Internal Conflicts and "Interregional Law" in the Spanish Legal System[1]

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I. INTRODUCTION

1. Plurilegislation and Private International Law: the Spanish system

The "plurilegislative State" is an umbrella term covering a wide variety of cases and circumstances. A "plurilegislative State" is a State where the legal system is complex[2] but this *complexity* is of highly diversified and nuanced kinds depending on specific cases: the cause/origin of the plurilegislation; whether the various legal systems are applicable on a personal or a territorial basis; the material scope affected by the plurilegislation; whether the system of sources is singular or plural; and whether the organisation of the State structures is singular or plural.

From the standpoint of Private International Law, plurilegislation can be viewed from two perspectives: one *ad intra*,[3] relating to the treatment and regulation *firstly* of internal matters of fact which are legally dispersed or multiply connected and *secondly* of matters which although international are localised under the provisions of Private International Law in the home legal system; the other *ad extra*,[4] in that from any State whether unitary or not, plurilegislation can be approached as a problem of applying its own system of Private International Law in all cases entailing remittal to a foreign system that is plural or complex.

The doctrine of International Law has traditionally used the term "internal conflicts" to designate the first of these approaches, and frequently in reference solely to the question of the treatment of legally dispersed or heterogeneous internal matters, and it has devoted a lot of time and thought to this, especially as it relates to defining the boundaries of the object and content of the discipline. However, a discussion on the inclusion or exclusion of matters of "internal conflict" in Private International Law[5] lies outwith the scope of this article.

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[2] P. Arminjon, "Les systèmes juridiques complexes et les conflits de lois et de juridictions auxquels ils donnent lieu", *Recueil des Cours*, vol. 74, 1949, pp.79 *et seq.*; E. Vitta, "Interlocal Conflict of Laws", vol. III, ch. 9 of the *International Encyclopedia of Comparative Law*, Tübingen, 1985.; A. Borras Rodríguez, "Les ordres plurilégislatifs", *Receuil des Cours*, vol. 249, 1994-V, pp. 145 *et seq.* (esp. 155–186).

[3] A. Borrás Rodríguez, "Les ordres plurilégislatifs", *Recueil des Cours*, vol. 249, 1994-V, pp. 251–295 and 328–333.

[4] A. Borrás Rodríguez, "Les ordres plurilégislatifs", *Recueil des Cours*, vol. 249, 1994-V, pp. 296–327.

[5] M. Aguilar Navarro, *Derecho Internacional Privado*, t. I, vol. 2, 4[2] ed., Madrid, Serv. Public. Univ. Complutense de Madrid, 1976, p. 31; Gannage; "La dinstiction des conflits internes et des conflits internationaux", *Melanges P. Roubier*, Paris, 1961, t. I, pp. 229–240; A. Borrás Rodríguez, *Calificación, reenvío y orden público en el Derecho Interregional español*, Bellaterra, 1984, pp. 5–7; by the same author, "Les ordres plurilégislatifs", *Recueil des Cours*, vol. 249, 1994-V, pp. 212–227; A.L. Calvo

Confining ourselves now to the Spanish example of a plurilegislative or complex system, in order to properly define the objective of this article, we must start with the following consideration: since the coming into force of the Spanish Constitution of 1978 (*CE*) and the process of construction and consolidation of the "State of Autonomous Communities" *(Estado de las Autonomías)* contemplated by the Constitution, the material scope of "internal conflicts" in Spain has become considerably enlarged.[6] Thus, if we analyse the materials susceptible of plurilegislation in light of the distribution of competences between the State and the Autonomous Communities as laid down by the Constitution, we are forced to conclude that to the traditional area of civil plurilegislation we must today add that relating to "Economic public law" (within the meaning and the limits proposed by Prof. González Campos[7] as a doctrinal category) of the Autonomous Communities. At present there are therefore two blocs of matters of "internal conflict": 1. relating to Civil Law, and 2. relating to Economic Public Law.

As regards the first of these two subject blocs, the Spanish doctrine has traditionally used the term "Interregional Law" to refer to the set of principles and rules which have the purpose in Spanish Law of regulating legally heterogeneous cases arising out of the coexistence of various systems of civil law in Spain.[8]

Against this background, the present article aims to: i) identify the differences in nature and nuance proper to the complexity of the Spanish legal system; ii) looking *ad intra*, to analyse the basic structural and functional framework of the Spanish system of "internal conflict"; and iii) to analyse the fundamental

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Caravaca, "Noción y contenido del Derecho Internacional Privado", *R.G.D.*, no. 508–509, 1987, pp. 16–18; O. Casanovas y La Rosa, "El Derecho Interregional e Interlocal", *Llibre del II Congrès Juridic Català 1971*, Barcelona, 1972, p. 255; J.C. Fernández Rozas, "Sobre el contenido del Derecho Internacional Privado (I)", *R.E.D.I.*, vol. XXXVIII, no. 1, 1986, pp. 82–93; J. C. Fernández Rozas and S. Sánchez Lorenzo, *Derecho Internacional Privado*, Civitas, Madrid, 1999, pp. 46 *et seq.* J.D. González Campos, *Derecho Internacional Privado. Introducción*, U.A.M., Madrid, 1984, pp. 147 *et seq.*; M. Miaja de la Muela, *Derecho Internacional Privado*, t. I, 9[2] ed., Madrid, 1987, pp. 14–15; E. Vitta, *Conflitti interni ed internazionali. Saggio comparativo*, vol.I, Torino, 1954.

[6] J.D. González Campos, in the *Prologue* to Arce Janariz, A., *Comunidades Autónomas y conflictos de leyes*, Madrid, Civitas, 1988, p.12.

[7] J.D. González Campos, "El marco constitucional de los conflictos internos en España", in Hommelhoff/Jayme/Mangold, (ed.), *Europäischer Binnenmarkt: IPR und Rechtsangleichung*, Heidelberg, C.F. Müller, 1995, pp. 16–31.

[8] J. Alegre González, "Reflexiones en torno al Derecho interregional español", in *Homenaje a Juan Berchmans Vallet de Goytisolo*,vol. I, Madrid, 1988, p.55; A. Arce Janariz, *Comunidades Autónomas y conflictos de leyes*, Madrid, Civitas, 1988, p. 26; R. Durán Rivacoba, *Derecho Interregional*, Dykinson, Madrid, 1996, pp. 31–34 and 285–390; M. Lasala Llanas, *Sistema español de Derecho Civil Internacional e Interregional*, Madrid, 1933, pp. 49–55.

solutions to conflicts in Spanish "Interregional Law" (as a system for regulating internal conflicts at civil law), which hinge on the institution of *vecindad civil.*[9]

Looking first at the nature of the system, the plurilegislative or complex nature of the Spanish legal system dates back to mediaeval times. Despite the passage of time and changes in political and legal circumstances, organisations and structures since then, this legislative complexity has persisted as a *historical constant.*[10] Going back to the origins, mediaeval bodies of local law grew up in response to specific political, economic and social interests and needs and were a factor in the social and territorial process of reconquest and repopulation.[11] Later on, the emergence and consolidation of territorial or general laws in each of the kingdoms of the Iberian Peninsula was succeeded by repeated efforts to affirm the absolute and primordial value of each of these laws

Historically there have been many and varied efforts to achieve unity of law under a uniform system – the effects of the transfer of monarchy from the Habsburgs to the Bourbons and the birth of the liberal State (centralist and unitary), the debates of the age of codification, the authoritarian nationalism of the Franco regime – but all have been marked, if not accompanied, by political and/or legal efforts to enshrine the fact of multiplicity.

In other words, the system has become no less complex between the birth of local mediaeval laws in the various political units of the Iberian Peninsula and the legal and political diversity today enshrined in the Spanish Constitution of 1978.[12]

The present situation can therefore be described as embodying two coexisting elements: unity and diversity, homogeneity and heterogeneity. In the course of

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[9] *Vecindad civil* is the criterion applied by Spanish interregional law to determine personal law in cases of internal conflict of laws. It is applicable to all Spaniards and only to Spaniards. It is based on personal and/or territorial circumstances (arts. 14 and 15 C.c.), which determine what ties every Spaniard has with any of the civil laws that coexist in Spain.

[10] A. García Gallo, *El origen y la evolución del Derecho. Manual de Historia del Derecho Español, I,* Madrid, 1982, pp. 22–23.

[11] For an analysis of the fundamental characteristics of the repopulation process, see J.A. García de Cortazar, *et al., Organización social del espacio en la España medieval. La Corona de Castilla en los siglos VIII a XV*, Ariel – historia, Barcelona, 1985.

[12] C. Lasarte, *Autonomías y Derecho Privado en la Constitución Española*, Madrid, 1980. Also, J. Delgado Echeverría, "Los derechos civiles forales en la Constitución", in *Estudios sobre la Constitución Española de 1978*, Zaragoza, 1979, pp.323–352; J.M. Puig Salellas, "La recuperació de l'autonomia legislativa a l'ambit del dret privat", *R.J.C.*, 1978, pp.1055 *et seq.*; and the examination by L. Garau Juaneda, "Comunidades Autónomas y Derecho Interregional", in *Constitución, Comunidades Autónomas y Derecho Internacional,* Santiago de Compostela, 1982, pp. 135 *et seq.*; A. Borrás Rodríguez, *Calificación, reenvío y orden público en el Derecho Interregional Español*, Bellaterra, 1984, pp. 10 *et seq.*; A. Arce Janariz, *Constitución y Derechos Civiles Forales*, Madrid, 1987, and *Comunidades Autónomas y conflictos de leyes*, Madrid, 1988; and the references cited in the foregoing studies.

history this situation has naturally elicited legislative responses to the concrete options available to determine the spatial and personal applicability of the coexisting systems. In considering and analysing what these options were and what form they took we can distinguish several important phases: i) a period from the 8th to the 12th century (High Middle Ages); ii) a period of consolidation of territorially-based law, both local laws emerging during the previous phase and the birth and development of territorial or general laws in each political unit; iii) a period of consolidation and predominance of the General Law of the Kingdoms up to the promulgation of the *Decretos de Nueva Planta*; iv) the period running from the *Decretos de Nueva Planta* to the unifying codification that culminated in the Civil Code of 1889; v) the drafting of the various Compilations of regional or special civil laws (1959–1973), and the successive reforms of the Civil Code (particularly the Preliminary Title of 1974)[13]; and vi) the coming into force of the Constitution of 1978, the political and legal configuration of the "State of Autonomous Communities" and the legislative activity of the Autonomous Communities.[14]

Given the undeniable historical fact of legal diversity in the Spanish system and the enshrinement of this fact in the Constitution of 1978 as one of the basic principles of construction of the "State of Autonomous Communities"[15] there are at least two parameters on which we must base any analysis of the nature and features of plurilegislation in the Spanish system: the *historical dimension* and the *constitutional dimension.*[16] These need to be analysed, but in various different contexts and with various different objectives. The historical dimension can be

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[13] R. Bercovitz y Rodríguez-Cano, "Comentario al art. 14 del Código civil", in *Comentarios a las reformas del Código Civil*, vol.I, Tecnos, Madrid, 1977, pp. 703 *et seq.*; by the same author autor, "Comentario al art. 14 *Cc*", in *Comentarios del Código civil y Compilaciones forales*, t. I, Edersa, Madrid, 1978, pp. 478 *et seq.*; A. Miaja de la Muela, Reflexiones acerca de la elaboración de un nuevo sistema español de Derecho Internacional Privado e Interregional", in *Estudios de Derecho público y privado ofrecidos al Prof. Dr. D. Ignacio Serrano y Serrano*, vol.II, Universidad de Valladolid, Valladolid, 1966, pp. 607–642; E. Pecourt García, *El nuevo sistema español de Derecho Interregional*, Pamplona, 1975; J. Sapena Tomás, "Vecindad civil y conflictos interregionales", in *Curso monográfico sobre la Ley de Bases para la modificación del Código civil*, Valencia, 1975, pp. 228 *et seq.*; V.L. Simo Santonja, "Derecho Internacional e Interregional (Sistema español: principios de reforma)", *R.D.N.*,1960, pp. 143–212, and 1961, pp. 161–340.

[14] For analysis of of a partial historical reconstruction of the question of plurality of civil laws in Spain, see P. Domínguez Lozano, *Las circunstancias personales determinantes de la vinculación con el Derecho Local. Estudio sobre el Derecho Local Altomedieval y el Derecho Local de Aragón, Navarra y Cataluña (siglos IX–XV)*, Madrid, Colección Estudios, Ediciones de la Universidad Autónoma de Madrid, 1986.

[15] F. Tomás y Valiente, *El reparto competencial en la jurisprudencia del Tribunal Constitucional*, Madrid, Tecnos, 1988, pp. 54–61.

[16] J.D. González Campos, "El marco constitucional de los conflictos internos en España", in Hommelhoff/Jayme/Mangold, (ed.), *Europäischer Binnenmarkt: IPR und Rechtsangleichung*, C.F. Müller, Heidelberg, 1995, pp. 7–11.

viewed in a purely explanatory light in order to give a proper account of the characteristics of the system and its historical roots. On the other hand the constitutional dimension has to be viewed in the context of justification of a model; the Constitution alone "legitimises" and "justifies" the system, and the historicist principle will only have transcendence and legitimising force if and as the Constitution so allows.[17]

2. Political and legal plurality as a feature of the Spanish State: the historical dimension

The Spanish State as a historical reality is the outcome of a lengthy process of construction of each of the Peninsular political units and of the development of relations between them in the course of centuries, from the Middle Ages to the present day.[18]

During the 13th, 14th and 15th centuries, the Iberian Peninsula was consolidated politically in two large blocs: the Crown of Castile and the Crown of Aragon. The *Crown of Castile*, which centred on the kingdoms of Castile and Leon, absorbed i) Vizcaya, followed by Alava and Guipúzcoa; ii) the Arab kingdoms, first of Murcia then of Al-Andalus, ending with the conquest of the kingdom of Granada; and iii) the Canary Islands. The *Crown of Aragon*, from its original base in the kingdom of Aragon and the Catalan counties, expanded to take in the kingdoms of Mallorca and Valencia. In third place, the *Kingdom of Navarra* retained its independence.

In the second half of the 15th century the two Crowns were joined through the marriage of Isabella of Castile and Ferdinand of Aragon, the Catholic Monarchs. Then, in the 16th century, the Kingdom of Navarra was absorbed by Castile through a special legal procedure.[19] Thus, there was a progressive political grouping of the various kingdoms, which eventually fell subject to the rule of a single Sovereign. This explains why the unification achieved under the Catholic Monarchs did not bring an end to diversity. Nor did this diversity disappear when the union of all these entities was finally embodied in a single sovereign unit under the rule of Carlos I, marking the birth of the "Spanish Monarchy".[20]

The diversity sprang not only from the fact of plurality (*i.e.*, the fact that several different entities persisted under a single Sovereign) but also from the added fact that these were differentiable and differentiated units that did not

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[17] F. Tomás y Valiente, *El reparto competencial en la jurisprudencia del Tribunal Constitucional*, Madrid, Tecnos, 1988, pp. 42–43, 54–61.

[18] The present summary of this historical process is taken from F. Tomás y Valiente, *El reparto competencial en la jurisprudencia del Tribunal Constitucional*, Madrid, Tecnos, 1988, pp. 32–43; see also the references there.

[19] J.A. Escudero, *Curso de Historia del Derecho*, Madrid, 1995, p. 625

[20] J.A. Escudero, *Curso de Historia del Derecho*, Madrid, 1995, pp. 619–621.

reflect homogeneous situations.[21] The origins of this lack of homogeneity lay in the diverseness of the "grouping" processes that had taken place in each Realm: while the units coming under the Crown of Aragon preserved their political and legal peculiarities[22] and their own institutions, incorporation in the Crown of Castile entailed unification of institutions and Law – that is, political and legal assimilation (with the exception of Vizcaya, Guipuzcoa and Alava, the Kingdom of Navarra, and to a lesser extent Asturias and Galicia, which retained some institutions of their own).[23]

The situation between the 16th and 18th centuries was therefore as follows: the various different territories were united under a single Monarchy and hence all of them shared some common governmental and functional structures and institutions; however, in coexistence with this partial homogeneity and the maintenance of the previous situation with regard to the scope of the rule and application of Laws, some of these territories retained their own legal/political peculiarities, specifically all those previously belonging to the Crown of Aragon (Aragon, Catalonia, Mallorca, and Valencia), and some belonging to the Crown of Castile (Vizcaya, Guipuzcoa, Alava and the Kingdom of Navarra).

This then was the situation when Philip V promulgated the *Decretos de Nueva Planta* (1704–1717), which marks the beginning of a new era in the analysis of plurilegislation in Spain. The accession of the Bourbons to the throne following the War of the Spanish Succession initiated the creation and gradual consolidation of a centralised, unitary State centred on Castile. This is also the time when we find the first signs of the existence of a "Spanish nation" with the development of a strong and clear consciousness of unity in political society. Nonetheless, despite this process of unification[24] and centralisation, the complexity of the legal and political system did not disappear altogether. The *Decretos de Nueva Planta* did in fact spell the loss of the "traditional rights, privileges, exemptions and freedoms" and the end of political autonomy for all the territories of the Crown of Aragon, which had supported the pretender Archduke Charles against Philip V in the war, but Aragon preserved its own civil law and Catalonia and Mallorca preserved not only their civil law but also their criminal law and part of their procedural and mercantile law. As regards the territories of the Crown of Castile, which had supported the cause of Philip V in the war, there was no change, for as noted earlier, the Castilian formula was already one of political and legal centralisation and unification,[25] while the

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[21] F. Tomás y Valiente, *Manual de Historia del Derecho Español*, Tecnos, Madrid, 1988, pp. 282 *et seq.*

[22] F. De Castro y Bravo, *Derecho Civil de España*, t. I, Madrid, 1949, pp. 161–166.

[23] J.A. Escudero, *Curso de Historia del Derecho*, Madrid, 1995, pp. 498 and 620.

[24] F. De Castro y Bravo, *Derecho Civil de España*, t. I, Madrid, 1949, pp. 169–175

[25] "The choice of Castilian laws as the unifying nexus was neither capricious nor the result of Castilian adhesion to the cause of Philip V; it was the only possible way of achieving a national Law. Only the Castilian laws included comprehensive regulation

public and private legal peculiarities of Vizcaya, Guipuzcoa, Alava, and Navarra were retained. To summarise: i) *legal/political diversity*, in that the territories of Vizcaya, Guipuzcoa, Alava and the Kingdom of Navarra retained their own peculiar systems alongside the common general institutional regime; and ii) *diversity of private and a part of public law*, in that alongside the now common Castilian law there persisted the private law of Aragon and the systems of private law – and in some cases parts of the public law – of Catalonia, Mallorca, the Basque territories and Navarra. Some peculiarities of private law were also retained in Galicia, if to a lesser extent.

In this situation, under what is known as "Bourbon royalism", the Old Regime evolved within a context of strong structural and institutional development of the system of Absolute Monarchy, with considerable economic growth and tremendous legislative development presided over by a policy of increasing legal unification. To embark at this point on an analysis of the process of transition to a bourgeois liberal political form goes beyond the scope of this article, which is intended only to illustrate and systematise the historical features that characterise the situation of plurilegislation in Spain.[26] We shall therefore confine ourselves to a few observations.

The "liberalising" process[27] that took place from the work of the *Cortes* of Cadiz to the promulgation of the Civil Code in 1889[28] was subject to advances and retreats, points and counterpoints, particularly as regards the aspiration to build a constitutional State. The whole period was marked by the processes of drafting of the various different constitutional texts and the fate of each one – from the Constitution of 1812, through the texts of 1837, 1845 and 1869, to the Constitution of 1876.[29]

In dealing with this period there are three elements of transcendent importance in the historical solidification of the Spanish system as a complex system:[30]

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of all institutions, and only the Castilian laws, in a centuries-long struggle, had attained the category of common law and ousted Roman law", F. De Castro y Bravo, *Derecho Civil de España*, t. I, Madrid, 1949, p. 173.

[26] M. Peset Reig, "Derechos Forales, del Antiguo Régimen al Liberalismo", in R. Bercovitz, and J. Martínez-Simancas, (dirs.): *Derechos Civiles de España*, vol. I, Aranzadi, 2000, pp. 15 *et seq.*

[27] F. Tomás y Valiente, *Manual de Historia del Derecho Español*, Tecnos, Madrid, 1988, pp. 401 *et seq.*

[28] F. De Castro y Bravo, *Derecho Civil de España*, t. I, Madrid, 1949, pp. 185–210.

[29] J.A. Escudero, *Curso de Historia del Derecho*, Madrid, 1995, pp. 849 *et seq.*; J. M. Pérez Prendes Muñoz-Arraco, *Interpretación Histórica del Derecho*, Universidad Complutense de Madrid, Madrid, 1996, pp. 1068 *et seq.*

[30] See the expositions in VV.AA., *La España de las Autonomías. Pasado, presente y futuro*, t. I, Espasa Calpe, Madrid, 1981.

1. the *federalising option* was a constant in the socio-political reality of 19th-century Spain. Indeed, the demonstrable fact of Spain as a historical reality endowed with unity and productive of a unitary collective consciousness on the one hand, and consideration of the Spanish State as the historic outcome of the grouping together of diverse units with characteristics of their own on the other hand, point to a tension – which appears to have persisted in one form or another until the present day – between two poles: the uniformist option and the federal option. One of the consequences of the failed attempt at a Federal Constitution in 1873[31] was a shift by the bourgeois nationalist movements, chiefly Catalan and Basque, from positions of separatism or independence towards options of autonomy.
2. as far as the Basque territories and Navarra were concerned, the point of the Carlist Wars (1833-1876) which broke out over the question of the succession to the throne on the death of Fernando VII – the result of the convergence of a wide variety of factors – was to defend and secure recognition of their "*Fueros*". The term "Fueros" is an umbrella embracing on the one hand a set of privileges in the regulation of their own particular economic, administrative and fiscal systems, and on the other hand their own body of private law (*Foral* or Special Law). The conflict ended with the confirmation of the "Fueros" for these territories. In the case of Navarra, the special system is regulated by an Act of 16 August 1841; as the fruit of a covenant, it places the legal situation of Navarra on a quite peculiar basis, which has been maintained and further consolidated in the regional structure deriving from the Constitution of 1978.[32]
3. again, the tension between unity and diversity appears as a determining factor in developments over a fundamental phase in the legal history of Spain. The "foral issue" marked the course of the process of codification of the Civil Law in Spain[33]; the codifying movement obviously sought to achieve a unified Civil Code in Spain, but it came up against the pro-Fueros opposition. Finally, the Foral civil rights were preserved "for the time being" in the Civil Code of 1889 (art. 12). However, this provisional or transitional recognition eventually became permanent (especially with the amendment of the Preliminary Title of the Civil Code in 1974) and has survived through to the present Constitution, which includes provision for their preservation, amendment and implementation.

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[31] J. De Estebán and P.J. González-Trevijano, *Curso de Derecho Constitucional Español*, III, Serv. Public. Univ. Complutense de Madrid, 1994, pp. 772–773.

[32] F. Tomás y Valiente, *Manual de Historia del Derecho Español*, Tecnos, Madrid, 1988, pp. 558 *et seq.*

[33] F. Tomás y Valiente, *Manual de Historia del Derecho Español*, Tecnos, Madrid, 1988, pp. 536 *et seq.*

With the Constitution of 1931, the Second Republic devised a model for an "integral" State (art. 1.3), a system of *integrated autonomy*[34] that gave regions the option to accede to a devolved regime (although drafted in general terms, it was devised specifically in consideration of Catalonia, the Basque Country and Galicia) and allowed provinces to opt into the autonomous communities or not. Statutes of Autonomy were drawn up only for Catalonia, the Basque Country and Galicia.

The Franco regime put an end to the Republican constitutional system of 1931, suppressing the Statutes and with them the devolved regimes in these three regions. The new, artificial design contemplated a "grand" nationalist State, unitary and centralist. Only Navarra and Alava retained their *Diputaciones Forales* with their own fiscal regime. As regards Civil Law, as noted earlier the common Civil Law continued to exist side by side with the "Fueros" or Special Laws (progressively recorded in "Compilations", of the Laws of Vizcaya and Álava in 1959, of Catalonia in 1960, of the Balearics in 1961, of Galicia in 1963, of Aragon in 1967 and the New Fuero of Navarra in 1973).[35] This point marked the construction of the present Spanish system of Interregional Law (as a system regulating legally heterogeneous cases in private law arising out of the coexistence of several civil law systems in Spain). Specifically, the amendment of the Preliminary Title of the Civil Code in 1974 opted generally for the *extension of application* of the solutions provided for "international conflicts of laws" to "internal conflicts of laws" (art. 16.1 *Cc*).[36]

It was against this background and with the features described heretofore that the Spanish political transition began and work commenced on the text that would eventually become the *Spanish Constitution of 6 December 1978*.

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[34] J. De Estebán and P.J. González-Trevijano, *Curso de Derecho Constitucional Español*, III, Serv. Public. Univ. Complutense de Madrid, 1994, pp. 774–776.

[35] The *Compilations system* was the fruit of a proposal of the Civil Law Congress in 1946 and was established by Decree on 23 May 1947. The process had two essential purposes: to create legal corpuses that would record and set the content of Foral Laws, and to update their contents. The resulting system was not exactly homogeneous, since the criteria on which the Compilations were drafted were not the same: in some cases they were limited strictly to recording existing institutions and norms, but in others the compilation was innovative.

[36] J.C. Fernández Rozas, and Sánchez Lorenzo, S.: *Derecho Internacional Privado*, Civitas, Madrid, 1999, pp. 52–53; M.E. Zabalo Escudero, "Comentario al art. 16.1 del *Cc*", in *Comentarios al Código Civil and Compilaciones Forales*, t. I, vol. 2, Edersa, Madrid, 1995, pp. 1259–1282.

II. THE CONSTITUTIONAL DIMENSION OF PLURILEGISLATION IN SPAIN

1. The constitutional model of the plurilegislative State

The Spanish Constitution of 1978 reflects the fundamental tension between unity and diversity, homogeneity and heterogeneity, and seeks from there to build up a system that addresses and makes room for the differing situations and aspirations (past, present and future) that actually exist in Spain.

The type of State that it envisages does not fit readily into the existing categories – whether complex (federal or otherwise) or unitary. In the search for a concept in which the constitutional formula would fit, the Spanish doctrine was faced with a question of terminology,[37] and the solution eventually arrived at was the notion of the "Autonomic State" (*Estado Autonómico*) or "*State of Autonomous Communities*" (*Estado de las Autonomías*). Later on we look more closely at the features of the constitutional model of 1978, but in the meantime it will suffice to say that its best feature, and at the same time the source of greatest difficulty in both technical and political terms, is the openness and flexibility of the system. On the one hand the Constitution eschews definitions and "essentialist approaches", and on the other hand it refrains from imposing single exclusive procedures or prejudging the final outcome of the construction of the constitutional State. It is therefore fair to say that the present Constitution contemplates no *one* model of State, in the sense that it does not envisage a closed model or predetermine the final option.[38]

On the basis of the *principle of autonomy*[39] as a fundamental structural principle of the constitutional provisions (*STC* [Constitutional Court Decision] 32/1981, *FJ tercero*), public power is distributed in three levels or echelons: i) municipalities and provinces, which have administrative autonomy; ii) Autonomous Communities, which as well as administrative autonomy also have

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[37] E. García de Enterria and T.R. Fernández Rodríguez, *Curso de Derecho Administrativo*, Civitas, Madrid, 1980, p. 259; F. Tomás y Valiente, *El reparto competencial en la jurisprudencia del Tribunal Constitucional*, Tecnos, Madrid, 1988, pp. 17 *et seq.*

[38] But although this is a constitutionally "open" or "flexible" model of State, the options for construction are not unlimited: "... the core norms for the State of Autonomous Communities are in the Constitution ...", "... the Constitution cannot configure the State and the flexibility of the model is not without constitutional limits." (Tomás y Valiente, *El reparto competencial en la jurisprudencia del Tribunal Constitucional*, Tecnos, Madrid, 1988, pp.22–24); G. Ariño Ortiz, G., in VV.AA., *La España de las Autonomías. Pasado, presente y futuro*, t. II, Espasa Calpe, Madrid, 1981, pp. 14 *et seq.*; J. De Estebán and P.J. González-Trevijano, *Curso de Derecho Constitucional Español*, III, Serv. Public. Univ. Complutense de Madrid, 1994, pp. 785–786.

[39] F. Fernández Segado, *El sistema constitucional español*, Dykinson, Madrid, 1992, pp. 870 *et seq.*; I. De Otto, *Derecho Constitucional. Sistema de fuentes*, Ariel, Barcelona, 1988, pp. 244–257.

political autonomy within certain margins determined by the will of each specific Region; and iii) the State, which is the sole repository of the national sovereignty. All three levels are the "State", for the design is that of a three-echelon State – that is, a State structure decentralised on three levels (art. 137 *CE*).[40] The Constitution does not determine the content of autonomy nor does it define, delimit or predetermine what or how many Autonomous Communities there are to be. It regulates the process whereby they are constituted and accede to autonomy, determines the relations between the central power and the regional powers and lays down the boundaries of competence between the Autonomous Communities and the central State.

The process of *constitution* of the Autonomous Communities is based upon geographical and historical criteria (arts. 143, 144, *DT segunda* and *cuarta*), so that provinces (having common boundaries) may "in exercise of the right to autonomy" (art.143 *CE*) take the initiative in constituting an Autonomous Community. As regards the avenues of *accession to autonomy*, the Constitution provides two different procedures: *one* ordinary procedure under art. 143 and *DT primera*, and another *extraordinary* procedure under art. 151 and *DT segunda*. In addition, there is a third procedure for the case of Navarra which – recalling to some extent the peculiarities that were historically enshrined in the so-called *Ley Paccionada* of 1841 and have since persisted – has acceded to autonomy by a special system under the provisions of *DA primera CE*.[41]

In the wake first of the initiation of this process of constitution and accession to autonomy following the entry into force of the Constitution and then of the completion of the regional mosaic, the Spanish State (the "State of Autonomous Communities") was subdivided into seventeen Autonomous Communities: Andalucia, Aragon, Asturias, Baleares, Canarias, Cantabria, Castilla-Leon, Castilla-La Mancha, Cataluña, Extremadura, Galicia, Madrid, Murcia, Navarra, Pais Vasco, La Rioja, and Valencia, plus the special case of the autonomous cities of Ceuta and Melilla.

The characterisation of relations between the central power and the regional powers proposed by Prof. Francisco Tomas y Valiente[42] on the basis of a strict and rigorous analysis of the Constitution lists five constitutional principles

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[40] F. Tomás y Valiente, *El reparto competencial en la jurisprudencia del Tribunal Constitucional*, Tecnos, Madrid, 1988, p. 47.

[41] On the processes of constitution of and access to autonomy by the various Autonomous Communities: J. De Estebán and P.J. González-Trevijano, *Curso de Derecho Constitucional Español*, 111, Serv. Public. Univ. Complutense de Madrid, 1994, pp. 793–803; F. Fernández Segado, *El sistema constitucional español*, Dykinson, Madrid, 1992, pp. 878 *et seq.*; J. Pérez Royo, *Curso de Derecho Constitucional*, Marcial Pons, Madrid, 1998, pp. 745–747.

[42] F. Tomás y Valiente, *El reparto competencial en la jurisprudencia del Tribunal Constitucional*, Tecnos, Madrid, 1988, pp. 54–66.

structuring these relations: i) the limitation of legal historicism, ii) diversity in diversity, iii) minimum homogeneity, iv) limitation of choice and v) solidarity.

The *principle of limitation of legal historicism* means that once the Constitution is promulgated, any kind of historical legitimism is admissible provided it is admissible for the Constitution and in so far as it is provided for in the Constitution or derived from it.

The *principle of diversity in diversity* applies in so far as the Constitution, in regulating the fundamental aspects of the State of Autonomous Communities, enshrines and propitiates heterogeneity among the different Autonomous Communities both in establishing the process of their constitution and accession to autonomy and in determining the possible content of that autonomy.

The *principle of minimum homogeneity* applies in that the Constitution sets the limits of possible diversity among the Autonomous Communities, establishing precepts and prohibitions in the form of rules of mandatory content applying to them all.

The *principle of limitation of choice* means that the principle of choice governing the assumption of a specific level of competence by each Autonomous Community is limited by the framework established in the Constitution on the basis of art. 149, and by the fact that art. 145 prohibits the federation of Autonomous Communities.

And lastly the *principle of solidarity*, set forth in art. 2 *CE*, designs and guarantees a concrete model of integration, cooperation and coresponsibility among the various Autonomous Communities.

As in any politically decentralised model of State, in the model of the Spanish Constitution of 1978 the distribution of competences between the State and the lesser territorial units, the Autonomous regions, is the crucial point of their legal regulation.[43] The central core of this regulation of competences is the principle of choice, so that each Autonomous Community decides, within the limits set by the Constitution, what set of competences it will assume. Thus, in each case it is the Statute of Autonomy that sets forth the details of the competences assumed.

Thus, all the Autonomous Communities do not enjoy or assume the same levels of competence. *Firstly* because the Constitution itself establishes differences with respect to the competences that Regions can assume depending on whether they acceded to autonomy by the procedure of art. 143 or the procedure of art. 151 or *DT segunda*. These differences relate to the levels of autonomy originally defined in the distinction between what were then called "Regions with full autonomy" (art. 151 and *DT segunda* CE: *extraordinary* procedure for accession to autonomy) and "Regions with less full autonomy" (art. 143 *CE*: *ordinary* procedure for accession to autonomy); but in any event such differences could eventually cease to be important, as has in fact been the case, inasmuch as after the lapse of five years the Statutes could be amended and

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[43] J. Pérez Royo, *Curso de Derecho Constitucional*, Marcial Pons, Madrid, 1998, p. 773.

the "regions with less full autonomy" could finally become "regions with full autonomy".[44] And *secondly* because, as noted in the foregoing paragraph, subject to the limits imposed by the Constitution, the Autonomous Communities may voluntarily establish their own levels of competence – *i.e.*, they can decide whether or not to incorporate competences in their Statutes as they deem appropriate.

The regulatory basis for the functioning of the complex decentralised system of the "*State of Autonomous Communities*" is the set of rules created for each Autonomous Community by the Constitution of 1978 and by their individual Statutes of Autonomy. The Statute is the fundamental set of provisions for the creation and regulation of autonomous communityal structures. It sets forth as a basic institutional norm the denomination of the Region and its autonomous institutions, the organisation and the seat of these institutions, the Autonomous Community's boundaries, and the competences that the Region assumes under the provisions of the Constitution (art.147 *CE*).[45] The regional public authority may therefore assume the competences specified in its own Statute, subject to the general and particular limitations contained in the Constitution.

In view of the current State of evolution of the State of Autonomous Communities, it will be best to confine our analysis and references to cases classified, as noted *supra*, as *full autonomy*, for in the event all the Autonomous Communities have acceded to a unitary autonomous regime – only the pace has varied. At this time, then, all the Autonomous Communities have attained the higher degree of autonomy as provided by the Constitution, and hence if they so wish they may, within the framework established by the Constitution and their individual Statutes, assume competences in all matters not reserved to the State in art. 149 *CE*.[46]

2. "Internal Conflicts" and the "State of Antonomons Communities": distribution of competeuces and demarcation of snhject-matter of internal conflicts

As noted in the previous section, the distribution of powers between the State (*i.e.*, the central power) and the Autonomous Communities is the cornerstone on

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[44] J. Pérez Royo, *Curso de Derecho Constitucional*, Marcial Pons, Madrid, 1998, pp. 774–777.

[45] J. De Estebán and P.J. González-Trevijano, *Curso de Derecho Constitucional Español*, III, Serv. Public. Univ. Complutense de Madrid, 1994, pp. 803–812; F. Fernández Segado, *El sistema constitucional español*, Dykinson, Madrid, 1992, pp. 898 *et seq.*; I. De Otto, *Derecho Constitucional. Sistema de fuentes*, Ariel, Barcelona, 1988, pp. 257 *et seq.*; J. Pérez Royo, *Curso de Derecho Constitucional*, Marcial Pons, Madrid, 1998, pp. 748–751.

[46] J. Pérez Royo, *Curso de Derecho Constitucional*, Marcial Pons, Madrid, 1998, pp. 776–777.

which the constitutional plurilegislative system rests. Moreover, the assumption of regulatory powers by the Autonomous Communities in some matters, as provided by the Constitution and the respective Statutes of Autonomy, has come to be a factor in defining the scope of "internal conflicts".[47] We must therefore first define the boundaries of scopes of competence before we can demarcate scopes of conflict.

Under the terms of the Constitution, the principle of competence underpins the validity of regional regulation. In other words, if in its regulatory activity the regional legislator exceeds the limits of competence established by the interplay of Constitution and Statute of Autonomy, any regional legislation so exceeding will be *invalid* (*STC* 156/1993 6 May, *FJ tercero*). Thus, the application of the principle of competence entails a judgment of validity which can preclude or eliminate a "conflict of laws".

Therefore, for the purposes of the present analysis the principle of competence has a twofold function: to demarcate material spheres of conflict and to control the validity of regional regulation in the first instance.

As noted earlier, all the Autonomous Communities have now reached their potential ceiling of autonomy under the Constitution. As regards the distribution of powers, this means that every region has assumed the *maximum level of competence* allowed it by the Constitution provided that this is also established in its Statute of Autonomy. On that basis we can undertake a relatively homogeneous analysis of the constitutional system of distribution of powers between the State and the Autonomous Communities. In this connection, given the *open* nature of the Constitutional procedure for assumption of powers by the Autonomous Communities, there is only *one* reliable fixed guideline to which we can hold for individualised analysis – that is, the reservation by the Constitution of certain matter and powers to the State.

The regime is indeed *open, firstly* because its design follows the principle of choice, whereby the Autonomous Communities can, subject to the limitations imposed by the Constitution and the individual Statutes of Autonomy, decide the extent of the competence that they wish to assume. And *secondly* because having attained its maximum potential autonomy under the Constitution, each Autonomous Community may further assume, by statutory regulation subject to existing provisions, whatever powers the Constitution *does not expressly reserve to the State* (art. 149.3 *CE*). Therefore, as we anticipated in the foregoing paragraph, the only fixed elements in our analytical parameters are the express reservations of competence that the Constitution makes for the State.

The fundamental provisions regarding the distribution of powers are articles 148 and 149 of the Constitution, which are necessarily interpreted together as

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[47] A. Arce Janariz, *Comunidades Autónomas y conflictos de leyes*, Madrid, Civitas, 1988, pp. 34, 67 and 68. Also, by the same author, *Constitución y Derechos Civiles Forales*, Madrid, Tecnos, 1987, pp. 163 *et seq.*

guiding principles of the *Constitutional system of competences.*[48] Such an interpretation, as the Constitutional Court (*Tribunal Constitucional – TC*) has had occasion to warn in the exercise of its functions, raises a variety of serious difficulties, frequently aggravated by lack of precision in the formulation of those constitutional precepts – particularly article 149 (*e.g.*, *STC* 37/1981, *FJ tercero*; *STC* 71/1982, *FJ segundo*; *STC* 59/1985, *FJ segundo*). For example, in some cases these ambiguities affect the demarcation of subject matters, and in others they affect the necessary establishment of categories for regulations, legal disciplines and institutions. All things considered, with regard to the work of the Constitutional Court, what such an interpretation amounts to is the individualisation of subject matters which, being constitutionally reserved to the State and not therefore susceptible of regulatory action by the Autonomous Communities, are excluded from plurilegislation and hence from affection to "internal conflicts", as opposed to other types of matter which are susceptible of legal pluralism and hence constitute "spheres of conflict".

In reserving competences to the State, article 149 *CE* sets forth a list of matters which do not conform to a homogeneous system. The "reservations" listed in article 149 *CE* do in fact vary in kind and scope: in some cases the Constitution reserves to the State *all aspects of a matter* in which "*no Region may assume powers, even of execution*" (*STC* 1/1982), while in other cases it establishes the "*reservation of concrete powers*" (*STC* 35/1982, esp. *FJ segundo*). The first category includes such instances as *international relations, the administration of justice, nationality and aliens* or *foreign trade*. The second includes all cases where the Constitution reserves to the State the *legislation* (*e.g.*, mercantile legislation, procedural legislation or labour legislation) or *the bases* (*e.g.*, bases of contractual obligations or bases and coordination of general planning of economic activity), the *basic legislation* (*e.g.*, basic legislation on protection of the environment), and the *basic norms* (*e.g.*, basic rules governing the mass media). From an integrative analysis of these constitutional provisions we conclude that there are two blocs of matters which are susceptible of plurilegislation and may therefore give rise to "internal conflicts": i) economic public law and ii) civil law.

The first of the blocs mentioned[49] lies outwith the scope of this article .

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[48] J. De Estebán and P.J. González-Trevijano, *Curso de Derecho Constitucional Español*, III, Serv. Public. Univ. Complutense de Madrid, 1994, pp. 850 *et seq.*; F. Fernández Segado, *El sistema constitucional español*,Dykinson, Madrid, 1992, pp. 914 *et seq.*; J. Pérez Royo, *Curso de Derecho Constitucional*, Marcial Pons, Madrid, 1998, pp. 777–789.

[49] J.J. Alvarez Rubio, "La necesaria reforma del sistema español de Derecho Interregional", *Cursos de Derecho Internacional de Vitoria-Gasteiz 1997*, Tecnos, pp. 300–302; J.D. González Campos, "El marco constitucional de los conflictos internos en España", in Hommelhoff/Jayme/Mangold, (ed.), *Europäischer Binnenmarkt: IPR und Rechtsangleichung*, C.F. Müller, Heidelberg, 1995, pp. 16–31; J.J. Pérez Milla, *La territorialidad en el ordenamiento plurilegislativo español*, CIRIEC-España, 1999.

However, it will be useful here to refer briefly to the fundamental framework within which this kind of conflict is raised and resolved. The first of the two blocs, that is economic public law, concerns regulations and/or acts arising from the legislative and executive action of the Autonomous Communities in the regulation of economic activity. Given the provisions of the Constitution and the Statutes, this is necessarily an administrative act in the sphere of public law which under no circumstances can be extended to the regulation of private-law relations between economic agents. The formulation of the basic framework of this sector of "internal conflict" requires an analysis on three levels. The *first* entails a clear material demarcation of the competence(s), of the Autonomous Community(s) on the one hand of and the State on the other. The *second* is based on the principle of territoriality of the Law of the Autonomous Communities, so that in setting the spatial boundaries of its own regulations the regional legislator must respect and establish a territorial restriction that is constitutionally acceptable and justifiable. The *third* relates to specific cases which raise a conflict transcending the previous two levels. We refer here to cases of conflict which cannot be resolved or governed by the rules of Interregional Law (largely set forth in articles 8 to 16 of the Civil Code) and therefore require specific (and appropriate) legal and/or jurisprudential solutions not presently existing.

III. CONFLICTS OF LAWS IN THE SPHERE OF CIVIL LAW

1. Civil legislation of the State and the Autonomous Communities

A) Art. 149.1.8 CE

Under the present system, the "key" regulation for any analysis of the features of plurilegislation on matters of Civil Law in Spain is art. 149.1.8[2] of the Constitution of 1978, whereunder:

> *"Article 149*
> *1. The State holds exclusive competence over the following matters:*
> ...
> *8. civil legislation, without prejudice to the preservation, modification and development by the Autonomous Communities of civil 'fueros' or special rights where they may exist; in any case, the rules relative to the application and effectiveness of legal norms, civil-legal relations having to do with the form of matrimony, regulation of registers and public instruments, the bases for contractual obligations, norms for resolving the conflicts of laws, and the determination of the sources of the Law, in this last case, with respect to the norms of the 'fueros' or special law;*
> ...".

Given that this rule is a basic precept of the system, it needs to be analysed in

conjunction with the parameters identified earlier as essential to its construction and interpretation: the historicist, which is explanatory, and the constitutional, which is justificatory. Both aspects will therefore be pertinent throughout the considerations set forth hereafter regarding the content, interpretation and application of art. 149.1.8ª *CE*.

According to the constitutional design, this is a rule delimiting areas of legislative competence between the State, as the central power, and the Autonomous Communities. It is a precept that on the one hand guarantees plurilegislation in this area of subject-matter in Spain, and on the other hand creates the framework of competence that underpins and regulates this complex legal situation.[50] However, alongside this technical classification, which flows very clearly from the rule itself and the related system, there is no simple sphere of interpretation and application. Indeed, the doctrine and interpreters in general were not slow to point out the difficulties and problems of interpreting the rule, and particularly of designing a coherent system of regulation of "internal conflicts" in this field.

As a norm demarcating the legislative boundaries between the State and the Autonomous Communities, the wording of the article is complicated and moreover "circular", in that it starts by establishing a general solution then goes on to lay down some exceptions to this; it then returns to the general principle by way of a number of particular material instances and finally introduces yet another exception to this last concrete instance of the general solution.

In commenting on the precept, the authors first posed two closely linked questions: the determination of those Autonomous Communities recognised by the article as entitled to legislative competence in civil matters, and demarcation of the material content of that competence. The question here was how to interpret the scope of the expression ".. .*where they may exist* ...", which clearly expresses a spatially limiting intention: not all the Autonomous Communities falling within the scope of the procedures provided in arts. 151 and 148.2 *CE* can assume the competences included in art. 149.1.8ª *CE*, but only those where, in clear allusion to a pre-Constitutional situation, *there are "fueros" or special civil rights*. In the analysis and interpretation of this limitation the arguments were generally split between those favourable to what came to be known as the "*foralist*" option and those favourable to the *autonomist option*.[51]

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[50] L. Martínez Vázquez de Castro, *Pluralidad de Derechos civiles españoles. El artículo 149.1, Regla 8, de la CE*,Civitas, Madrid, 1997, pp. 54 *et seq*.

[51] R. Bercovitz Rodríguez-Cano, "La doctrina del Tribunal Constitucional sobre el art. 149.1.8 de la Constitución", in R. Bercovitz and J. Martínez Simancas, *Derechos Civiles de España*, vol. I, Aranzadi, 2000, pp. 106–108; R. Durán Rivacoba, *Hacia un nuevo sistema del derecho foral y su relación con el ordenamiento civil común*, Dykinson, Madrid, 1993, pp. 20–23; E. Lalaguna Domínguez, *La diversidad de legislaciones civiles en España*, Tirant lo Blanch, Valencia, 1998, pp. 49–78; L. Martínez Vázquez de Castro, *Pluralidad de Derechos civiles españoles. El artículo 149.1, Regla 8, de la C.E.*, Civitas, Madrid, 1997, pp. 15–25.

According to the "foralist" option, the Constitution started from, and to some extent held as good (guaranteeing legislative avenues for development of the "fueros" or special Laws) the situation existing at the time it was drawn up and promulgated. Thus, in the spatial scope only those Autonomous Communities corresponding to territories with "fueros" or special Law currently in force and compiled at the time that the Constitution came into force could assume the competence referred to in art. 149.1.8ª *CE*, and such competence would be subject to exactly the same demarcation as the relevant Compilations.

According to the autonomist option, on the other hand, the Constitution recognised an entitlement to legislative competence in civil matters not only for the Autonomous Communities in territories possessing compilations of Laws current at the time of promulgation, but also for Regions in territories which at that time possessed customary local peculiarities of private law and those which were entitled to such recognition historically as "territories with special Law" as opposed to the common (Castilian) Law. Logically therefore the material content of the competence referred to in the Constitution can neither be identified with nor confined to the limits of the competence under the *compiled Law*. It would thus remain to be seen whether the content of the competence of such Autonomous Communities in matters of civil legislation is limited by the Constitution's reservation of certain matters "... *in any case* ..." to the State, or whether to the contrary one would have to establish some other limit or some other particular restriction.

On the other hand, we should bear in mind that the demarcation of the material content of the legislative competence of certain Autonomous Communities by virtue of art. 149.1.8ª *CE* also depends in any event on the characterisation of each of the sectors of subject-matter specifically listed to in the article, and how the words "... *preservation, modification and development* ..." as used there are interpreted.

These questions, thus presented, have been dealt with by the Constitutional Court, which in order to resolve the various cases that have reached it in this area of subject-matter, has devised elements of doctrine in order to build up a body capable of interpreting the scope and the attributes of competence contained in the Constitutional provision. In the first place the *TC* has ruled that the expression "*where they may exist*" is not confined to territories of Autonomous Communities having compilations of Law but also takes in territories where customary law, though not compiled, survives (*STC* 121/1992, 28 September, *FJ primero*). It must therefore be concluded that art. 149.1.8ª *CE* permits the assumption of legislative competence in civil matters by Autonomous Communities in whose territory peculiarities of private law, whether compiled or customary, survive.[52]

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[52] R. Bercovitz Rodríguez Cano, "La doctrina del Tribunal Constitucional sobre el art. 149.1.8 de la Constitución", in R. Bercovitz and J. Martínez Simancas (dirs.), *Derechos*

In the second place, having regard to the subject matter of such competence, in consistence with what was said in the foregoing paragraph, the *TC* has ruled that this competence extends equally to the content of a compilation of Law proper to an autonomous territory and to the customary content of the same[53] (*STC* 182/1992, 16 November, *FJ tercero*). In this same line of reasoning the *TC* dealt with the term "*development*" as contained in the article of the Constitution.[54] In determining the content of the conduct of legislative activity by Autonomous Communities having their own Law, the terms "*preservation*" and "*modification*" necessarily restrict such activity to the content of the already existing Law; however, simple legal logic demands that the term "*development*" be interpreted in such a way as not to render it meaningless, and hence an interpretation that does not imply virtual identification with "*preservation*" or "*modification*". In this connection *STC* 88/1993, 12 March, *FJ tercero*, includes the ruling that the *development* of the "Fueros" or Special Law "*implies a legislative action that renders organic growth possible*", but following a somewhat restrictive course links such growth to the content of the pre-existing regulation and further remits this link solely to the *compiled* content of the particular Law of the Autonomous Community (a limitation reiterated in *STC* 156/1993, 6 May), specifying as to the nature of such a link that there must be a *connectedness* between the institution which it is sought to regulate *ex novo* and the institutions already regulated in the Compilation. How controversial the solution provided by this decision is will be readily appreciated from the fact that two Constitutional Court judges (Messrs. C. Viver Pi-Sunyer, and J.D. Gonzalez Campos) entered Dissenting Votes expressing their disagreement with the decision as regards firstly the requirement of a link between the compiled content of the Foral Law and the material content of the new regulation, and secondly and fundamentally to the resort to *connectedness*, which they judged to be constitutionally unwarranted and to be a notion of indeterminate legal meaning the application of which will assuredly produce uncertainty.

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cont.
civiles de España, vol. I, Aranzadi, 2000, pp. 98–100; R. Durán Rivacoba, *Hacia un nuevo sistema del Derecho foral y su relación con el ordenamiento civil común*, Dykinson, Madrid, 1993, pp. 84 *et seq.*

[53] R. Bercovitz Rodríguez Cano, "La doctrina del Tribunal Constitucional sobre el art. 149.1.8 de la Constitución", in R. Bercovitz and J. Martínez Simancas (dirs.), *Derechos civiles de España*, vol. I, Aranzadi, 2000, pp. 100–101.

[54] R. Bercovitz Rodríguez Cano, "La doctrina del Tribunal Constitucional sobre el art. 149.1.8 de la Constitución", in R. Bercovitz and J. Martínez Simancas, *Derechos civiles de España*, vol. I, Aranzadi, 2000, pp. 103–106; R. Durán Rivacoba, *Hacia un nuevo sistema del Derecho foral y su relación con el ordenamiento civil común*, Dykinson, Madrid, 1993, pp. 23–30.

B) Legislation of the Autonomous Communities and Interregional Law

As we noted earlier, in the Spanish system Interregional Law regulates private-law cases where more than one of the bodies of civil law coexisting in Spain are involved. Civil Law is the sector traditionally associated with plurilegislation in Spain and as such the legislation, jurisprudence and doctrine on conflict are better developed; however, in the area of plurilegislation new aspects, issues and problems are now arising as the situation becomes more complex than it was in pre-Constitutional times, relating fundamentally to the attribution of legislative competences in matter of Civil Law to certain Autonomous Communities.

In fact by establishing the legitimacy of legislative decentralisation and the possibility of some Autonomous Communities assuming competences in civil legislation, the Constitution of 1978 opened the doors to the development and enhancement of the "Fueros" or Special Laws, giving rise, through the initiative and action of the Autonomous Communities concerned, to a considerable increase in the amount of non-central regulation in matters of civil law.

Given this situation of civil plurilegislation, characterised at present by the parameters laid down in the Constitution of 1978, we need to determine the nature, content and functioning of the current system of Interregional Law. Here again, as already noted earlier, art. 149.1.8 *CE* is the basic precept in the design of the system. When the Constitution establishes in this article that legislation relating to "norms for the resolution of conflicts of laws" is a competence pertaining solely to the State, it is opting – as the authors pointed out and the doctrine of the Constitutional Court has confirmed – for a single, uniform system of conflict[55] as regards the resolution of both "international conflicts of laws" and "internal conflicts of laws", without any limitation on subject matter. It is therefore up to the State to "establish the rules of conflict for the resolution of cases of interregional traffic, and ... generally to define and regulate the points of connection in accordance with which these rules have to be structured" (*STC* 226/1993, 8 July, *FJ cuarto*). Within the Spanish rules, therefore, this system as regards the sphere of issues of conflict is unitary and unaffected by plurilegislation.

If we then take as our starting point the Constitution's option for "a State-wide and hence uniform system of interregional civil law", this being considered as "matters entirely removed ... from the regulatory action of the Autonomous Communities" (*STC* 72/1983, 29 July, *FJ tercero*), we must attempt to clarify the

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[55] J.J. Alvarez Rubio, *Las normas de Derecho Interregional de la Ley 3/1992, de 1 de julio, de Derecho Civil Foral Vasco*, I.V.A.P., Oñati, 1995, pp. 37–41; and by the same author: "La necesaria reforma del sistema español de Derecho Interregional", *Cursos de Derecho Internacional de Vitoria-Gasteiz 1997*, Tecnos, pp. 296–299; A. Arce Janariz, *Constitución y Derechos Civiles Forales*, Tecnos, Madrid, 1987, p. 215; R. Bercovitz Rodríguez Cano, "La doctrina del Tribunal Constitucional sobre el art. 149.1.8 de la Constitución", in R. Bercovitz and J. Martínez Simancas (dirs.): *Derechos civiles de España*, vol. I, Aranzadi, 2000, p. 123.

outlines of this reservation of competence from the standpoint of the State and of Autonomous Communities having their own civil law: as the central power, is the State subject to strictures which may in general entail the imposition of limits on the exercise of this competence? And is any kind of regional regulatory activity compatible with the reservation contained in art. 149.1.8 *CE* in this area of enquiry?.[56]

In this connection, along with the limits in respect of subject matter that the Constitution generally places upon any regulatory and executive action of the State or the Autonomous Communities, the Constitutional Court has on occasion drawn attention to the existence of a particular limitation upon the action of the State in the drawing up of the system of Interregional Law: *i.e.*, respect for the equality and parity of the various different civil laws existing in Spain, preserving an equal scope of application for all of them and thus assuring that they will in principle be applied without distinction (*STC* 156/1993, 6 May, *FJ tercero*). In Decision 226/1993, 8 July, however, the Court expressed the need to balance or weigh the requirement that application of the various civil laws without distinction be guaranteed, against the need to preserve certainty in interregional private law traffic, and with that it admitted preferential application – which is hardly admissible – of the common *vecindad civil* and the Common Law as against the Foral Laws (in the decision on appeal 148/91 on unconstitutionality, raised by the *Diputación General de Aragón* against art. 14.3 and art. 16.3 *Cc* as drafted by the Civil Code Reform Act 11/1990, 15 October, in application of the principle of non-discrimination by reason of sex).[57]

As regards the constitutionality of some kind of regulatory activity within the scope of the system of Interregional Law by Autonomous Communities possessing their own civil laws, the majority opinion is that although *firstly* the Autonomous Communities cannot under any circumstances draw up rules of conflict, in consideration both of the literal meaning of the reservation set forth in art. 149.1.8 *CE* ("norms for resolving conflicts of laws") and of the very nature of the procedure of conflict, in so far as this procedure (which is multilateral) entails technical recourse to localisation and regulation of cases having connections with different systems of law; it must *secondly* be allowed that these procedures may resort to certain regulatory techniques (unilateral by definition) appropriate for determining the scope of application of their own

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[56] E. Lalaguna Domínguez, *La diversidad de legislaciones civiles en España*, Tirant lo Blanch, Valencia, 1998, pp. 149–168; L. Martínez Vázquez de Castro, *Pluralidad de Derechos civiles españoles. El artículo 149.1, Regla 8, de la C.E.*, Civitas, Madrid, 1997, pp. 122 *et seq.*

[57] J.J. Alvarez Rubio, J.J.: *Las normas de Derecho Interregional de la Ley 3/1992, de 1 de julio, de Derecho Civil Foral Vasco*, I.V.A.P., Oñati, 1995, pp. 37–41; and by the same author: "La necesaria reforma del sistema español de Derecho Interregional", *Cursos de Derecho Internacional de Vitoria-Gasteiz 1997*, Tecnos, pp. 296–299.

Law – otherwise in many instances this would affect matters of competence established by the Constitution and Statutes.[58]

As already noted, the post-constitutional situation as regards the drafting and functioning of the Spanish system of Interregional Law has prompted the emergence of major doubts, new questions and new problems, which in many cases can be deduced solely from what we have seen so far. The existence of these doubts, questions and problems demands equally new elements and perspectives which will eventually piece together and define a coherent system. All these are issues that we can only point to here, as it is not our purpose to enter into an in-depth analysis. But at all events, the fact that these have been individually identified and formulated shows that the system is not a "closed" one and its design is not complete. And this fact highlights the observation that the parts and elements furnished so far by the doctrine of the Constitutional Court are both inadequate and not always easy to fit.[59]

Here we cite two of these questions, purely by way of example: *One*, when in wholly internal pluri-connected situations the applicable civil law is determined in line with the Interregional Law solutions provided in the *Cc*, can such localisation be altered by the way that the Foral Law whose application is claimed determines its own scope of application? *Two*: when in a pluri-connected international situation the Spanish system of Private International Law establishes that Spanish civil law is applicable, must one then have recourse to the Interregional Law to determine which of the Spanish civil laws is the applicable one if all the subjective elements of the relationship are foreign? And could the reply to this question vary depending on the different Foral Laws?

To wind up these considerations, we would simply include some remarks on the options for regulation of the Spanish system of Interregional Law. The immediate option is the one set forth in art. 16.1 *Cc*, which establishes that internal conflicts of laws are to be resolved according to the rules of Private International Law (contained in Chapter IV of the Preliminary Title of the Civil Code itself) and necessarily indicates the application of certain "particularities".

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[58] Position defended by many authors, originally formulated by J.D.González Campos (see the various editions of the work, directed by E. Pérez Vera: *Derecho Internacional Privado*, vol. I, U.N.E.D., Madrid, and esp., 6th ed., 1996, p.66). The author however appears to abandon this position in the last edition of the collective work cited here, on the grounds that it does not conform to the doctrine of the Constitutional Court. (J.D. González Campos, in VV.AA., *Derecho Internacional Privado*, vol. I, U.N.E.D., Madrid, 1998, p. 71).

[59] For an example of these difficulties, see the question on "*vecindad civil*" and Spanish personal law with respecto to the new Foral systems" raised by R. Durán Rivacoba, *Hacia un nuevo sistema del Derecho foral y su relación con el ordenamiento civil común*, Dykinson, Madrid, 1993, pp. 106 *et seq.*; on the same question, this time in the specific case of the civil law of Valencia, see L. Martínez Vázquez de Castro, *Pluralidad de Derechos civiles españoles. El artículo 149.1, Regla 8, de la CE*, Civitas, Madrid, 1997, p. 212.

It should be said that the ones mentioned in art. 16.1 *Cc* are not all of the "particularities" that must technically be considered in the adaptation of solutions of conflict from Private International Law to interregional cases, but certainly the most outstanding particularity is the one that refers to the designation of *vecindad civil* as a connection determining personal law. The special importance of this designation lies in two factors: the frequency with which the Spanish system of conflict resorts to personal law (which in international cases is determined by nationality), and the essentiality of the traditional content of "Fueros" and Special laws in relation to matters coming within the scope of "personal status" (traditionally submitted to the personal law).

2. Vecindad civil[60]

The notion of "*vecindad civil*" first appeared in the Spanish system in the original text of art. 15 of the Civil Code of 1889.[61] It should be said that this Code, as noted *supra* in the analysis of the historical dimension of plurilegislation in Spain, established *provisional* or *transitory* recognition of the Foral civil laws, whose content was by then limited mainly but not exclusively to matters pertaining to what has traditionally been known as "personal status".

In effect, in 1889 *vecindad civil* was incorporated in the system of Interregional Law as one of the three criteria determining submission to each of the coexisting civil laws in Spain for matters relating to "personal status".[62] Its content is determined on the basis of length of time in residence in each of the territories – "Fuero" territories on the one hand and Common Law territories on the other – mediated by the possibility of resorting to options mentioned in specific declarations of will. Thus, personal status in Interregional Law was determined at that time, pursuant to art. 15 *Cc*, in consideration of three criteria: 1. *jus sanguinis*, 2. *jus soli* + option, and 3. *vecindad civil*, the prevailing precept being *reciprocal application* to all territories having different civil laws. This was the legal situation until the reform introduced in the Preliminary Title of the 1974 Civil Code (enacted by Decree 1836/1974, 31 May).

As noted earlier, the 1974 reform placed on a *permanent* footing the recognition of the coexistence of the Common Civil Law and the "Fueros" or Special civil laws whose contents had been fixed and set forth in the various Compilations. In the new version of the Preliminary Title of the Civil Code,

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[60] See note 8.

[61] For the notion of *vecindad* in Spanish Law prior to the Civil Code, see M. Coca Payeras, "Vecindad administrativa y vecindad civil. Génesis de un concepto legal", *R.J.C.*, 1981, no. 1, pp.135–144.

[62] F. De Castro Bravo, *Derecho Civil de España*, t. II, Madrid, 1952, p.470; M. Coca Payeras, "Vecindad administrativa y vecindad civil. Génesis de un concepto legal", *R.J.C.*, 1981, no. 1, pp. 144 *et seq.* and 174–175.

vecindad civil became *the sole connection* sanctioning and determining personal subjection to one of the civil laws coexisting in Spain, the other two original criteria being incorporated in the regime of *vecindad civil* itself.[63] The resulting system was thus a complex, mixed regime organised around *jus sanguinis* and *jus soli*, subject to the various different systems, grouped for general reference under a single notion – that is, *vecindad civil*. The system thus created is characterised by preferential recourse to *jus sanguinis*, qualified by some consideration of *jus soli* and possible options, and ultimately impaired by an excessively rigid and automatised process based on residence. The notion of *vecindad civil* is thus established as the sole consideration determining the solution of conflicts of laws in matters of personal status, both in conflicts of first and second order (in so far as it also defines personal dependence with respect to a district or locality with its own specific civil law). In this way the Code seeks to establish a general unitary notion, regime and application. Its general and unitary nature was however seriously affected by two centrifugal elements: first was the fact that the Compilation of the Foral Civil Law of Navarra of 1973 unilaterally determined *the Navarrese foral status* (a special situation that was definitively established after the Constitution of 1978 with the promulgation of the Act of Reintegration and Improvement of the Foral Regime of Navarra in 1982, which regulates the regime of the Navarrese foral civil status in the terms of its Compilation), and second was the process which began with the Constitution of 1978 (specifically with regard to art. 149.1.8) and the construction of the *State of Autonomous Communities*.[64]

In connection with the factors counter to the general and unitary nature of the notion of *vecindad civil* arising out of the Constitution of 1978, we may identify two separate processes: *one* relating to the drafting, interpretation and application of the reservation of legislative competence to the State in art. 149.1.8 *CE* as it relates to the rules for resolving conflicts of laws, and *another* relating to the drafting and promulgation of Statutes of Autonomy, and to the legislative activity of the Autonomous Communities pursuant to these Statutes.

As indicated earlier, from the outset the majority of the doctrine, taking art.

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[63] R. Bercovitz y Rodríguez Cano, "Comentario al artículo 14 del Código civil", in *Comentarios a las reformas del Código Civil*, vol. I, Tecnos, Madrid, 1977, pp. 703 *et seq.*; by the same author, "Comentario al art. 14 del *Cc*", in *Comentarios al Código Civil y Compilaciones Forales*, t. I, Edersa, Madrid, 1978, pp. 478 *et seq.*; A. Borrás Rodríguez, "Les ordres plurilégislatifs", *Recueil des Cours*, vol. 249, 1994-V, pp. 231–236; M. Coca Payeras, "Vecindad administrativa y vecindad civil. Génesis de un concepto legal", *R.J.C.*, 1981, no. 1, pp. 175–176.; J. Sapena Tomas, "Vecindad civil y conflictos interregionales", in *Curso monográfico sobre la Ley de Bases para la modificación del Título Preliminar del Código Civil*, Valencia, 1975, pp. 228 *et seq.*

[64] R. Bercovitz y Rodríguez Cano, "La vecindad civil en los Estatutos de las Comunidades Autónomas", *R.J.C.*, 1981, no. 2, pp. 366 *et seq.*; J.D. González Campos, *Curso de Derecho Internacional Privado*, I (policopiado), U.A.M., Madrid, 1984, p. 177.

149.1.8 *CE* in relation to the State's exclusive competence in the drafting of rules for the resolution of conflicts of laws, preferred the interpretation that the Constituent had clearly opted for a single, uniform, State-wide system of resolution of "conflicts of laws"[65] both internationally and internally. In this connection it is worth recalling the doctrine handed down by the *TC*, chiefly in decisions 72/1983, 29 July, and 156/1993, 6 May, whereby the exclusive competence in these matters of the State, which seeks to establish a single uniform system of Interregional Law, extends both to the design of the system for resolution of conflicts of laws and to the choice and drafting of the criteria of connection and the regime. This is therefore a subject-matter "entirely removed" from the legislative activity of the Autonomous Communities and "entirely divorced" from their competences.[66]

In the second place, a new set of problems was introduced by the drafting and promulgation of the Statutes of Autonomy, legal corpuses which were sanctioned by Organic Law and are hence also technically speaking State-wide norms. The Statutes introduced a new concept of personal affiliation, denominated "political condition" (*condición política*), in all Statutes, which is linked to *vecindad civil* inasmuch as the former is determined on the basis of the latter. This statutory regulation created a legal anomaly arising out of the mutual implication, in theory and practice, of three distinct and differentiable notions: *vecindad civil, vecindad administrativa*[67] and *political condition.*[68] For the purposes of this analysis the most relevant and striking consequence of this situation is probably the fact that art. 7.2 of the Statute of Autonomy of Catalonia and art. 6.2 of the Statute of the Balearics provide that foreigners

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[65] See the documentation and the papers "Vecindad Civil" and "Artículo 149.1.8[2] de la Constitución" in the *Congreso de Jurisconsultos sobre los Derechos Civiles Territoriales en la Constitución*, held at Zaragoza from 29 October to 1 November 1981; P. Lucas Verdú, "Penetración de la historicidad en el Derecho Constitucional Español. El art. 149.1.8[2] y disposición adicional primera de la Constitución", *Primer Congreso de Derecho Vasco: La actualización del Derecho Civil*, Inst. Vasco de Administración Pública, Oñate, 1983.

[66] R. Bercovitz Rodríguez Cano and Pérez de Castro N., *La vecindad civil*, La Ley-Actualidad S.A., Madrid, 1996, pp. 13–16.

[67] The notion of *vecindad administrativa* derives from art. 55.1 Regulation of Population and Territorial Demarcation of Local Authorities, 11 July 1986 (as it relates to art. 15 of Act 7/1985, 2 April, regulating the bases of Local Government): *Vecinos* [denizens] *of a municipality are those persons who habitually reside there, (...) and are registered in the local roll. A person acquires the condition of* vecino *whenever he or she is registered in the roll.*

[68] R. Bercovitz Rodríguez Cano, "Vecindad civil y nacionalidad", *A.D.C.*, t. XXXVI, 1983, esp. pp. 1155–1157; M. Coca Payeras, "Condición política, vecindad administrativa y vecindad civil balear. (En torno a los arts. 6° and 7° del Estatuto de Autonomía)", *Cuadernos de la Facultad de Derecho*, Palma de Mallorca, 1985, pp. 9–50; J.C. Fernández Rozas, "Nacionalidad, vecindad civil y vecindad administrativa: consideraciones sobre el desarrollo constitucional", *R.E.D.I.*, vol. XXXIII, no. 1, 1981, pp. 141–159.

acquiring Spanish nationality while having *vecindad administrative* in Catalonia or the Balearics are subject to Catalan or Balearic civil law. This means that in relation to art. 15.1 and 2 *Cc* (as worded in the reform introduced by Act 18/1990, 17 December):[69]

> *"1. Any foreigner acquiring Spanish nationality must on registering such acquisition opt for one of the following modes of citizenship:*
>
> *a) According to place of residence.*
>
> *b) According to place of birth.*
>
> *c) The last place of citizenship of either of his/her natural or adoptive parents.*
>
> *d) That of the spouse.*
>
> *This statement of option shall be submitted by the person so opting, by such person with the assistance of his/her legal representative, or by the latter depending on the capacity of that person to acquire nationality. Where the acquisition of nationality takes place by declaration or at the petition of the legal representative, the requisite authorisation must determine the vecindad civil for which option is made.*
>
> *2. Any foreigner acquiring Spanish nationality through naturalisation papers shall have whatever vecindad civil is determined by the granting Royal Decree taking into account that person's option with reference to the foregoing paragraph or other circumstances relating to the applicant.*
>
> ...",

foreigners acquiring Spanish nationality and having *vecindad administrativa* in the territories of the Regions cited are subject to the civil law of these Regions, even if under the cited provision of the *Cc* at the time of naturalisation they opted for a citizenship ("regional", that is) other than that of their administrative citizenship.[70] To conclude these reflections on the breakdown of the general and unitary applicability of the legal category of "*vecindad civil*"[71] as a linking criterion in Interregional Law, we would stress that the consequence here analysed is not readily reconciled with the doctrine handed down by the Constitutional Court, which seeks to guarantee the establishment of a single system of Interregional Law. Although the Statutes of Autonomy are State-wide norms, which means that the exclusive competence of the State in these matters is

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[69] R. Bercovitz Rodrguez Cano, "Comentario al art. 15 del Código civil", in *Comentarios al Código civil y Compilaciones forales*, t. I, vol. 2°, EDERSA, Madrid, 1995, pp. 1248-1259; R. Bercovitz Rodríguez Cano and N. Pérez de Castro, *La vecindad civil*, La Ley-Actualidad S.A., 1996, pp. 57 *et seq.*; R. Durán Rivacoba, *Derecho Interregional*, Dykinson, Madrid, 1996, pp. 123–139.

[70] L. Martínez Vázquez de Castro, *Pluralidad de Derechos civiles españoles. El artículo 149.1, Regla 8, de la CE*, Civitas, Madrid, 1997, pp. 130 *et seq.*

[71] R. Bercovitz Rodriguez Cano and N. Pérez de Castro, *La vecindad civil*, La Ley-Actualidad S.A., Madrid, 1996, pp. 16–19.

arguably intact, what does clearly emerge is the breakdown of the aspiration to a single, uniform system.

Turning specifically to the substance of the notion and how it is regulated, arts. 14 and 32.1 *CE* directly affected art. 14.4 *Cc* (whose content was derived from the above-cited 1974 reform of the Preliminary Title of the *Cc*),[72] on whose constitutionality serious doubts were cast. This situation elicited opinions favourable to automatic repeal of the precept on the grounds of *post facto* unconstitutionality and opinions favourable to its maintenance, but all acknowledged an urgent need for reform. In addition, doubts arose as to whether art. 15.1 *Cc* could fit into the legal framework provided by the Constitution, given that its regulation (again based on the 1974 reform) contained a criterion that was clearly centralist and created exceptions to every one of the bodies of Foral civil law, which clearly ran counter to the Constitution's recognition of equality of treatment for the different systems of civil law.

Apart from the constitutional problems that this notion entailed, the prospect of reform also raised two equally problematical questions: the effectiveness of the system of options and declarations, and the difficulty entailed in proving a person's *vecindad civil* at any particular moment in time. Practical experience demonstrated the scarcity if not absence of options and declarations under the system created by art. 14 *Cc* in the regime of modification or preservation of *vecindad civil*. This seemed to suggest a lack of social awareness and inadequate knowledge of how the legal system works. For all these reasons, observers concluded that any reform that based the regime of *vecindad civil* on more or less complex systems of options and declarations was unrealistic.

Given that the system was really based on *jus sanguinis* and was automatically modified by continuous residence (10 years), the difficulty of proof of *vecindad civil* lay essentially in the theoretical need for retrospective analysis ad infinitum of the vicissitudes of the actual legal situation of ancestors in respect of *vecindad civil*. The existence and proof of these difficulties gave rise to the establishment of legal presumptions as to the determination of the connection. At the same time, the very existence of such a system of legal presumptions highlighted the ineffectiveness of the way in which that system of acquisition and loss of *vecindad civil* was regulated.

Despite the "urgency" of the reform, it was not introduced until 1990. Act 11/1990 15 October (reform of the Civil Code in obedience to the principle of non-discrimination by reason of sex) reformed arts. 14 and 16 *Cc*, and Act 18/1990 17 December (reform of the Civil Code as it relates to nationality) amended art. 15

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[72] For an analysis of the institution at its origins following the reform of the Preliminary Title of the *Cc* of 1974, and in the early post-constitutional phase, see the work of I. Ribas Alguero, *La vecindad civil: problemática en torno a su régimen jurídico y a su prueba*, Bosch, Barcelona, 1984.

Cc.[73] Especially in the case of art. 14 *Cc*, which establishes the regime of connection, the reform adapted the regulations in this respect to the strictures of the Constitution. However, it did not prevent the emergence of problems akin to the ones described above (the effectiveness of the system of options and declarations and the difficulty of proving *vecindad civil*). In fact art. 14 *Cc* provides as follows:[74]

"1. Vecindad civil determines whether the person is subject to common civil law or to a special or Foral law.

2. Children of parents possessing vecindad civil in a common law territory or a special or Foral law have the same vecindad civil as their parents.

In cases of adoption, a dependent adopted child acquires the vecindad civil of the adoptive parents.

3. If at the time a child is born or adopted the parents possess different vecindades civiles, the child shall have that of the parent whose filiation was determined first; failing this, it shall have the vecindad civil of its place of birth, and failing all else it shall have the common-law vecindad civil.

This notwithstanding, the parents, or whichever of the parents possesses or has been awarded legal custody, may assign the child the vecindad civil of either parent within the first six months following its birth or adoption.

The removal or suspension of legal custody or a change of residence of the parents shall not affect the vecindad civil of their children.

In any event, from the time that the child reaches the age of fourteen until one year after he/she becomes independent, that child may choose between the vecindad civil of his/her place of birth and the vecindad civil of the last place of residence of either of his/her parents. If the child is still dependent, he/she must be assisted by his/her legal representative in choosing.

4. Vecindad civil is not affected by marriage. However, where a couple are not in a situation of legal or de facto separation, either spouse may opt at any time for the vecindad civil of the other.

5. Vecindad civil is acquired:

i) By two years of continuous residence, provided that the person concerned states that this is his/her will.

ii) By ten years of continuous residence without any contrary declaration during that time.

Both declarations must be entered in the Civil Registry and need not be reiterated.

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[73] R. Durán Rivacoba, *Derecho Interregional*, Dykinson, Madrid, 1996, pp. 37–52.

[74] R. Bercovitz Rodríguez Cano, "Comentario al artículo 14 del Código civil", in *Comentarios al Código civil y Compilaciones forales*, t. I, vol. 2°, EDERSA, Madrid, 1995, pp. 1201–1248; R. Bercovitz Rodríguez Cano and N. Pérez de Castro, *La vecindad civil*, La Ley-Actualidad S.A., 1996, pp. 21 *et seq.*; R. Durán Rivacoba, *Derecho Interregional*, Dykinson, Madrid, 1996, pp. 53–122.

6. In case of doubt the vecindad civil of the place of birth shall prevail."

The system then still rests *in the first place* on *jus sanguinis* complemented by possible options; *in the second place, jus solis* is residually applicable, again with certain options; and *in the third place* there is the consideration of residence, which in one case allows a new option and in the other causes an automatic change of *vecindad civil*[75]. Insofar as the family as a legal unit is not a constitutionally relevant value or a recognised unit in the system, application of the regime provided by art.14 *Cc* does nothing to prevent the coexistence of more than one *vecindad civil* in a single family. In this same connection, inasmuch as marriage does not alter *vecindad civil*, where the spouses have different *vecindad civils* the family can only be brought under one law if its members actively seek to achieve this, since the only way is to resort to the system of options.

We must therefore conclude that given the legal interplay of options and declarations of will, the proper functioning of the system of attribution, acquisition and modification of *vecindad civil* requires the "collaboration" of the interested parties. To that end a good knowledge of the system and its application would be required, and above all a good knowledge of the juridical consequences of the legal operation of the *vecindad civil* connection. Otherwise, certain consequences which are simply the result of ignorance could be attributed to implied wills. These considerations are especially pertinent bearing in mind that from a sociological standpoint, only in some of the Autonomous Communities with their own civil law and only in some clearly identifiable sectors of their population or of the members of their cultural community is there a clear consciousness of belonging to and having legal ties with that community, and a conscious awareness of the functioning of the system.

At the same time, we would also criticise the fact that when the legislator has needed to lay down deciding clauses (arts. 14.3 and 16.3 *Cc*) he has done so in favour of Common Law and to the detriment of the Foral Laws. It has even been suggested in this connection that the reform has led to discrimination among the legal systems coexisting in Spain.[76]

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[75] R. Durán Rivacoba, *El nuevo régimen de la vecindad civil y los conflictos interregionales*, Dykinson, Madrid, 1992, pp. 27 *et seq.*

[76] A. Borrás Rodríguez, "La Ley 11/1990, de 15 de octubre: de la no discriminación por razón de sexo a la discriminación entre los ordenamientos jurídicos",