Regulation to regulate not only the types impositivos, but also the bases and in general the quantities of the provision patrimoniales of public character. Thus, still when said precept can line of superfluo whereas simple reminder that, in concrete suppositions, the Law do not fix with accuracy the type of gravamen, leaving some margin of discrecionalidad to the executive<sup>395</sup>, understand with the professor FERREIRO that his reason to be answers to the rapidity of performance that demands the adaptation of these suppositions to the economic and commercial circumstances of each moment<sup>396</sup>.

#### **b) III.1.2.- President of the Government**

Inside the circle of competitions of the President of the Government is the consistent in "Creating, modify or suppress by Royal decree the Ministerial Departments and the Offices of State (article 2.2.j Of the Law of the Government), as well as, in general, the one to dictate Royal decrees on the composition and organisation of the Government and also of his organs of collaboration and support (article 17.To of the L. Gob.).

Jerárquicamente, occupy the rank more high the disposals approved by Royal decree of the President of the Government or of the Council of Ministers (art. 23 L.Gob.). Between both governs the principle of competition and not the one of hierarchy.

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<sup>395</sup> FALCIÓN And TELLA, R., "The Law like Source of the Legislation tributario", ob., cit., pág. 220, it affirms (referring to the article 12 of the LGT): "it would be advisable, therefore, the suppression of this precept, that or interprets like a simple reminder of the possibility that in concrete suppositions the Law do not fix with accuracy the type of gravamen, but it leave a true margin of discrecionalidad to the executive, in whose case results unnecessary".

<sup>396</sup> FERREIRO LAPATZA, J.J., "The principle of legality and relate them Law-Regulation in the legislation tributario Spanish", ob., cit., pág. 882.

### III.1.3.- The Boss of the State: inadecuación of the article 6.1 LGT to the Spanish Constitution of 1978

Incomprensiblemente, the successive partial reforms of the LGT have left incólume the editorial originaria of his article 6.1, still in spite of the clamour of the scientific and jurisprudential doctrine that has come positing his invalidity by not to adapt to the CE of 1978 which attributes the statutory authority to the Government with character originario, deleting any shadow of doubt with regard to the competition of the Boss of the State to dictate statutory disposals.

PÉREZ ROYO, F.<sup>397</sup>, it affirms that in what it concerns to the reference to the Boss of the State, this precept (art. 6.1 LGT) –together with the concordantes- has to consider derogated. Like this also SAINZ OF BUJANDA, F.<sup>398</sup>, it considers that “the reference to the boss of the State has to understand derogated by the CE of 1978. Similar opinions adduce MARTÍNEZ LAFUENTE<sup>399</sup>; BAYONA OF PEROGORDO and SOLER ROCH<sup>400</sup>; MARTÍN QUERALT, LOZANO SERRANO, MARRIED OLLERO, TEJERIZO LÓPEZ<sup>401</sup>; ... .

The pervivencia of the statutory authority of the Boss of the State in the article 6.1 LGT still when no justifiable is explainable because of a historical factor, cual is the hegemony that in the history of Spain and in other neighbouring countries had the monarchic absolutism. The power of Rey, far to eradicate with the end of the Modern Age, perpetuated during the 19th century and in the case of Spain, although shared with the Assembly of representatives, also during the three first chambers of the 20th century, then , remember, that in spite of that in the Constitution of Cádiz of 1812 consolidates the principle of legality reserving to the Parliament the legislative authority, the Monarch conserves important competitions in statutory matter<sup>402</sup>.

In conclusion it can affirm that in spite of the reference that contains the article 6.1 of the LGT with regard to the statutory authority of the Boss of the State, such quotation is absolutely unfeasible to the light of the CE of 1978.

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<sup>397</sup> *Financial right and Tributario*, ob., cit., pág. 64.

<sup>398</sup> *Lessons of Financial Right*, ob., cit., pág. 25.

<sup>399</sup> "The statutory authority of the Ministers. Special reference to the field tributario", *Civitas*, number 22, April/June, 1979, pág. 231.

<sup>400</sup> *Compendio Of Financial Right*, ob., cit., pág. 101

<sup>401</sup> *Course of Financial Right and Tributario*, ob., cit., pág. 177

<sup>402</sup> Vineyard. In this sense asks it number 1, last part.

### **III.1.4.- The Commissions Delegated of the Government**

In spite of that the article 6.1 of the LGT does not mention reference any on the Commissions Delegated of the Government, the article 9 of the same legal text appointment like source of the tributes the agreed Orders by said Commissions<sup>403</sup>. This last legal precept, does not do but move to the field tributario an already foreseen norm previously in the public Right in matter of sources of the Right, today also valid. Like this, the article 23 of the LRJAE of 1957 relates between the administrative disposals of general character, second, the agreed Orders by Commissions Delegated of the Government<sup>404</sup>.

Exactly equal that sucede with the statutory titularity that have the Ministers, in the case of the Commissions Delegated of the Government fits to stand out that after the CE, the one who has attributed the generic statutory authority is the Government, although, no of exclusive way and excluyente, by what, with derivative character, also other different organs to the same will be able to dictate statutory disposals with previous legal habilitation<sup>405</sup>.

### **III.1.5.- The Minister of Inland revenue**

They are precepts that recognise on purpose statutory authority of the Ministers, the following: art. 14.2 and 12.2.To) of the LOFAGE; art. 4.1.b) Of the Law of the Government and, in the field tributario and financial, the articles 6.1 of the LGT and 9.1 of the LGP, respectively.

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<sup>403</sup> Regarding this matter vineyard.: -CALVO ORTEGA, R., "The regulations in the state Legislation Spanish", ob., cit., pág. 51 et seq. -TEJERIZO LÓPEZ, J.M. "The sources of the financial Right to the light of the CE, in *The Spanish Constitution and the sources of the Right*, vol. III, IEF, Madrid, 1979, págs. 2029 et seq.

<sup>404</sup> By his part, the valid Law of the Government, in his article 23 does not do quotation expresses to such Orders, understanding the doctrine, nevertheless this, that find included between the disposals approved by Ministerial order.

<sup>405</sup> With the object of not repeating the same reasonings, remit us to the comment contained in the question III.2.3 of this work.

Given the transcendence and importance of this individual, to his study devote a wider space *infra*, under the title "A controversial subject: the statutory authority of the Ministers" (question III.2).

### III.1.6.- The organs jerárquicamente inferior to the Government

The disposals emanated of authorities and inferior organs jerárquicamente to the Minister are properly administrative disposals no statutory with internal efficiency exclusively. It treats , as it already put of self-evident GIANNINI, To., of "administrative acts, so much in formal sense like substantial"<sup>406</sup>, that do not contain juridical norms unlike the regulations and therefore, "do not constitute never a source of objective right"<sup>407</sup>.

The *titularity* of said attribution have it generally the bosses of the administrative Departments, with the end to order, direct and coordinate the activity of the Administration between upper and inferior organs and that they can adopt the denomination of instructions, orders, circular and even of resolutions. In this sense the art. 21 of the Law 30/1992 establishes that "the administrative organs will be able to direct the activities of his organs jerárquicamente dependent by means of instructions and orders of service".

By his part, the LOFAGE also allows this competition attributing it to distinct headlines:

- General administration of the State (art. 2.1)
- Instructions of the Ministers to the upper organs and directors of the Ministry (art. 12.h)
- Instructions of the Secretaries of State to the corresponding managerial organs (art. 14.2)

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<sup>406</sup> GIANNINI, To., D., *Institutions of Right Tributario*, translation by Sainz of Bujanda, ed. Of Financial Right, Madrid, 1957, pág. 22.

<sup>407</sup> BERLIRI, To., *Principles of Right tributario*, translation by Vicente-Arche Sunday, Madrid, 1964, pág. 65 establish in this regard: " .... They do not constitute never source of objective right, since they do not contain compulsory juridical norms for the Administration neither for third, but only norms with efficiency vinculante for the Administration, ...". See also regarding this matter LICCARDO: "Nature giuridica delle circolari ministeriali", in Riv. Dir. Finan., 1952, or also COCIVIERA, quoted by PÉREZ OF AYALA and GONZÁLEZ, And., *Course of Right Tributario*, 1989, pág. 57.

- Instructions or orders of service of the subsecretarios to the common services of the Ministry (art. 15.1.d)
- Instructions of the upper organs of the Ministries to the Delegates of the Government in the Autonomous Communities (art. 26.1)

With regard to the *juridical effects* derived of the called instructions of service and circular connects as we said with the "duty of obedience of the inferior hierarchical concerning his upper"<sup>408</sup>, without that, in no case, have direct normative character for the Administration, the administered, neither neither for the Courts of Justice and officials.

The content of these administrative disposals no statutory is used to to consist in guidelines or orders given to organs jerárquicamente inferior, without prejudice to that also dictate instructions and circular with the end to interpret and analyse legal or statutory norms. It is precisely in these suppositions where, often, produce difficulties to distinguish between the exercise of the merely interpretative activity *versus* the exercise of the normative faculty that would go further of the material scope of this type of administrative disposals. In fact, the problems pose because many times under the mantle of the interpretation hide activities of normative character with repercussion in the sphere of the rights and duties of the administered, this is, hide true statutory norms.

The consequence of this fact, peacefully admitted by the doctrine is the illegality of the circular that contain normative or statutory disposals<sup>409</sup> (in Sentence of the T.S.J Of Madrid, of 16-6-1994 declares the nullity of a circulate of the General Direction of Tributes because no fixed criteria of performance for the civil servants to those who directed , but it imposed a behaviour of acatamiento by part of the administered).

Without prejudice to the previous, in some occasions the Jurisprudence has admitted the validity of circular integradoras of statutory disposals of upper hierarchical rank, when they exist

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<sup>408</sup> GARRIDO FAILS, *Treated of administrative Right*, ob., cit., pág. 243.

<sup>409</sup> By all PÉREZ OF AYALA and GONZÁLEZ, And., *Course of Right* ..., ob., cit., pág. 58.



technical difficulties for his determination or big versatility in the time, whenever it mediate legal habilitation and the no statutory disposal have the same advertising that the norm that develops (SSTS 9-7-1994, 27-10-1997).

Atinente To the subject of *his advertising* is constatable that although many of them publish in the BOE, does not exist norm expresses regarding the obligation of his advertising. Logically, the fact that like this it proceed , will influence positively in the juridical security of the citizens in front of the vision of the Administration in front of concrete subjects of the positive legislation<sup>410</sup>, all time that will allow to detect the called by the Italian doctrine vices of excess to be able to that they produce when a civil servant dictates an administrative act separating of the criterion of the circular<sup>411</sup>.

*Field tributario*: known the complexity of the appearances that stir in the Financial Right and tributario, is not of extrañar the important profusion that have had circular, instructions, resolutions ... Dictated by upper organs of the Public Administration tributaria<sup>412</sup>. With everything, possibly the most characteristic in this juridical discipline was the special attribution that the article 18 of the LGT award to the Minister of Inland revenue to dictate interpretative orders or aclaratorias of the laws and other disposals in matter tributaria. Of his analysis occupy us in a back epigraph<sup>413</sup>.

### ***III.2.- A controversial subject: the statutory authority of the Ministers***

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<sup>410</sup> In this sense affirms : "... They serve to the juridical security by what is possible to know a priori the opinion of the Administration on appearances, in a lot of complex occasions, of the positive legislation and, finally, can serve to base a semence of deviation to be able to if an administrative organ separates of the warned in such disposals". MARTÍN QUERALT, LOZANO SERRANO, MARRIED OLLERO, TEJERIZO LÓPEZ, *Course of Right* ..., 1999, ob., cit., pág. 182

<sup>411</sup> BERILIRI, *Principles of right* ..., ob., cit., pág. 68, it affirms: "... The act dictated in opposition to a circular is viciado by excess to be able to". A more extensive comment regarding this matter can see in GIANNINI, To.D., *Institutions of Right* ..., ob., cit., págs. 23 et seq.

<sup>412</sup> GIANNINI, "Given the complexity of the financial Administration, owed, especially to the cumulus of the norms tributarias and to the difficulties of his application to the innumerable cases of the economic life-social, exercises widely the faculty of the executive power, particularly of the Ministry of the Treasury, to give to the offices that of him depend managerial criteria and rules of behaviour and to suggest concrete resolutions of controversial cases, so that the own administration manage with prontitud and uniformity". *Institutions of Right* ..., already quoted.

<sup>413</sup> Vineyard. Section III.3 .The interpretative faculty of the Minister foreseen in the article 18 of the LGT.

Very controversial has been the attribution of the statutory authority to the Ministers, so much from him legal point of view like jurisprudential and doctrinal. In effect, the question to determine if the Ministers have or do not have statutory authority as well as his scope, is a subject of difficult solution, or at least, if what pretends is to test a univocal and precise answer regarding his field and limits.

The subject begins to enturbiar since the CE of 1978 proclaims to the Government title of the statutory authority and, at the same time, continue valid, of a side; the article 14.3 of the LRJAE of 1957 that preaches the statutory authority of the Ministers in own matters of his Department and, of another; the article 6.1 of the LGT that attributes generic statutory competition to the Ministers. From here, the normative texts that have known of the matter characterise by his fault of clarity and precision, what, definitely, has caused an important confusion arising contradictory opinions so much in the scientific doctrine like jurisprudential.

### **II.2.1.-Legal regulation**

- The CE does not tackle the problem that treat. It conceives to the Government like the headline of the statutory authority without forbidding, neither exclude that other organs like the Minister, can be equally titled of the same.

- This question yes had been tackled with antelación to the approval of the CE by the LRJAE of 1957, whose article 14 mentions between the attributions of which are investidos the Ministers: “3. *Prepare and present to the Government the projects of Law or of Decree, relative to the questions attributed to his Department*”. The LOFAGE of 14 April 1997 keeps on purpose the force of this precept (art. 14.2).

- The article 6.1 of the LGT, according to editorial originaria no modified establishes: "The statutory authority in matter tributaria corresponds to the Boss of the State, to the Council of Ministers and to the Minister of Inland revenue, without prejudice to the faculties that the legislation of local diet attributes to the Local Corporations in relation with the Ordenanzas of exactions.

- By his part, the Law 50/1997, of 27 November, of the Government, approved to require and develop organic appearances, procedimentales or functional of the planned Government in the CE, all time that for aunar the rule on organisation and operation of the same, disperses in different legal texts; equally it attributes to the Ministers the competition to “*Exert the statutory authority in the own matters of his Department*” (article 4.1.b)<sup>414</sup>.

- To the margin of the field competencial to the that have said circumscribe said laws the statutory authority of the Ministers, is very significant the quotation that makes the first quoted law (LOFAGE) in his article 12, whose aparado 2 affirms:

2.- *It corresponds to the Ministers, anyway, exert the following competitions:*

To) *Exert the statutory authority in the planned terms in the specific legislation.*

- In the field tributario, the subject complicates more if it fits, as the successive reforms of the LGT leave live the statutory authority of the on purpose recognised Ministers in the art. 6.1 LGT. The problem estriba in that this article implicitly recognises a generic statutory authority to the Ministers, when it is very known that the CE only attributes him to the Government of the Nation such *potestas*.

### **III.2.2.- Hierarchical rank of the ministerial orders inside the statutory disposals**

With regard to his hierarchical position in the echelon of the statutory disposals, the article 23 of the LRJAE of 1957<sup>415</sup> mentions in third place the ministerial orders (behind the Decrees and of the Orders of the Commissions Delegated of the Government). However, the new regulation

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<sup>414</sup> The article 14.2 of the LRJAE of 1957 today valid establishes that the Ministers are investidos of the consistent attribution in “Preparing and present to the Government the projects of Law or of Decree, relative to questions attributed to his Department”.

<sup>415</sup> The annex of the LOFAGE keeps transitoriamente in force, among others, the article 23.2 of the LRJAE of 1957.

in this regard contained in the article 23 of the law 50/1997 of the Government establishes the following prelación in statutory matter<sup>416</sup>:

**Note:** for a better understanding expose the following picture sinóptico in which it compares the planned regulation in the LRJAE and in the Law of the Government.

<b>LRJAE Of 1957</b> <b>Art. 23 (valid)</b>	<b>LAW 50/1997, of 27 of nov., of the Government</b> <b>(article 23)</b>
<p><i>Administrative disposals of general character:</i></p> <p>1.- Decrees</p> <p>2.- Agreed orders by Commissions  Delegates of the Government</p> <p>3.- Ministerial orders</p> <p>4.- Disposals of Authorities and  Inferior organs, according to the order  Of his respective hierarchy.</p>	<p><i>Regulations:</i></p> <p>1.- Disposals approved by the  - President of the Government  - Council of Ministers  Both by means of Royal decree</p> <p>2.- Disposals approved by Order  Ministerial</p>

Of the comparison of both rules fits to extract the following considerandos:

1.- The new Law of the Govern mint the statutory authority of the President of the Government, billed in the first place hierarchical to the same level that the Council of Ministers, without that it mediate between both organs

–As it has said - hierarchical relation, but competencial.

<sup>416</sup> GALICIAN ANABITARTE and MENÉNDEZ REXACH, “Comments ...”, ob., cit., pág. 197.

2.- Whereas the LRJAE distinguishes on purpose between Orders of the Commissions Delegated of the Government and Ministerial orders, the article 23 of the Law of the Government simply mentions the “Disposals approved by Ministerial order”, between which fits to understand represented the two previous. Very known that, in virtue of the article 25.And) of the Law of the Government, the disposals adopted in Commissions Delegated of the Government revestirán the form of Order of the competent Minister or of the Minister of the Presidency, when the competition correspond to distinct Ministers.

3.- The LRJAE speech of “administrative disposals of general character”, between which includes the dictated by inferior organs to the Government. No like this the Law of the Government, that limits strictly to “Regulations” leaving clear (by exclusion) that the same are not statutory norms. Therefore, only they are regulations: 1.- The disposals approved by Royal decree of the President of the Government or of the Council of Ministers; 2.- Disposals approved by Ministerial order (between which would include so much the Orders dictated by the Commissions Delegated of the Government as by the Ministers).

In *matter tributaria* the prelación of sources of the Right collects in the article 9 of the LGT, to whose tenor, the tributes -with independence of his nature and character- will govern , amen of by the same LGT and the own of each tribute, by the regulations dictated in the matter. To know:

Art. 9º.- The tributes (...) They will govern :

c) By the General Regulations dictated developing of this Law, especially the ones of management, collection, inspection sworn and procedure of the economic claims-administrative, and by the typical of each tribute.

d) By the Decrees, by the agreed Orders by the Commission Delegated of the Government for Economic Subjects and by the Orders of the Ministry of the Treasury published in the "Official Bulletin of the State".

Observe how in the letter d) extrapolates to the order tributario the prelación hierarchical of the disposals dictated by the Administration contained, with general character, in the ancient article 23 of the LRJAE of 1957 today valid.

### III.2.3.- Scientific doctrine

Exposed the cast of juridical precepts that give regulation to the subject that treat: the statutory authority of the Ministers, see cuáles are the main fringes or questions inconclusas that would require of a more detailed treatment. In synthesis, the basic questions to which has to give answer are the following:

1.- *It can understand that according to the valid juridical frame the Ministers have generic statutory “authority” in spite of that the Spanish Constitution at all say in this regard?.*

It is doctrine generalised that the attribution of the statutory authority to the Government that foresees the article 97 of the CE does not make of exclusive form and excluyente, by what also other organs like the ministers enjoy of said authority. The quoted precept has that the Government exerts the statutory authority, without forbidding in any moment that other organs or authorities can be equally titled of the same, although, logically “with derivative character” and no originario.

Well known that our Letter Magna does not pronounce on such extreme, voices authorised in the matter consider that the fact that the Constitutional Text attribute the statutory authority to the Government, means that it does not treat of a statutory authority general, but of a “needy faculty in each case of a special habilitation”<sup>417</sup>. “The Ministers –and other authorities-, affirms SANTAMARÍA PASTOR, can exert, then, the statutory authority. But his competition is not

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<sup>417</sup> GARCÍA OF ENTERRÍA and FERNÁNDEZ RODRÍGUEZ, *Course of Administrative Right*, ob., cit., págs. 177-178, authors that consider that the key of the statutory authority of the Ministers is in the reference that makes the article 12.2.To of the LOFAGE to the specific legislation.

generic, but of attribution: only they will be able to exert it when a specific norm attribute it to him”<sup>418</sup>.

In the same sense pronounce , among others, TRAINS CUESTA<sup>419</sup>, GÓMEZ-FERRER MORANT<sup>420</sup>, PAREJO ALONSO/ JIMÉNEZ WHITE and ORTEGA ÁLVAREZ<sup>421</sup>, GARRIDO FAILS<sup>422</sup>, confirming the reasoning that the statutory authority corresponds of form originaria to the Government and any another organ or distinct body to the same (except the Autonomous Communities) will need previous legal habilitation to exercise said authority.

In the field of the Right Tributario the generality of the doctrine participates of the exposed reasoning. To know: SAINZ OF BUJANDA, *Lessons of Financial Right*, ob., cit., págs. 25 and ss; FALCÓN And TELLA, R., "The ministerial statutory authority in matter tributaria", REDF, number 37, 1983, págs. 65 and 66, it affirms: "The circumstance to have referred the Constitution so only to the statutory authority of the Government without marking exclusions, indicates that these attributions have not foreseen of exclusive form and excluyente, by what fits to admit legitimacy of a law that confer statutory faculties to the Minister and inferior authorities". MARTÍNEZ LAFUENTE, To., "The statutory authority of the Ministers...", ob., cit., pág. 231 it considers that to the Minister, before and now, has assisted him only a derivative statutory power and never autonomous", etc<sup>423</sup>.

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<sup>418</sup> SANTAMARÍA PASTOR, *Foundations of Administrative Right*, ob., cit., págs. 760-763.

<sup>419</sup> *Course of Administrative Right*, ob., cit., pág. 140

<sup>420</sup> "The statutory authority of the Government and the Constitution" in Administrative Documentation, number 188, 1980, págs. 227 et seq.

<sup>421</sup> Manual of Administrative Right, ob., cit., pág. 273, authors that affirm that the ministers have a derivative statutory authority, "that is to say, required of a deconcentration of the recognised with character originario, well of an attribution expresses precisely by one ,formal law, what is usual, by other, in our Right" (art. 4.1.b) Of the Law of the Government in the case of the Ministers).

<sup>422</sup> *Treaty of Administrative Right*, ob., cit.,

<sup>423</sup> Between the doctrine tributaria some pioneering authors of the treatment of the subject that argued the subjects before the promulgation of the CE, understood, however, that a Minister has a residual statutory authority, so that, in case of not being attributed to the boss of the State or to the Council of Ministers, can the Minister with residual authority emanate a regulation. CALVO ORTEGA, R., "The regulations tributarios in the state legislation Spanish", ob., cit., págs 48 to 50. Followed also by F. Díez and And. GONZÁLEZ, in "Comments to the article 6 LGT", Edersa. This last author, nevertheless, changes later of criterion interpreting on line with FALCÓN And TELLA, R., that the statutory authority of the Minister demands specific enabling Law. PÉREZ OF AYALA and GÓNZÁLEZ, And., *Right Tributario I*, ob., cit., pág. 62.

Like this then , we can conclude that the Ministers possess a derivative statutory authority and no originaria, without that it was possible that a specific law can attribute en bloc the generic statutory authority to a determinate Minister as like this it does it the article 6.1 LGT<sup>424</sup> .

### *2.- Which is the field of performance of the Minister in statutory matter?*

It seems clear that to tenor of the articles 14.2 of the LOFAGE and 4.1.b) Of the Law of the Government, the Ministers have a statutory authority limited to the own matters of his Department, nonetheless, between the doctrine is perceivable a fault of consensus to determine what has to understand by “own matters of a Ministerial Department”, as while some authors restrict it to the purely organisational field of the Administration; to the internal organisation of the services of his respective Ministry<sup>425</sup>, others, extend his interpretation further of the pure tasks of Departamental internal organisation, covering a wider competition concretable, precisely in which it attributes the article 98.2 of the CE to the Ministers: “Direct the action of the Government and coordinate the functions of the other members without prejudice to the competition and direct responsibility of these in his management”<sup>426</sup>. Possibly it was necessary to give him the reason to SANTAMARÍA PASTOR<sup>427</sup>, the one who subtracting importance to the subject considers unnecessary indagar in the sense of such expression, the one who concludes: “... The statutory authority of a Minister can not, in principle, exercise on own matters of other Departments”.

### *3.-Which type of statutory disposals can dictate the Ministers inside his field competencial?*

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<sup>424</sup> SSTs 12-7-1982 and 15-10-1982.

<sup>425</sup> By all GARCÍA OF ENTERRÍA and FERNÁNDEZ RODRÍQUEZ, *Course of...*, ob, cit., pág. 178.

<sup>426</sup> Like this OF OTTO, I., *Constitutional right* , ob., cit., pag. 224. In the same sense BOQUERA OLIVER, J.M<sup>a</sup>. “Enjuiciamiento And inaplicación judicial of the regulations”, ob., cit., pág. 19 it affirms: “Neither it fits to understand that “the own matters of a Department” are only the ones of organisation. The material competition is properly the contrary: decide especially that attributed to the Ministerial Department”. Or also GALICIAN ANABITARTE and MENÉNDEZ REXACH, “Comments to the article ...”, ob., cit., pág. 198, for those who the reiterated expression does not have to circumscribe to the field of the organisation and of the special relations of subjection”.

<sup>427</sup> *Foundations of Right ...*, ob., cit., pág. 760.



- a) Disposals *praeter legem*
- b) Disposals *secundum legem*

To) Obviously, the Minister will be able to dictate norms that reach his field competencial, this is, in bounded matters in his respective Ministry. The question that arouses doubt is to know if anyway they will need legislative habilitation, this is, if necessary that it exist a previous law that specifically commission them said task, or if by the contrary will be able to obviar such requirement.

The opinions doctrinales poured regarding this matter are contradictory. Like this, for example, SANTAMARÍA PASTOR defends the need that also in the supposed that the statutory authority of the Minister reduce to the internal organisation of his Department, as well as to the people subjected to a special relation of subjection or power with the Ministry, is prescriptive the attribution of the Law to the competent Minister<sup>428</sup>.

Other authors disagree of such reasoning when understanding that in the own matters of a Ministerial Department, the specific laws that enable to the Ministers to dictate Orders, do not confer them the statutory authority because already they have it, “but impose them the obligation to exercise it regarding what in them has ”<sup>429</sup>.

More conclusive show in this regard GALICIAN ANABITARTE and MENÉNDEZ REXACH, those who understand that the Ministers can dictate regulations *praeter legem* in the own matters of his Departments, whenever no rebasen said field and that the matters have not been regulated by norms of legal rank<sup>430</sup>. Or, also the speech argumental of OF OTTO, I.<sup>431</sup>, it drives to obviar said requirement of the legal permission.

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<sup>428</sup> In the first supposition (internal organisation of his Department) is necessary attribution of Law or Regulation of the Government by the constitutional requirement of a previous law that discipline genéricamente the administrative organisation (art. 103.2) and because the authority organiser of the Ministers finds attributed and delimited by a legal norm 8art. 2 LPA). In THE second case: special relations of subjection, is not possible to recognise to the Ministers an independent statutory authority of all apoderamiento normative, "by what this equivale to recognise to said authorities a general statutory power on any one matters.

It is to signal that this author allows excepcionalmente, that the legislative reference make by decree of the Government. It admits such possibility when “the regulation of the Government remit to inferior norms the regulation of secondary questions, purely operative and no integral of the essential core of the normación that the Government has to by himself make”. SANTAMARÍA PASTOR, *Foundations of Right ...*, ob., cit., págs.760-763.

<sup>429</sup> BOQUERA OLIVER, J. M<sup>a</sup>, “Enjuiciamiento and inaplicación of the Regulations”, ob., cit. Pág. 20.

<sup>430</sup> “Comments to the article 97 ...”, ob., cit., pág. 198. As we will see, these authors only foresee the requirement of the legal permission when it treat that the Ministers develop partially a law.

<sup>431</sup> *Constitutional right*, ob., cit., págs. 223-224.

In our opinion the Minister will be able to dictate Orders without previous legal permission when it do not exceed of the purely domestic field, so that it suppose a simple ordination of means or resources interadministrativos that concretise in hierarchical orders of upper to inferior, but, without that in no case his disposals have normative value, this is, will not be able to affect the rights and the obligations of the administered. To these effects, the content of the same could document by means of instructions of use or circular, but substance in the form of Ministerial order<sup>432</sup>. With this do not overlook the reservation of constitutional law foreseen in the article 103.2, but, inside this juridical frame and attending to the capacity of autoorganización administrativa seems possible the road of pointed.

-“*A subtle question*”-. In the reality, unfortunately, the regulation described gives place to a perverse effect cual is that, the Minister, conscious of his fault of legitimacy to dictate general regulations, opts by incoar interpretative orders that in occasions hide authentic regulations and that they can affect to rights and duties of the individuals. With this attain a double advantage:

- No extralimitarse in his competitions, at least in appearance.
- Case of impugnation, will carry out individually by the subject affected, and what will cancel , in his case, is a particular administrative act, but the rest of subjects affected will have to follow said interpretative criterion, from here that in these cases would have to examine rigorously if the ministerial order transfers his field of tackled.

2.- Fed up controversial is equally the second question posed relative to know if the ministers have or do not have competition to dictate executive regulations.

The authors that tackle directly the question divide between those in favour of a flexible interpretation, in accordance with what sucede in the reality, understanding that a Minister can

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<sup>432</sup> What occurs, however, is that if really it treats of hierarchical orders or instructions of internal use, does not seem that the optimum form to document such performances was by means of Orden Ministerial, then , seem the own that in such suppositions document by means of simple instructions of use or circular.

develop directly a law, but, always with partial character and previous habilitation legal<sup>433</sup>; those that deny such possibility due to the fact that the valid legislation (article 10.6 LRJAE) attributes the “competition regarding the regulations for the execution of the laws” to the Council of Ministers, what “excludes *to sensu contrario* that correspond to the Ministers a similar competition, so that they only will be able to dictate the called regulations *praeter legem*<sup>434</sup> and, finally, also exists the one who thinks that the Ministers do not have autonomous statutory authority, neither neither a law will be able to entrust him his executive development to the Minister, due to the fact that the one who has the authority is the Council of Ministers and only this will be able to entrust his development to a Minister in particular<sup>435</sup>.

From our point of view, the Minister will be able to dictate Orders of development of laws whenever it exist a previous Law that commission him said tackled, and, anyway, develop concrete appearances and very specified, that under any pretext will be able to reach to the global development of a determinate law, since this is competition of the Council of Ministers<sup>436</sup>. De facto, this is the situation that produces in the reality, as it is more than evident that Ministers of diverse Ministerial Departments have developed appearances of laws of diverse type, with special profusion in the field of the taxation. It has not wanted to desconocer this factor the LOFAGE, juridical norm that, understand, awards protect legal; it legitimates the exposed situation, when allowing implicitly that the Ministers make such statutory activity (art. 12.2.To). This was, equally the doctrine kept by the Council of State in his dictamen dated in 29 July 1982, document in which it keeps the thesis that the Minister can dictate executive regulations whenever it exist specific habilitation. It is to suit in that the Ministers can not develop laws with character originario or primary, but yes with derivative character (STC 185/1995 of 14 December), this is, when it exist a law that enable them to "dictate concrete statutory disposals limiting and ordering his exercise" (F.J. 6.c). Doctrine that has reiterated so much by this Court as by other orders Jurisdiccionales, as we see in the question that follows.

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<sup>433</sup> GALICIAN ANABITARTE and MENÉNDEZ REXACH, “Comments to the article 97...”, ob., cit., pág. 198.

<sup>434</sup> OF OTTO, I., *Constitutional right*, ob., cit., pág. 224.

<sup>435</sup> MARTÍNEZ LAFUENTE, "The statutory authority ...", ob., cit., pág. 228. For GARCÍA OF ENTERRÍA and RODRÍGUEZ FERNÁNDEZ also fit the habilitations by Decree but with reservations, since they suppose to attribute to an inferior organ some competitions that are own of the Government, according to the CE, or have been him delegated in the Government for the execution of the Law. In *the Course of Administrative Right*, so many times quoted.

<sup>436</sup> With everything, will be indispensable that to regulate by Ministerial order those appearances reserved to law (material or formally), the own law contain a material regulation of the subjects object of reference or reenvío formal, then, in another case, would incur in a deslegalización to the not containing the Law, norm remitente, a normative content material, so that, would operate like a degradation of the rank of a previous material regulation.

### III.2.4.- Courts of Justice

Complicated, difficult, garbled, interdisciplinary, recurrent and, of course, important are only some of the adjectives that define the subject of the statutory authority of the Administration<sup>437</sup>. Appearances that, beyond all doubt, prodigan with big profusion in the specific point of the statutory authority of the Ministers.

In effect, the complication, the difficulty that the same houses finds his origin in previous time to the CE of 1978. The fault of legislative clarity and especially of normative precision when establishing the scope and the limits of the problem, has generated a broth of optimum crop to engender a big confusion, that has his immediate reflection in the Courts of Justice, those who with recurrent character see compellidos to resolve on the matter, límitándose –generally- to resolve strictly the subject, without arriving to seat a general theory in the matter.

The importance, anyway, of the statutory authority of the Ministers, is so much quantitative like qualitative, this is, no only by the high number of Sentences pronounced by the economic courts-administrative and contentious-administrative in this regard, but also by the profusion and rich variety of contents that in them houses , then , of matter interdisciplinary fits, without place to doubts, tildarla.

Very known is, that in the preparation of the juridical Legislation the statutory norm integrates like a normative element more<sup>438</sup> (subject to the Spanish Constitution and to the Laws), conceiving his predicamentos on all fronts of the same. To know: Administrative Right, Urbanístico<sup>439</sup>, Health and Consumption<sup>440</sup>, Fuels<sup>441</sup>, Transports, Environment<sup>442</sup>, Ports and

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<sup>437</sup> Regarding this matter, it affirms the Sentence of the T.S. Of 16-12-1986: “The subject of the statutory authority of the Administration has been and is one of the most complicated of the Administrative Right in general and of the Spanish in particular and this so much before as after the CE of 1978”.

<sup>438</sup> Like this also It Sentences of the TSJ of Galicia dated on 5 March 1999.

<sup>439</sup> S.T.S. 14-6-1983

<sup>440</sup> S.S. T.S. 16-12-1986; 19-12-1986; 25-10-1991

<sup>441</sup> S.T.S. 15-6-1982

<sup>442</sup> S. T.S.J. Of Andalucia of 2 June 1997.

Channels<sup>443</sup>, Public Works<sup>444</sup>, ONLAE<sup>445</sup>, Taxes and Public Prices<sup>446</sup>, collection, Imposición state<sup>447</sup>, autonomic and local, etc.

See which has been the guideline gone on down the Courts of Justice with regard to the scope and limits of the statutory authority of the Ministers. Today, after more than 20 years of force of our Letter Magna, can analyse in perspective the interpretations kept in this regard. Pronouncements, that, nevertheless this, it will be necessary to temper in function of the time and of the space in which they conceive . Like this, and without prejudice to particular sentences that can escape to what would be the line argumental that chairs a determinate period, in our opinion fits to distinguish the following chronological stages attending to the following interpretative guidelines kept by the Courts in the subject that occupies us- To know:

To.- Period preconstitucional

B.- Period postconstitucional

To.- *Period preconstitucional*; With antelación to that it was approved the CE of 1978 the Ministers enjoyed of important prerogatives of administrative cut. The big raigambre of the exercise of the ministerial statutory authority, aunado to the valid legislation, conferred, of his, to the Ministers, a power desafortando to dictate statutory disposals, that would have faithful reflection in the jurisprudential failures.

As we saw, the article 14 of the LRJAE, attributed, in his third section, the statutory authority to the Ministers in the own matters of his Departments. This disposal projects little time afterwards in the field tributario, establishing the article 6.1 of the LGT of 1963 the ministerial statutory authority. It would be necessary to expect until the year 1966 so that the normative reality then valid: -Organic Law of the State of 1966- attributed said competition to the Government. Situation that resume the Council of State in his motion of 1969 when it affirms:

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<sup>443</sup> S.T.S. 27-5-1998

<sup>444</sup> S.T.S. 30-3-1984

<sup>445</sup> Resolution of 30-1-1998

<sup>446</sup> S.T.C. 185/1995, of 14 December

<sup>447</sup> S.T.S. 25-1-1982 on Regulations of execution of the Law of Special Taxes; S.T.S. 12-7-1982: Tax on Societies, Update of Balances, impugnation of the Ministerial order of 27-3-1981.

“... In the valid Spanish right, the Council of Ministers and *these same*<sup>448</sup> have attributed a generic statutory authority ...”. Authority that, equally revalidates the High court in Sentences dictated before the approval of the CE of 1978<sup>449</sup>; and also, perhaps because of the effect inertia, once approved the same, and this, still although the article 97 of the CE refer such competition to the Government of the Nation.

It results at least chocante and contradictory observe how the High court keeps in shape that we finish to expose in failures postconstitucionales. Good sample of this give the dated the 22-10-1981, 4-2-1982 and 10-12-1982. In all these Sentences repeats the same rúbrica:

“That in the valid Spanish right the Council of Ministers and *these same* have attributed a generic statutory authority, distinct of the mere execution of the laws –art. 14.3 of the Law of Juridical Diet and 97 and 106 of the Constitution- not being executive of the laws those Regulations dictated in exercise of this generic statutory authority and designated ‘independent’, ‘autonomous’ or ‘*praeter legem*’, that although they have to respect the ‘block of formal legality’ are not, however, subjects preceptively to the previous control of the Council of the State”<sup>450</sup>.

To the light of the quoted judicial pronouncements quoted can conclude that the Ministers had wide competitions in statutory matter, so that they could dictate statutory disposals no only in execution of laws (previous dictamen of the Council of the State), but also independent regulations or *praeter legem*.

Also the Sentence of the T.S. Of 14-6-1983 it resolves on the subject that occupies us attributing to the Ministry of the Treasury the authority to develop, in sense restrictivo, and still modificativo, the precepts of the Law of 3 December 1953, understanding that COPLACO (Commission of Planing and Coordination of the metropolitan area of Madrid) is not competent for this.

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<sup>448</sup> The underlined is ours.

<sup>449</sup> For example, the Sentence of 22 April 1974

<sup>450</sup> In S.T.S. Of 10-12-1982 matiza that “Still after the CE can affirm that in the Spanish Right the Council of Ministers and these same have attributed a generic statutory authority”.

## B) *Period postconstitucional*

In the starts of the Decade of the eighty is possibly when it produces the greater confusion and contradictions between the Supreme court's decisions when resolving on the matter that occupies us. Like this, we can extract until four different criteria to judge the limits and the scope of the statutory authority of the Ministers.

- a) Criterion preconstitucional, that follows valid after the approval of the Letter Magna and that resume in that the Ministers, the same that the Council of Ministers have generic statutory authority, what includes statutory competition of execution of a law and competition to dictate independent regulations or *praeter legem*.
- b) Criterion of interpretation restrictivo of the article 97 CE, as which the CE attributes the statutory authority to the Government and this can not delegate it in any another organ, neither in the Minister. Therefore, only they can dictate executive regulations the Council of Ministers and if it does it the Minister by means of Order, will be *viciada* of nullity.
- c) Criterion of interpretation matizado of the article 97 CE; as which, the interpretation of the so quoted article does not have to deprive of organisational competition to the headlines of the Government, because it comes them given by the article 98.1 of the CE. Therefore, whenever it was not incompatible with the CE, will serve of guideline the article 14.3 of the LRJAE that attributes competition to the Ministers in own matters of his Department. Of this way in numerous Sentences that reiterate along the time the T.S. And other Courts of Justice pronounce with regard to if the subjects in litigio go in or do not go in in the own sphere of a Ministerial Department, answering in positive sense when it treats to regulate questions of organisational type as well as special relations of subjection, that in no case affect to the rights and freedoms of the administered. By the contrary, understands the T.S. That is out of the own matters of a Ministerial Department the preparation of regulations of execution of a law.

- d) Derivative statutory “authority” of the Ministers: STC 185/1995 and jurisprudential doctrine concordante.

To) and b) Developing the diagram that finish to expose and giving gone in to the two first criteria mentioned, already said lines backwards the paradoxical that results the one who the T.S. It issue failures following the legal bases preconstitucionales<sup>451</sup> and, simultaneously, defend a criterion restrictivo when judging the scope of the statutory authority of the Ministers, as which, to tenor of the article 97 of the CE only the Government has attributed the competition to dictate regulations of execution, without that it fit delegation of said competition to other Ministerial organs (Sentences of the T.S. Of 25-1-1982, 15-10-1982 and 12-7-1985)<sup>452</sup>. In concrete, the two last quoted Sentences refer to the Minister gives Inland revenue, adducing that, in spite of that the article 6.1 of the LGT attribute generic statutory authority to the Ministers, after the CE that Law has to fold to the dictated of the Letter Magna that awards said authority to the Government. It cancels like this, the Or.M. Of 27 March 1981 when being dictated by the Minister, organ manifestly incompetent to dictate executive regulations of a Law:

“... Inside the norms that mentions the article 6.1 LGT, that is to say, inside the Regulations of execution of the Law, for which could have competition the Minister of Inland revenue in the moment in that the LGT dictated –and would be difficult given the terms of the article 10.6 LRJAE, that attributes the statutory authority of execution of the Laws to the Council of Ministers-, but of course lacked she in the year 1981, since, being in force the Constitution, this attributes the statutory authority to the Govern –article 97- collegiate body and supreme of the Administration, that can not be substituted by a Minister, member of the Government, yes, but distinct of him and extraneous to the competition of the collegiate body” (STS 12-7-1982).

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<sup>451</sup> Sentences of the TS of 20-10-1981, 4-2-1982, 10-12-1982 and 14-6-1983.

<sup>452</sup> “CDO.: That by application of the established in the article 97 of the Spanish Constitution, the statutory authority is attributed to the Government, the one who will have to exercise it ‘in accordance with the Constitution and the Laws’, what means that only by means of precepts that revistan the form of Decrees and that adopt by the Council of Ministers, will be able to exercise this statutory authority, when it treats of regulations of execution of a Law .... Not being possible a delegation in a Minister to exercise the statutory authority of execution of the Laws, .... “.(STS 25-1-1982).



“... To the statutory authority that the article 97 of the Constitution attributes to the Government, like supreme collegiate body of the Administration, by what the Ministerial order impugned incide in nullity of right plenary according to the article 47.1.To) LPA, when being dictated by organ manifestly incompetent, without that it can found the competition of the Minister in the article 14.3 LRJAE, then , from the valid Constitution, said Law has to apply with subordination to the constitutional norm by his upper hierarchy, *and the same occurs with the article 6.1 LGT from the promulgation of the Constitution*<sup>453</sup> (STS 15-10-1982).

c) In an important number of Sentences of the High court appreciates a criterion of interpretation matizado or less restrictivo regarding the interpretation of the article 97.1 of the C.And., consistent in establishing a no exclusive consideration of the statutory authority of the Government. Like this, with character reiterativo considers that, without prejudice to the authority of the Government in this subject, the Minister has statutory authority in own matters of his Department (SS.T.S. 15-6-1982; 9-3-1984; 30-3-1984; 16-12-1986; 19-12-1986; 30-12-1987; 15-5-1988; 27-12-1989; 24-1-1990; 23-12-1991, ... ).

Of the global analysis of the quoted Sentences is questionable the fault of determination with regard to what has to consider “own matters of a Ministerial Department” and, especially, which scope has, that is to say, inside such field of matters admits that his regulation carry out by means of independent regulation, understood like regulation of organisation; however, it does not remain clear if they also can dictate regulations of execution of laws dictated by the Minister of the bouquet, that obviously will adopt the form of Orders. Also it remains slope the subject of the legal habilitation in one and another supposition, without arriving to pose of general and uniform way. These questions, that as had occasion to analyse, are the main points of debate between the scientific doctrine, neither resolve by the Courts of Justice, then , during the ínterin temporary that visits from 1982 until 1995, the T.S. And some T.S.J. Of the Autonomous Communities do not make a theory of clear public right and applicable uniform in the generality of the cases, but, by the contrary, limit to examine case by case, being used to resolve with a very general criterion, as for example: “that the Ministers have statutory authority in own matters of his Department, being admissible the ministerial competition in so much no rebase the departamental matter that is him own”. The problem of the delegations does not pose unless

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<sup>453</sup> The underlined is ours

in the concrete supposition that judge question the existence of a Law or enabling Regulation or, by the contrary, do not exist such norm of reference.

Without prejudice to the previous, suits that we analyse with greater gender of detail the pointed Sentences. To know:

In failure dictated on 15 June 1982 the High court posits the statutory authority of the Minister whenever it act inside own matters of his Department with organisational character, since the article 97 of the CE does not prevent that other organs like the Ministers can have said attribution although subordinated to the constitutional norm and being admissible “in so much no rebase the departamental matter that is him own”<sup>454</sup>.

In Sentence dated on 9 March 1984 the T.S. Equally it conceives the competition of the Minister to dictate regulations in own matters of his Department. But, in this supposition, implicitly admits that the Minister dictate executive regulations of a law whenever it move inside his circle of competitions<sup>455</sup>.

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<sup>454</sup> The supposition in fact refers to one Or.M. On supplies of fuels by part of CAMPSA. These services regulate by Law of 17 July 1947 in which it authorises to the Government so that it approve the respective Regulation of development, fact that takes place by means of decree of 20-5-1949, whose article 58 orders that the Ministry of the Treasury modify the regulations of services entrusted to the Company dealer, in whose consequence approves the Or.M. Impugned. The T.S. It revalidates the validity of said Order because the Minister acted inside the organisational competition of matter that is him own, “as it only treats to require an already contained norm in the Regulation of 5-3-1979”. Fix, that in this case the Court understands that it is a norm dictated in virtue the exercise of the organisational authority, when really of what seems to treat is of a regulation of development (definitely inside the field competencial of the respective Ministry), that has habilitation expresses by part of a Royal decree (would treat of a regulation of second degree, as it designates it this same Court in other Sentences as for example the one of 25-10-1991). SANTAMARÍA PASTOR and PAREJO ALONSO, *Administrative Right. The Jurisprudence of the High court*, ob., cit., pág. 66 they coincide with us when affirming that the organisational character of the Order impugned constitutes “a qualification more than debatable”.

<sup>455</sup> The T.S. It understands that the General Director of Agricultural Production (inferior organ to the Minister) is not competent to dictate a general disposal, that in spite of designating it circulate or instruction of service, is innovando or complementing the Legislation with general character and without temporary limit, as for this is competent the Minister or the Council of Ministers, according to the cases.

By his part, the S.T.S. Of 30 March 1984 it considers that the statutory authority of general character roots in the Council of Ministers and not in the Minister of Public Works, for exceeding of the field of the internal questions of the Department<sup>456</sup>.

To the margin of these three Sentences, can generalise affirming that during the decade of the 80 and until mediated of the 95, the High court seats the following doctrine reiterated in the greater part of his failures: The ministers will be able to dictate regulations to regulate own or specific matters of his Departments, between which include :

- Organisational questions of the same
- Relations of special supremacy, that, in no case will be able to affect to the rights and obligations of the administered.

(Like this, the S.S.T.S. Of 19-12-1986<sup>457</sup>; 30-12-1987<sup>458</sup>; 12-5-1988; 27-12-1989; ... ).

This doctrine complete in other back sentences that amen to collect the theory that finish to transcribe with regard to the competition of the Minister in own matters of his Department and the scope of the same, refer to the possibility that have authority to dictate executive regulations or, by the contrary, was desprovisto of the same (S.S.T.S. 9-4-1982; 10-12-1982; 16-12-1986<sup>459</sup>; 12-5-1988; 24-1-1990).

NOTE: ascertain how the T.S. It has admitted reiteradamente the possibility that the Minister dictate regulations of development of Royal decrees whenever it treat of relative questions to

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<sup>456</sup> In this Sentence the High court considers invalid the Or. M. Of 3-5-1977 on ordination of discharges of the river Llobregat of Barcelona for understanding that said competition exceeds with a lot of the internal questions of the Ministerial Department of Public Works corresponding to the Council of Ministers his statutory development since it can affect the rights of the individuals and some City councils.

<sup>457</sup> The scope of the statutory authority of the Ministers is delimited by the own matters of the respective Ministry "... Matters referents in the first place to the ones of organisational character and in second term to the relative to the special relations of subjection, as they are the funcionariales and, in general, the one of all the personnel to the service of the Public Administration" (F.J. 4°).

<sup>458</sup> The T.S. It admits the validity of the Or.M. Of the Ministry of Health and Consumption by which dictated the norms for the jerarquización of open Sanitary Institutions of the Social Security. This Court understands that the Minister is competent to establish the jerarquización and organisation of his services in the form that the Administration understand more suitable, since the Or.M. It does not affect to the administered in general but to a group restricted of people, linked to this Ministry in a special relation of subjection.

<sup>459</sup> They impugn two Ministerial orders of Health and Consumption of dates 28 February and 1° March 1985, by which, respectively, establish the organs of direction of the hospitals managed or administered by the INS and approves the General Regulation of Structure, Organisation and Operation of the Hospitals of the Social Security, appearing like first problem to resolve the one of the competition of the title of said Ministry to dictate the two orders questioned, for understanding the Association demandante that when being they execution or development of a Law, the competition for such normación corresponds to the Council of Ministers (F.J.1°). The T.S. It resolves dictaminando that sure enough said Or.M. They are of execution of a Law and therefore, result invalid of right plenary when having dictated by organ manifestly incompetent.

his own Department; describing them like regulations of organisational type (SSTS 15-6-1982; 12-5-1988, ...). In spite of that this Court designates them regulations of organisational character, what have really such Ministerial orders is to develop and complement determinate Royal decrees. It treats, therefore, as it affirms later this same Organ in Sentence of date 25 October 1991 of Regulations of 2º degree (Or.M. That develops a regulation approved by R.D.), that, anyway, need previous habilitation by part of the Decree to the that complement, as the omission of such habilitation vulneraría the principle of normative hierarchy (art. 9.3 CE) that links the Or.M. To the R.D. Enabling.

It interests to underline that for this type of statutory disposals is not prescriptive the dictamen of the Council of the State, as only it results insoslayable when it pretend “develop in shape direct or immediate one or several legal precepts or with strength of law”. Not being, therefore, prescriptive such document when it treats of regulations that develop other statutory disposals (S.T.S. 25-10-1991).

d) *The thesis of the derivative statutory authority of the Ministers according to S.T.C. 185/1995 and acogimiento of the same by part of the Courts of Justice.*

The Sentence 185/1995 of 14 December 1995 of the T.C. It marks a turning point in the regulation of the statutory authority of executive character by part of the Ministers. In synthesis, and without prejudice to a more extensive comment that next carry out, this Organ bets by the attribution of statutory authority to the Ministers with *derivative character*, so that, the fact that the article 97 of the CE attribute the generic statutory authority to the Government “no prohibe that a law can award to the Ministers the exercise of this authority with derivative character or enable them to dictate concrete statutory disposals, limiting and ordering his exercise” (F.J. 6º). Therefore, the T.C. It admits that the Ministers can dictate regulations of development of a Law whenever it exist a previous habilitation by part of the same that limit and order the ministerial statutory performance<sup>460</sup>.

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<sup>460</sup> With this Sentence breaks the criterion of the T.S. That as we have seen it was the tonic general, consistent in denying tajantemente that a Minister could dictate an executive regulation of a law of a law.

In the reiterated Sentence, the problem of the statutory authority of the Ministers treats under the optics of the principle of reservation of law in matter tributaria, being object of debate not only the competition of these to said effects, but also the faculty of the Government to establish new categories of public prices, this is, income of public right. The recurrent impugn, among others, the articles 1.b), 3.4, 26.1 and D.To. 2ª of the Law of Taxes and Public Prices for understanding that vulneran the principle of reservation of law in matter tributaria<sup>461</sup>. Of them, the article 26 first section treats specifically of the subject of the statutory authority of the Minister and his scope. His diction establishes that by Or.M. It can regulate the establishment or modification of the public prices. It is then, here, where debate if the Minister has authority to dictate a regulatory statutory disposal of an essential element of all provision patrimonial or if, by the contrary, would have to fix by Law.

This Court pronounces in affirmative sense alleging that the Minister can develop directly a legal precept, whenever it exist specific previous habilitation by a norm with said rank to regulate a concrete and determinate matter<sup>462</sup>, whenever in the Law contain the criteria and limits of the exercise of the statutory authority by part of the Minister.

b.1) *Repercussions of the S.T.C. 185/1995 of 14 December, in other back failures.*

Known is that the STC 185/1995 has constituted a key normative milestone in matter of taxes and public prices. The doctrine that in her seats has carried to modify the regulatory law of the matter, as well as to that, by part of the Courts of Justice, reviewed considerations been supported by antelación to the quoted Sentence<sup>463</sup>. Like this for example, in Sentences of 24-1-1996, 2-2-1996, 5-2-1996, 9-2-1996 and 22-2-1999. In them the supposition in fact consists in

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<sup>461</sup> See asks it number 5, section 4 of this work.

<sup>462</sup> Conclusion that repeats in the supposed that they are the autonomous organisms those that previous permission of the Ministry of the that depend, fix or modify the quantity of the prices: "To the same conclusion fits to arrive with regard to the section b) of this article 26.1 that foresees the possibility that they are the autonomous Organisms of commercial character, industrial or financial those who, previous permission of the Ministerial of the that depend, directly fix or modify the quantity of the prices. At all it can object from the perspective of the article 97 CE to that a law enable on purpose to an autonomous Organism to fix the quantity of the public prices, previous permission of his respective Ministry" (F.J.6º). Like this also the STC 233/1999

<sup>463</sup> In this sense the T.S. In Sentences of 24-1-96, 2-2-96, 5-2-96, 9-2-96 and 22-2-99 modifies the criteria kept previously by the T.S.J. Of Galicia, no because this salt of the Supreme sponsor a change of criterion, but because, as they affirm such Sentences, in the moment to resolve has dictated and published the Sentence 185/1995, of 14 December of the Plenary of the Constitutional Court.

determining if the price G-3 (prices by port services) has nature of public price or of tax. The Court concludes that after the new concept of public price created by the TC (S. 185/1995), it has to consider that are in front of a tax because: 1º these services are not to charge of the private sector, but of dependent organisms of the Ministry of Public Works; and, 2º, they are of compulsory application by the administered imposed by statutory disposals. It treats, then, of a tax; provision patrimonial of public nature in the sense of the article 31.1 of the CE, that, in what such, remains subjected to the reservation of Law.

As it has reiterated the TC the reservation of law in matter tributaria demands that the *creation novo* of a tribute and the determination of the essential elements or configurators of the same has to carry out by means of law, but treats of a “relative reservation”, in which, although the criteria or principles that have to govern the matter have to contain in a law, results admissible the collaboration of the regulation, collaboration that can be especially intense in the fixation or modification of the quantities, whenever his fundamental parameters are contained in the law (STC 24-1-1996 (F.J. 6º)<sup>464</sup>.

“Of this luck results that the settlement practised to the protect of the quantification of the tax by price G-3 done in Or.M. It has to consider invalid, habida explains that this element of the juridical relation-tributaria would have to have been content, at least, in a disposal of rank of Royal decree, since here it does not exist neither a law that attribute the statutory authority to the Minister”<sup>465</sup>.

Of where colige that the T.C. It had been able to admit the regulation of the quantity of this tax well by means of Royal decree<sup>466</sup>, well by means of Ministerial order as long as it had existed an enabling law. Supposed that it does not give in any of these Sentences, since in them affirms that by means of Laws 1/1996 and 18/1995 regulates the fact imponible, subject passive, the base, the become and the exemptions, but the quantification has come doing by Ministerial orders.

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<sup>464</sup> SSTC 2-2-1996 (F. J. 6º); 5-2-1996 (F.J. 6º); 22-2-1999 (F.J. 5º).

<sup>465</sup> SSTC 24-1-1996 (F.J. 6º), 5-2-96 (F.J. 6º); 2-2-96 (F.J.6º), 9-2-96 (F.J. 6º); 22-2-1999 (F.J. 5º).

<sup>466</sup> Question that arouses us serious reservations, since treating of an essential element of the that does not state the minimum regulation in a law is very difficult that regulate only by means of Regulation.

In consequence and regarding the statutory authority of the Minister, these Sentences of the TC that are analysing revalidate the theory of the statutory authority derivative of the same, with scope to dictate statutory disposals of executive character, whenever it exist a legal minimum regulation, all time that specific habilitation to the Minister by norm of the same rank<sup>467</sup>.

Very significant in the matter that treat is the Sentence of the TSJ of Andalucia of date 2-6-1997 in which equally it takes like reference the so quoted STC 185/1995, although his extrapolation leaves a lot that wish. In that Sentence poses the problem of the nullity of the Or. 23-12-1986 dictated by the Minister of Public Works and Urbanismo, that collects the complementary norms of the permissions of poured of residual waters, by incompetence of the organ that pronounces it, as according to the art. 97 CE the statutory authority recaee in the Government. Amén of this, the D.F. 2ª of the Law of waters, authorises to the Government to dictate developing statutory disposals of the legal text.

The TSJ of Andalucia keeps to ultranza the competition of the quoted Minister to dictate said Or.M. Protecting in the following reasonings, to know:

- The Minister has exercised his domestic statutory authority, as it treats of a norm of organisation, and therefore, is perfectly lawful as it aims the TS in sentence of 25-1-1992.

- By the reasoning kept in the STC of 14 December 1995 that attributes the legislative authority of character derived to the Ministers<sup>468</sup>.

In our opinion, however, this failure could be questioned by the following reasons: in the first place, it is hardly credible that treat of a norm of internal organisation since his tackled is to develop the Law of waters and his content is the regulation of the granting of relative

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<sup>467</sup> Doing, therefore, gather of the thesis kept by the TC in Sentence 185/1995, of 14 of dec.

<sup>468</sup> In the F.J. 2º the T.S.J. Of Andalucia brings in support of his reasoning the more recent doctrine of the TC extracted of his Sentence 185/1995, in virtue of which “the generic attribution of the statutory authority converts to the Government in titling originario of the same, but no prohibe the one who a Law can award to the Ministers the exercise of this authority with derivative character or enable them to dictate concrete disposals...”; “And something like this -says this S. Of the quoted T.S.J.- It is what sucede in the case of cars in which, without clear damage is, that the development of the Law of Waters have carried out by the Government in what headline of the statutory authority (and like this dictated the R.D. 849/1986, of 11 April, at all empece to that it was a Ministerial order the one who determine the criteria that have to follow the organisms of basin to proceed to concede the permissions by poured of residual waters”.

permissions to the poured of residual waters<sup>469</sup>, what in our opinion exceeds of the field “ad intra” of the own Administration, being able to generate effects to third; and, second, the Law of waters empowers on purpose to the Government and no to the Minister, mention that the STC 185/1995, although it recognises statutory authority derivative to the same, said authority is supeditada to the existence of an enabling law, law that, in the case of cars, shines by his absence since to the one who enables is to the Government, when, besides, neither exists statutory reference of the R.D. That develops the Law of waters to the Minister.

By his part, in Sentence of 27-5-1998, the TS treats equally on the statutory authority of the Ministers, but, here is less debatable then , referred to matter of practical and ports of services of practicaje, exists sufficient legal coverage (D.F. 3ª of the Law of Ports) to effects to empower to the “Ministry of Public Works so that in the field of his competitions dictate statutory norms and administrative disposals of general character that require the development of the law” (F.J. 3º).

Thesis that shares also the Resolution of 30-1-1998 dictated by the Court of defence of the Competition, the one who with meridian clarity aims: “so that distinct organs of the Government can dictate válidamente statutory norms demands –to the not being headlines of the statutory authority ‘originaria’ a previous legal habilitation or statutory. Said habilitation will be able to be more or less generic, but his existence will be indispensable so that the distinct organ of the Government can válidamente dictate regulations, especially when they go further of what splits of the German doctrine designated “administrative regulations” –in front of the “juridical regulations”-, this is, the designated internal regulations regulators of the organisation of the own Administration and, in general, of his operation (Council of State. Compilation of legal doctrine, 1992, pgs. 55 and 56)”.

Repair in an important data, and is that this Civil Court, unlike many others and on line with the questions aroused in the previous epigraph, yes distinguishes between internal regulations and of development, understanding that, anyway, does lacking legal habilitation whenever they

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<sup>469</sup> Fix that this Ministerial order details: 1.- The data to consign in the writing by which request the permission for the poured; in the art. 3 it empowers to the organisms of basin to extend provisional permissions of poured of waters; the article 5 signals that these organs of the Administration will evaluate with provisional character the canon of poured of waters; ...



dictate them distinct organs of the Government, but logically much more when it treat of juridical regulations<sup>470</sup>.

We will quote, likewise, the S.T.S. Of 10-10-1998 where poses the problem of the reorganisation and modernisation of the management recaudatoria. The T.S. It confirms the validity of the Order of the Ministry of Economy and Inland revenue of 23 November 1987 by the two following reasons: because the Minister has enjoyed of the permission in accordance with all a normative frame chaired by legal criteria (art. 138 LGT, 9 LGP, RD 1327/1986, 1451/1987, etc.) and, also, by “the principle of the authority autoorganizatoria of the Administration, that empowers him to modify, suppress and create administrative organs (whenever there is legal habilitation to the effect, as in the supposed present)”.

Finally, they are to take into account two recent Sentences, to know<sup>471</sup>: the S. TSJ Of Canaries of 24 July 2000 in which it alludes to the doctrine established in S. T.C. 42/1987, of 7 April (“that the reservation of law does not exclude the possibility that the laws contain references to statutory norms, but yes that such references make possible an independent regulation and no clearly subordinated to Law”) and in S.T.C. 83/1984, of 24 July, concluding that declares the inconstitucionalidad requested in so much leaves to the statutory power entirely ex " novo" the definition of the susceptible behaviours of sanction, what results frontalmente contrary to the reservation of law of the article 25.1 CE, as well as the S. TSJ Madrid, 8-3-2000, in which it argues if in order of the adviser of Inland revenue of the Community of Madrid can modify a term of entry of a quota impositiva fixed by law. This Court understands that this is not possible by vulnerar the principles of legality and normative hierarchy.

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<sup>470</sup> What, however, is not so clear is that said habilitation can be more or less generic, since the own TC in the reiterated Sentence 185/1995 affirms that it will have to be concrete and specific, limiting and ordering his exercise.

<sup>471</sup> "The principle of reservation of law in relation with the exercise of the statutory authority, the establishment of infringements, the normative hierarchy and the public prices", *Jurisprudencia Tributaria*, number 20, February, 2001.

To) Scope of the Royal decree in matter tributaria: The reservation of Law in matter tributaria demands that the *ex creation novo* of a tribute and the determination of the essential elements or configurators of the same have to carry out by means of Law (SSTC 37/1981, 6/1983, 79/1985, 19/1987). Nonetheless, since “it treats of a relative reservation in which although the principles that have to govern the matter have to contain in a law, results admissible the collaboration of the regulation, whenever *it was indispensable by technical reasons or to optimise the fulfillment of the purposes proposed by the Constitution or by the own Law* and whenever the collaboration produce *in terms of subordination develop and complementarity*” (SSTC 37/1981, 6/1983, 79/1985, 60/1986, 19/1987, 99/1987). The scope of the collaboration will be in function of the diverse nature of the juridical figures-tributarias and of the distinct elements of the same (SSTC 37/1981, 19/1987).

Of where is inferible that by means of Royal decree can regulate determinate essential elements of some categories tributarias, but always in terms of development and collaboration of the Law, that will have to contain, likewise, the criteria, principles and limits that have to govern the matter<sup>472</sup>.

b) Scope of the Or.M. In matter tributaria: statutory authority of the Minister of the bouquet in this field. From the Sentence 185/1995, the TC seats the doctrine that the Minister can dictate Orders of direct development of a Law because it is to title of a derivative statutory authority. It can dictate, therefore, executive regulations of a Law, whenever they fulfil the following extremes<sup>473</sup>:

- That by Law regulate the essential appearances of the matter (elements configurators of the tribute).
- That by means of norm of legal rank enable to the Minister to dictate such statutory disposals.

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<sup>472</sup> With regard to the legislative habilitation by part of the Law to the Regulation, the TC does not pronounce, although it is the true that practically all the financial laws that require said statutory development contain a reference so that the Government make such tackled.

<sup>473</sup> “The generic attribution of the statutory authority converts to the Government in titling originario of the same, but no prohibe that a law can award to the Ministers the exercise of this authority with derivative character or enable them to dictate concrete statutory disposals, limiting and ordering his exercise. And this is totally what does the article 26.1 to) LTPP that limits to attribute to the Ministers that can result affected, in what you titled of the respective ministerial Departments, a derivative statutory power, resulted of a specific legal habilitation, to regulate a concrete and determinate matter, cual is in this case the fixation and modification of the quantity of the public prices”.(F.J.6° STC 185/1995, of 14 December).

- That said habilitation was concrete and specific, limiting and ordering the exercise of the statutory authority of the Minister. What excludes habilitations of general type for the whole development of a determinate Law.
- The own TC recognises that the collaboration will be more or less intense depending on the nature of the provision patrimonial and of the matter that require development. Like this, for example, in the subject of the regulation of the “quantity” already treat of a public price (STC 185/1995), already treat of a tax (SSTC 24-1-1996, 2-2-1996, 5-2-1996, 9-2-1996), is an essential element of the provision patrimonial that admits a special collaboration by part of the Regulation.

### **III.3.- *The interpretative faculty of the Minister of planned Inland revenue in the article 18 of the LGT***

The problem to delimit the profile of the "interpretative authority" of the Minister *versus* the "statutory authority" of the same traces back to the primes of the decade of the sixty like consequence that the editorial originaria of the LGT received in his precept eighteenth the interpretative faculty of the Minister of Inland revenue, valid in the actuality. The considerations and doubts that his approval generated -so much with a view to the juridical nature of the interpretative disposals, what to the consequences and effects of his publication-, already were put of self-evident by the authors of then<sup>474</sup>, by what his considerations commented and in some extreme expanded by the back doctrine have full force in our days<sup>475</sup>.

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<sup>474</sup> MARTÍN-RETORTILLO BAQUER, ., "The interpretation of the norms according to the LGT", R. DFHP, number 54, 1964, I; -PASTOR RIDRUEJO, "The faculty of interpretation of the disposals tributarias in front of the Constitution: comments to a resolution of the T.And.To.C., C.T., number 35, 1972; -RAMALLO MASSANET, J., "The exemption of the tax of successions by the familiar heritage furniture and agricultural", CT, number 8, 1972; another classical in the matter is MARTÍNEZ LAFUENTE, "The statutory authority of the Ministers. Special reference to the field tributario", REDF, number 22, April/June, 1979, still when some of his conclusions have been questioned later.

<sup>475</sup> GIMÉNEZ-REYNA RODRÍGUEZ, And., "The statutory and interpretative authorities in the LGT", CT, number 50, 1984; -PALAO TABOADA, C., "Reservation of Law and regulations in matter tributaria", quoted; FALCÓN And TELLA, "The ministerial statutory authority in matter tributaria, REDF, number 37, 1983; -ANTÓN PÉREZ, "Comments to the article 18 LGT", in *Comments to the Financial Laws and Tributarias*, Edersa, 1982; -HERNÁNDEZ WASHED, To., "The faculty conceded to the Minister of Inland revenue by the article 18

As we have had occasion to analyse in the present work, the Minister of inland revenue has attributed competitions of normative order. Competitions that does not fit to confuse with the faculty to dictate interpretative disposals or aclaratorias of laws and other disposals in matter tributaria that on purpose attributes him the article 18 LGT<sup>476</sup>. In this sense, with regard to the authorities attributed to the Minister of Inland revenue, is to differentiate:

- *Statutory authority* in whose virtue this will be able to dictate regulations of organisational type, consequence of his statutory authority in the domestic field, that affect to own matters of his Department. On the other hand, and after a consolidated jurisprudential doctrine, in the present admits the possibility that they approve Ministerial orders of partial development of laws whenever it exist previous legal permission of character express.
- *Interpretative faculty*, consistent in establishing, clear or require the meaning of laws or other disposals in matter tributaria<sup>477</sup>. This task of explanation of norms in no case can identify with the creation or innovation of the same, not even, as it affirms Martín-Retortillo<sup>478</sup>, with the development of other norms. As we said lines backwards, recognises legally in the article 18 LGT, that prays like this:

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of the LGT, R.DFHP, number 38, 1988; CAZORLA, L.M., "The interpretative disposals", in *Comments to the LGT and lines for his reform*, Vol. I, IEF, Madrid, 1991; -ESEVERRI MARTÍNEZ, And., "The normative creation to the protect of the article 19 of the LGT", CT, number 48, 1984; -MANTERO SÁENZ, To., "General Law Tributaria", CT, number 48, 1984; -ALBIÑANA GARCÍA-QUINTANA, "On the interpretative ministerial orders in matter tributaria", Spanish juridical Magazine, The Law, 1984, 1; -DURÁN-SINDREU BUXADÉ, Comments to the Sentence of the High court of 24-4-1984, in regard to the R.D. 412/1982", R.DFHP, Vol. II, 1984, number 172; -PÉREZ OF AYALA and And. GONZÁLEZ, *Right Tributario* I, ob., cit., 1994, págs. 65 et seq.

<sup>476</sup> By all, MARTÍN-RETORTILLO, L, alluding to the article 18 LGT affirms: "... Explanation, say, and no creation, not even development of other norms. In front of the demonstration of a statement of will of the Administration that characterises, in definite to the statutory, the interpretative disposals situate us, by the contrary, in front of the demonstration of an act by which the Administration, in place to treat to impose his will, declares simply cual is, in his opinion, the scope and sense of the norm dictated by the Legislator. *There is not statement of will, but only of trial or of knowledge.*" The interpretation of the norms ...", ob., cit., pág. 367.

<sup>477</sup> For CALVO ORTEGA, R., the interpretation is "the activity that treats to know the true sense, scope or content of the norm". "The interpretation of the exemptions tributarias", HPE, number 13, 1971, p. 117. Regarding this matter vineyard. Among others, PÉREZ ROYO, F., *financial Right and tributario*, ob., cit., pág. 67; HERNÁNDEZ WASHED, To., "The faculty conceded to the Minister of Inland revenue by the article 18 of the LGT", ob., cit., pág. 107.

<sup>478</sup> "The interpretation of the norms on the LGT", ob., cit., pág. 367.

*The faculty to dictate interpretative disposals or aclaratorias of the Laws and Other disposals in matter tributaria corresponds privativamente to the Minister of Inland revenue, the one who will exert it by means of the Order published in the "Official Bulletin of the State".*

With everything, and still although the distinction between the interpretative and statutory faculty could be clear in the conceptual plane, his practical application has observed multiple vicisitudes, habida explains no always is easy to trace the watershed between both, all time that under the mantle of the interpretation have hid authentic regulations<sup>479</sup>, fact that reports the doctrine<sup>480</sup> and that, likewise, puts of self-evident the Jurisprudence<sup>481</sup>.

From here that it seem us of big utility the doctrine seated by the High court in Sentence of 12-7-1982 in which precisely when it puts of self-evident the possibility that it can "attend to the subterfuge to mask by means of a pretended disposal aclaratoria or interpretative a regulation that executes the precepts of a Law"; to distinguish both suppositions declares that if it treats of an interpretative norm or aclaratoria, would have to concretise:

- Which is the precept that interprets or clears;
- Which are the terms of the norm cleared needed of explanation or interpretation;

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<sup>479</sup> Other times uses the Ministerial order of interpretative character to elevate to this category the replies vinculantes to queries formulated by the taxpayers (Or.M. 17-4-1980) in matter of income tax and Or.M. 17-6-1981 in Tax on Societies. See GIMÉNEZ-REYNA, And., "The statutory and interpretative authorities in the LGT", ob., cit., pág. 85. Like this also, PALAO TABOADA, "Reservation of law ...", ob., cit., pág. 543.

<sup>480</sup> Regarding this matter it can see an extensive explanation in MARTÍN-RETORTILLO, L, "The interpretation of the norms according to the LGT", ob., cit., págs. 364 et seq.; -RAMALLO MASSANET, J., "The exemption of the tax of successions by the familiar heritage ...", ob., cit., pág. 271 et seq.; HERNÁNDEZ WASHED, To., "The faculty conceded to the Minister of Inland revenue...", ob., cit., pág. 109, FALCÓN And TELLA, R., "The ministerial statutory authority ...", ob., cit., pág. 70 and ss; ESEVERRI MARTÍNEZ, "The normative creation to the protect of the article 18 of the LGT", already quoted.

<sup>481</sup> -S.T.S. 1-3-1974 (commented by MARTÍNEZ LAFUENTE); S.T.S. 12-7-1982

-S.T.S. 15-11- 1983 commented by: ESEVERRI MARTÍNEZ, "The normative creation to the protect of the article 18 of the LGT, ob., cit., -MANTERO SÁENZ, To., "General Law Tributaria", ob., cit., -ALBIÑANA GARCÍA-QUINTANA, "On the interpretative ministerial orders ...", ob., cit.

-S.T.S. 24-2-1984, commented by DURÁN-SINDREU BUXADE, in "Comments to the Sentence of the T.S. Of 24-4-1984, in relation to the R.D. 412/1982", R.DFHP, number 172, 1984.

- In matter of circular in general and putting of self-evident his differentiation with regard to the regulations, vineyard. STSJ Of Galicia 28-10-1994 and 23-2-1996. SS TSJ Of Castilla the Stain of 27-3-1999 and 8-4-1999. In all they puts of self-evident the internal character of the circular that force exclusively to the subordinated deriving his strength to force of the hierarchical principle and no of the statutory authority. By what carecen absolutely of normative value.

- In which sense clears the doubt, but keeping in his integrity the terms of the precept cleared.

Like this then, and in consequence with all the previous, remains patent between the greater part of the doctrine<sup>482</sup> (to which add us) that the authority attributed to the Minister of Inland revenue to dictate interpretative disposals does not circumscribe to the circle of his statutory competitions, this is, does not derive of his statutory authority, but, by the contrary, when it treats the question of the juridical nature of the faculty hermenéutica of the same, prevails the thesis that the same "inserts in this same power of direction according to which the headline of the Department instructs on the form to make the administrative performances"<sup>483</sup>; "it is not but a reflection of the authority that has all upper hierarchical of cursar managerial to his inferior"<sup>484</sup>. Aserto That sustains with base in the had in the section second of the article 18 of the LGT as which the organs of management are forced to limit such interpretative disposals<sup>485</sup>.

The qualification that award him to a Ministerial order well like interpretative disposal, well like normative disposal, has connotations very important that, in way any can obviate. Like this, as it has left proof in the Courts<sup>486</sup> and as it has ascertained the doctrine<sup>487</sup>, is to repair in the following **appearances diferenciadores**. To know:

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<sup>482</sup> Against CAYÓN GALIARDO, To., "The interdiction of the discrecionalidad in the management tributaria", REDF, number 36, 1983, pág. 572 and ALBIÑANA GARCÍA-QUINTANA, "On the interpretative ministerial orders in matter tributaria", quoted. Other authors defend a hybrid thesis on the nature of these orders. Like this, MARTÍNEZ LAFUENTE considers that the same "sound on the one hand normative disposals and by another, mandate headed to the inferior organs to the Minister that will have to limit his instructions in accordance with the principle of hierarchy that inspires our public Administration". "The statutory authority of the Ministers. Special reference to the field tributario", ob., cit., p. 237.

<sup>483</sup> PASTOR RIDRUEJO, L., "The faculty of interpretation of the disposals tributarias in front of the Constitution: comments to a resolution of the TEAC, CT number 35, 1972, pág. 312.

<sup>484</sup> MARTÍN-RETORTILLO, "The interpretation of the norms ...", ob., cit., pág. 363. In the same sense pronounce also: - FERREIRO LAPATZA, , *Course of Right ...*, ob., cit., 1999, pág. 88, the one who affirms: "Inside the authority that has all upper hierarchical of cursar managerial to his subordinated have to include the possibility to clear them to these subordinated doubtful precepts"; FALCÓN And TELLA, R., it affirms: "it does not treat, therefore, of norms, but of mere circular and instructions that the upper authorities impose to his subordinated in virtue of the own attributions of his hierarchy". "The ministerial statutory authority ...", ob., cit., pág. 70.

<sup>485</sup> PALAO TABOADA, C., "Reservation of law and regulations in matter tributaria", ob., cit., pág. 541.

<sup>486</sup> STS 15-11-1983 and comments on the same quoted *supra*.

<sup>487</sup> PASTOR RIDRUEJO, "The faculty of interpretation of the disposals...", ob., cit., pág. 311

- In the first place, the formal procedure to dictate a normative disposal observes a greater complexity<sup>488</sup> than the mere fact to emanate interpretative orders.

- With regard to the effects derived of the entrance in force of the ministerial orders, treating of a disposal interpretadora, his entrance in force produces in the same moment that goes in force the norm interpreted (retroactive or *ex effects tunc*)<sup>489</sup>, whereas in the case of the statutory norms the effects are *ex nunc*.

- In regard to the fundamental issues, has ascertained how by means of the interpretative disposal could affect questions atinentes to reservation of law in matter tributaria<sup>490</sup>.

- Finally, like consequence of the principle of normative hierarchy the interpretative disposals have effects *ad intra*; they force to the subordinated hierarchical<sup>491</sup>. No like this the normative disposals that, by the contrary, possess effects *ad extra* with direct normative character for the administered, that will have to be observed so much by the Administration as by the Courts (economic and of Justice).

Contrariamente, the interpretative disposals and the normative disposals dictated by the Minister do not present differences, but **identity of deal** with regard to the formalities that have to revestir to effects of his advertising. Like this, of a side will have to document in shape of Ministerial order and, of another, equally in both cases will have to publish in the BOE. The fact that also the interpretative orders have to publish self-evident a "potenciamiento of the public Administration" and constitutes a "purpose of defence of the taxpayer", a guarantee of certainty when allowing him know the criterion of the Administration. However, as it warns

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<sup>488</sup> Formal procedure to dictate Decrees.

<sup>489</sup> As it has certified, this retroactividad, especially when it is hurtful for the taxpayer, can pose problems. PASTOR RIDRUEJO, "The interpretative faculty ...", ob., cit., pág. 311.

<sup>490</sup> "The grave, from the point of view that now interests us -says PALAO TABOADA- is that the interpretative Orders based in the article 18 open an enormous brecha in the reservation of law tributaria, allowing to the Administration penetrate freely in the bounded field by this "Reserves of law and regulations in matter tributaria", ob., cit., pág. 342.

<sup>491</sup> The article 18.2 LGT establishes that "the previous disposals will be of forced acatamiento for the organs of management of the Public Administration". Well known that the article 90 LGT distinguishes between the orders of management and of resolution of conflicts

also MARTÍN RETORTILLO, can turn into a "weapon of double edge" and serve "to facilitate some totally distinct ends of the distinguished"<sup>492</sup>.

Thus, the fact that such Ministerial orders are published in the BOE does not have to confuse neither allow that they turn into mere normative disposals norms aclaratorias of laws or other disposals in matter tributaria. The jurisprudence<sup>493</sup> and the doctrine<sup>494</sup> have reacted in front of this situation considering that the consequence of said extralimitación will be the nullity of those interpretative orders that cover some normative lagoon warned, or modify the content of other norms already promulgadas, by incomplete or unsuitable (STS 13-7-1985).

### **Principio Of normative hierarchy**

*"All the 'general disposals' then , in the sense of normae agendi or norms of behaviour for the citizens, distinct of the established by the Law, correspond like this to the Decree, inside his own limits, no to the individual Ministers, by means of Orders of his respective Departments"* (GARCÍA OF ENTERRÍA and T.R. FERNÁNDEZ), neither much less to organs infraordenados.

Originariamente The one who has attributed the statutory authority to dictate general disposals with normative efficiency is the Government and, besides, these disposals will have to be approved by means of R.D. Adopted by the Council of Ministers and signed by the King<sup>495</sup>. It suffice as remember here that "the statutory normative disposals, that is to say, the disposals with juridical effects "ad extra", dictates them the Government and approve by Royal decree.

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<sup>492</sup> Vineyard. An extensive comment in MARTÍN-RETORTILLO, "The interpretation ...", ob., cit., pág. 368 and ss and RAMALLO MASSANET, "The exemption of the tax of successions ...", quoted.

<sup>493</sup> SSTs 1-3-1974; 12-7-1982; 15-11-1983; 13-7-1985; 30-5 and 13-7-1985.

<sup>494</sup> They conclude PÉREZ OF AYALA and GONZÁLEZ, And., "it seems arrived the moment to tackle the problem of a way resolved, proclaiming without more the susceptibility of impugnation and ulterior statement of nullity of all administrative disposal, with independence of the title under which the same appear, that of some way exceed the strict limits aclaratorios and interpretative that the article 18 LGT attribute to the Minister of Inland revenue", *Course of Right Tributario*, ob., cit., pág. 1989, pág. 58.

<sup>495</sup> "The signature of the King in the Decrees -affirm GARCÍA OF ENTERRÍA and T.R. FERNÁNDEZ- that is missing in the Or.M. And inferior disposals, constitutes the mark of the general supremacy expressed in the objective Right and the one of his extension and general scope, including the mandate of fulfillment to the judges, that administer justice, precisely, for Rey, according to the article 117.1 of the CE". *Course of Administrative Right*, ed., Civitas, Madrid, 1997, pág. 178.



**The disposals dictated by inferior authorities to the same (under the name of resolutions, circular ...) "They are not normative acts"<sup>496</sup>.**

The normative authority that has the Government is an *authority subordinated* to the constitutional prescriptions and to the empire of the Law<sup>497</sup>, materialised –to our effects- in the principles of reservation of law and primacy of the Law. Nonetheless, said subordination reaches a radius of greater performance, as the same observes not only with regard to the CE and to the Law, but also with regard to the rest of the juridical legislation by virtue of the art. 9.1 CE that subject generically the performance of the citizens and public powers to the CE and to the rest of the juridical legislation; very known that, this power limited of the public powers to the that alludes of general form in the article 9 of the CE, sections 1 and 3, reiterates and concrete specifically for the performance of the Public Administration in the article 103.1 of the same constitutional text that orders full submission of the administrative performance to the law and to the Right<sup>498</sup>.

Like this then, in this global frame of constitutional principles in that they deploy the limits of the exercise of the statutory authority, is to have very in consideration the principle of normative hierarchy guaranteed constitutionally in the article 9.3, as well as the retroactivity of the penalizing disposals, the juridical security, the responsibility and interdiction of the arbitrariness of the public powers, foreseen –also- in the last constitutional precept mentioned<sup>499</sup>.

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<sup>496</sup> SANTAMARÍA PASTOR, *Foundations of Administrative Right*, Ed. Centre of studies Ramón Areces, Madrid, 1988, págs. 764 et seq.

<sup>497</sup> Like this It Sentences of the TS of 19-7-91, and SSTs of 16-4; 7-4; 12-6 all they of 1997.

<sup>498</sup> On the meaning of the meanings “submission to Law”, to the juridical legislation and to the Right can see PABLO L. MURILLO OF THE CAVE, “Observations around the statutory authority of the Government”, fascicles of the Faculty of Right. University *Illes Balears*, number 10, 1985, págs. 113 to 115. On the delimitation of the principles of juridicidad and legality, vineyard., REBOLLO PUIG, M., “Juridicidad, legality and reservation of law law like limits to the statutory authority, RAP, number 125, 1991, págs. 112 et seq.. In this regard GUTIERREZ GUTIERREZ, I., *The controls of the legislation delegated*, ed. Centre of Constitutional Studies, Madrid, 1995.

<sup>499</sup> Among others, PABLO L. MURILLO OF THE CAVE, “Observations around the statutory authority of the Government”, ob., cit., pág. 113; DÍEZ PICAZO, “Constitution and sources of the Right”, in *The Constitution and the Sources of the Right*, Vol. I, I.And.F., Madrid, 1979, págs. 653 et seq. GARCIA AÑOVEROS, J.: “The sources of the Right in the General Law Tributaria”, RDFHP, 54, 1964, and his speech of closure “On the Constitution and the sources of the Right”, in *The Spanish Constitution and the Sources of the Right*, Vol. III, IEF, Madrid, 1979; CAYÓN GALIARDO, “The interdiction of the discrecionalidad in the management tributaria”, REDF, number 36, 1982.

### **III. 3. 4.- The absence of “normative character” of the disposals and Administrative interpretations**

The disposals emanated of authorities and inferior organs jerárquicamente to the Minister are properly administrative disposals no statutory with internal efficiency exclusively. It treats , as it already put of self-evident GIANNINI, To., of "administrative acts, so much in formal sense like substantial"<sup>500</sup>, that do not contain juridical norms unlike the regulations and therefore, "do not constitute never a source of objective right"<sup>501</sup>.

The *titularity* of said attribution have it generally the bosses of the administrative Departments, with the end to order, direct and coordinate the activity of the Administration between upper and inferior organs and that they can adopt the denomination of instructions, orders, circular and even of resolutions. In this sense the art. 21 of the Law 30/1992 establishes that “the administrative organs will be able to direct the activities of his organs jerárquicamente dependent by means of instructions and orders of service”.

By his part, the LOFAGE also allows this competition attributing it to distinct headlines:

- General administration of the State (art. 2.1)
- Instructions of the Ministers to the upper organs and directors of the Ministry (art. 12.h)
- Instructions of the Secretaries of State to the corresponding managerial organs (art. 14.2)
- Instructions or orders of service of the subsecretarios to the common services of the Ministry (art. 15.1.d)
- Instructions of the upper organs of the Ministries to the Delegates of the Government in the Autonomous Communities (art. 26.1)

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<sup>500</sup> GIANNINI, To., D., *Institutions of Right Tributario*, translation by Sainz of Bujanda, ed. Of Financial Right, Madrid, 1957, pág. 22.

<sup>501</sup> BERLIRI, To., *Principles of Right tributario*, translation by Vicente-Arche Sunday, Madrid, 1964, pág. 65 establish in this regard: " .... They do not constitute never source of objective right, since they do not contain compulsory juridical norms for the Administration neither for third, but only norms with efficiency vinculante for the Administration, ...". See also regarding this matter LICCARDO: "Nature giuridica delle circolari ministeriali", in Riv. Dir. Finan., 1952, or also COCIVIERA, quoted by PÉREZ OF AYALA and GONZÁLEZ, And., *Course of Right Tributario*, 1989, pág. 57.

With regard to the *juridical effects* derived of the called instructions of service and circular connects as we said with the "duty of obedience of the inferior hierarchical concerning his upper"<sup>502</sup>, without that, in no case, have direct normative character for the Administration, the administered, neither neither for the Courts of Justice and officials.

The content of these administrative disposals no statutory is used to consist in guidelines or orders given to organs jerárquicamente inferior, without prejudice to that also dictate instructions and circular with the end to interpret and analyse legal or statutory norms. It is precisely in these suppositions where, often, produce difficulties to distinguish between the exercise of the merely interpretative activity *versus* the exercise of the normative faculty that would go further of the material scope of this type of administrative disposals. In fact, *the problems pose because many times under the "mantle of the interpretation" hide activities of normative character with repercussion in the sphere of the rights and duties of the administered, this is, hide true statutory norms.*

The consequence of this fact, peacefully admitted by the doctrine is the illegality of the circular that contain normative or statutory disposals<sup>503</sup> (in Sentence of the T.S.J Of Madrid, of 16-6-1994 declares the nullity of a circulate of the General Direction of Tributes because no fixed criteria of performance for the civil servants to those who directed , but it imposed a behaviour of acatamiento by part of the administered).

Sabida The complexity of the appearances that stir in the Financial Right and tributario, is not of extrañar the important profusion that have had circular, instructions, resolutions, interpretations, ... Dictated by upper organs of the Public Administration tributaria<sup>504</sup>. But yes of recelar and demand against the extralimitación of his juridical effects never opposable in front of third. Generating the contrary very grave juridical consequences as we adduced to the start of this Chapter.

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<sup>502</sup> GARRIDO FAILS, *Treated of administrative Right*, ob., cit., pág. 243.

<sup>503</sup> By all PÉREZ OF AYALA and GONZÁLEZ, And., *Course of Right* ..., ob., cit., pág. 58.

<sup>504</sup> GIANNINI, "Given the complexity of the financial Administration, debito, especially to the cumulus of the norms tributarias and to the difficulties of his application to the innumerable cases of the economic life-social, exercises widely the faculty of the executive power, particularly of the Ministry of the Treasury, to give to the offices that of him depend managerial criteria and rules of behaviour and to suggest concrete resolutions of controversial cases, so that the own administration manage with prontitud and uniformity". *Institutions of Right* ..., already quoted.