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CIVIL LAW LEXICON: LA LEY

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In the civil law jurisdictions, the written law (*la ley*) has primacy among the sources of the legal order. And so much so, that the expression *la ley* has attained such a degree of generality that the term has become amphibolic. *La ley* may mean, in general, the legal discipline of any relation. For example, a contract is *la ley* as between the parties and contracts, of course, may be verbal, not written. Sometimes it is said that custom, (*la costumbre*), is the law. But *la ley*, para-digmatically, means statutory law.

La ley is, normally, the product of the legislative process according to constitutional norms. In this respect, *la ley* would be the equivalent of an Act of Congress not vetoed by the President; it is *prima facie* obligatory. *La ley* can be general or public i.e., it may refer with generality to specified human conduct, or it may have a private, individualized character. In the civil law the former are known as *leyes sustantivas or materiales*; the latter as *leyes formales*. The difference in this regard, between the civil law and the common law is merely terminological.

Another common classification is that of *leyes ordinarias y leyes extraordinarias*. The *leyes extraordinarias* are those which, because of the importance of the subject, are submitted to more stringent requirements for approval by the Legislative, typically, a two-thirds vote being needed. Nevertheless, there is no hierarchical difference between them. Of course, the distinction may give raise to important theoretical and practical problems e.g., the requisites for the repeal, express or implied, of a *ley extraordinaria*.

Leyes complementarias are those which are regarded as necessary to give full effect to a constitutional precept, either because the Constitution in question says so, or because the very constitutional precept

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is not self-executing and further action by the legislative power is needed to implement the constitutional provisions. In these cases, as long as the *ley complementaria* is not enacted a former apparently clearly unconstitutional *ley* (statute) may continue in force on the premise that the Constitution itself *wills* the provisional validity of such statute. The fact that this provisionality may last a long time, or forever, is but one of the expected consequences of the trend towards long and detailed constitutional provisions in many of the civil law countries. (France is clearly an exception, but France has no judicial review of the constitutionality of its *lois*.)

Las leyes, before becoming such are *proyectos de ley* (bills); once approved by the Legislature *la ley* must be *sancionada* and *promulgada* by the chief of the executive branch. *La sanción* is the acquiescence of the executive — its opposite would be *el veto* — to the enactment of the Legislative; *la promulgación* is the attesting by the chief of the Executive of the existence of *la ley* and the ordering of its *ejecución* (execution, implementation.)

A caveat is in order. Oftentimes legal writers, and even legal provisions, confuse *promulgación* with *publicación* (See, for example, Art. 6 of the Spanish Civil Code as it read before its recent modification). *Publicación* is the official publication of the text of *la ley*, without which *la ley* would be perfected and executory but it won't be binding for the citizens, not even for those who have actual knowledge of the contents of *la ley*. *La ley* itself may expressly set a particular time for *entrar en vigor* (to come into force,) otherwise, a term generally set, will apply. Thus in civil law jurisdictions, a statute does not come into force upon executive assent, nor have the courts to take judicial notice of its existence until publication. The period elapsing between *publicación* and *entrada en vigor* is usually labelled with the Latin expression *vacatio legis*. If *la ley* becomes obligatory at the same time in all the national territory, civil law lawyers speak of the *sistema sincronístico instantáneo* (the most common one); if *la ley*, on the contrary, comes into force in a staggered fashion according to the distances from the capital, the system is the *sistema sucesivo*. (Countries with large territories, like Brazil, employ this system.)

Sometimes the Executive branch also has legislative powers, either delegated or ordinary. In such cases, *la ley* will be called *decreto-ley*, *decreto con fuerza de ley*, *acuerdo-ley* or other similar denomination. The common law lawyer should realize that these enactments have generally the

same hierarchy of a *ley* emanating from the Legislature, and, due to that fact, cannot be *abrogados* (fully repealed) or *derogadas* (partially repealed) by a mere *decreto* of the Executive. A full legislative act (from whatever state organ has legislative capacity) is required.

Parenthetically, it is well to point out that in civil law jurisdictions there are no *decretos* (decrees) of the courts. The *decreto* (decree) is always an act of the executive power, be it a mere *decreto* or a *decreto supremo*.

La ley, like statutes everywhere, must be construed, *interpretada*. Many authors speak of *interpretación legítima* when the Legislature itself indicates — in a *ley*, of course — the construction to be given a statute. The majority of publicists do not agree that one should speak of *interpretación* in such cases. Common law lawyers should not assume that civil law courts and attorneys will employ the self same techniques of construction used by a common law court.

For instance, civil law courts, when considering the weight to be given to the legislative history of a statute, would be mid-way between the English rule against “Parliamentary history” (see *Ellerman Lines v. Murray*, 1931, A. C. 126) and the American courts proclivity to ascertain “legislative intent” through legislative history. When needed, the civil law court will have recourse to *trabajos preparatorios* (*travaux préparatoires*), but the tradition in the civil law, is to search for the *voluntas legis* (the will of the law itself) and not for the *voluntas legislatoris* (the will, or intent, of the legislators.) A good example of the modern trend in this matter in civil law jurisdictions is Art. 3 in the recently modified *Título Preliminar* of the Civil Code of Spain.

As initially stated, *la ley* is a very broad term. It covers not only enactments by the legislative branch but any other written legal norm of general application although under different terms. These will be dealt with in future installments of this *Lexicon*.