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## Plurality of Laws, Legal Traditions and Codification in Spain

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# PLURALITY OF LAWS, LEGAL TRADITIONS AND CODIFICATION IN SPAIN

Aniceto Masferrer<sup>\*</sup>

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## I. INTRODUCTION

One may ask to which extent is codification compatible with the existence of a plurality of laws and the validity of different legal traditions within a jurisdiction. Perhaps at the first glance the title of this article may look provocative. That is not my intention though. I just want to make clear three points. First, Spanish legal history shows the existence of different legal traditions which are, in turn, composed of a plurality of laws. Second, I will show the compatibility of this variety of laws and legal traditions with the codification movement or, in other words, how Spain uncovers the myth whereby codification necessarily implies legal unification. And third, I will conclude with some considerations regarding the presence of the past in the current, Spanish private law system. In doing so, I will divide the paper into three parts. First, I will briefly explain both the plurality of

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laws and legal traditions in Spain; second, I will turn to what, in my view, should be considered regarding the compatibility between the existence of different legal traditions and the codification movement; and third, I will conclude with some reflections on the presence of the past concerning the current validity of different legal traditions in Spain.

## II. A BRIEF HISTORIOGRAPHICAL OVERVIEW: SPANISH LEGAL TRADITION? SPANISH LEGAL TRADITIONS

Spanish history has witnessed a long legal development which goes from the period of its legal Romanization until today.<sup>1</sup> Interestingly enough, it has been said—although not always recognized by non-Spanish scholars<sup>2</sup>—that Spanish legal history is one of the most instructive, oldest and richest legal tradition which has ever existed, a statement which could have been hardly written by a Spanish scholar. Instructive, because “Few countries have experienced so many vicissitudes as Spain; and few, if any, present more varied and more instructive lessons in social sciences . . . (than) the ancient history of Spain.”<sup>3</sup> Considering at least that

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1. An interesting question to pose is at what time Spanish legal history really begins. There are different views among legal historiography. Some state that it begins with the Roman conquest (218 B.C), others with the Visigothic period (476 or 568 AD), and others with the Constitution of Cádiz (1812). They give all different arguments to defend their own views. I think it is better to start from the beginning, that is, before the Romanization of the Iberian Peninsula, since it will enable us to cover the history of Roman law in Spain which constituted an important characteristic not only of Spanish legal tradition but also of civil law countries.

2. In my opinion, this is due to the fact that few non-Spanish legal historians can read Spanish, and that Spanish legal historians have made little effort to publish in other languages different from those used in Spain. Nevertheless, this is another matter that does not concern the topic of this paper.

3. Schmidt stated in the nineteenth century that:

Few countries have experienced so many vicissitudes as Spain; and few, if any, present more varied and more instructive lessons in social sciences . . . the ancient history of Spain [referring to the period of Iberians, Celts and Phoenicians], though obscure and by time and disfigured by fables, affords sufficient information to enable us to ascertain that it was at a very early period a rich and flourishing kingdom.

GUSTAVUS SCHMIDT, *THE CIVIL LAW OF SPAIN AND MEXICO* 9 (New Orleans, 1851).

Spanish legal history should cover all laws made and applied throughout history in the territories that have formed part of Spain, it is clear that Spanish legal history is quite long and rich. As Putnam says, "it possesses one of the oldest developed systems of law—a composite of Roman, Germanic and Arabic elements, with a strong infusion of canon law."<sup>4</sup> Kleffens stated that "there is no doubt that the history of Spanish law in the Middle Ages is exceptionally rich."<sup>5</sup>

There is no doubt, as Kleffens recognized, of the richness of "Spanish law in the Middle Ages," which comes not just from the fact of the presence of a plurality of laws, but of different legal systems or traditions. In fact, a clear feature of the Spanish historiography has largely been the study of legal sources and institutions of the different Spanish (or Hispanic) legal entities (Castile, Aragon, Catalonia, Valencia, Majorca, Navarre, etc.). A brief look at the considerable number of Spanish legal history

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4. Putnam also says that:

... Spain offers a fruitful field for study. It possesses one of the oldest developed systems of law—a composite of Roman, Germanic and Arabic elements, with a strong infusion of canon law; it is growing in industrial and commercial importance; it is participating actively in the legislative movement for social and economic reform; and—of particular interest to us—is the mother of the legal system of a large part of the world in which we have vital interests.

and later on, the same author states that:

the history of Spanish law assumes far more than a local importance. In the early Spanish codes and compilations may be traced some of the most lasting institutions of Roman law, and they were the medium through which Spain carried her law into the new world.

HERBERT PUTNAM, *preface to* THOMAS W. PALMER, JR.: *GUIDE TO THE LAW AND LEGAL LITERATURE OF SPAIN* 4, 26 (Washington, Gov't Printing Office, 1915).

5. Kleffens says that:

there is no doubt that the history of Spanish law in the middle Ages is exceptionally rich; its study cannot but broaden the law-student's understanding, and open his eyes to his merits and demerits of a great many solutions for a great many problems which, through the ages, are basically and generally the same everywhere . . . Surely, a legal system of such unique magnitude would seem to deserve more attention than it has hitherto received beyond the frontiers of Spain.

E.N. VAN KLEFFENS, *HISPANIC LAW UNTIL THE END OF THE MIDDLE AGES* 27-28 (Edinburgh, 1968). *See also* J. O'CALLAGHAN, *HIST. OF MEDIEVAL SPAIN* (Cornell, Univ. Press, 1975).

handbooks would be enough to realize the importance and autonomy of the different kingdoms in creating and developing their legal traditions,<sup>6</sup> although none of them dared to state explicitly this important point in the very title of the handbook.<sup>7</sup>

The plurality of laws—or legal pluralism<sup>8</sup>—in Spanish legal history does not just refer to the duality between *ius commune* and *ius proprium* (or *iura propria*).<sup>9</sup> In Spain, for example, the variety of legal sources of the different kingdoms was, like in other European territories, considerable. A legal historian dealing with the Spanish case, then, has to make the necessary effort to capture a clear picture of the different Spanish

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6. See e.g. SANTOS M. CORONAS GONZÁLEZ, *MANUEL DE HISTORIA DEL DERECHO ESPAÑOL* (Valencia, 1999); JOSÉ ANTONIO ESCUDERO LOPÉZ, *CURSO DE HISTORIA DEL DERECHO: FUENTES E INSTITUCIONES POLÍTICO-ADMINISTRATIVAS* (Madrid, 2003); R. FERNÁNDEZ ESPINAR, *MANUEL DE HISTORIA DEL DERECHO ESPAÑOL* (Madrid, 1989); JOSEP M<sup>a</sup> FONT I RIUS, *APUNTES DE HISTORIA DEL DERECHO ESPAÑOL TOMADOS DE LAS EXPLICACIONES ORDINARIAS DE LA CÁTEDRA: PARTE GENERAL: LA EVOLUCIÓN GENERAL DEL DERECHO ESPAÑOL: LECCIONES 1-37 DEL PROGRAMA DE CLASES* (Barcelona, Univ., D.L., 1974); ENRIQUE GACTO FERNÁNDEZ ET AL, *DERECHO HISTÓRICO DE LOS PUEBLOS DE ESPAÑA* (Madrid, 1992); ALFONSO GARCIA GALLO, *MANUEL DE HISTORIA DEL DERECHO* (Madrid, 1992); RAFAEL GIBERT, *HISTORIA GENERAL DEL DERECHO ESPAÑOL* (Madrid, 1975); AQUILINO IGLESIA FERREIROS, *LA CREACIÓN DEL DERECHO: UNA HISTORIA DE LA FORMACIÓN DE UN DERECHO ESTATAL ESPAÑOL* (2 vols., Barcelona, 1992); JESÚS LALINDE, *INICIACIÓN A LA HISTORIA DEL DERECHO ESPAÑOL* (Madrid, 1989); *HISTORIA DEL DRET ESPANYOL* (Tomàs Montagut Estragués coord., edicions de la Universitat Oberta de Catalunya, Barcelona, 1998); MARIANO PESET ET AL, *HISTORIA DEL DERECHO* (Valencia, 1989); ROGELIO PÉREZ-BUSTAMANTE, *HISTORIA DEL DERECHO ESPAÑOL. LAS FUENTES DEL DERECHO* (Madrid, Dykinson, 1994); JOSÉ MANUEL PÉREZ PRENDES, *CURSO DE HISTORIA DEL DERECHO ESPAÑOL* (Madrid, 1990); GALO SÁNCHEZ, *CURSO DE HISTORIA DEL DERECHO ESPAÑOL: INTRODUCCIÓN Y FUENTES* (Valladolid, 1980); FRANCISCO TOMÁS Y VALIENTE, *MANUEL DE HISTORIA DEL DERECHO ESPAÑOL* (Madrid, 1992).

7. An exception can be found in ANICETO MASFERRER, *SPANISH LEGAL TRADITIONS: A COMPARATIVE LEGAL HISTORY OUTLINE* (Madrid, Dykinson, 2009).

8. On the distinction between the expressions “plurality of laws” and “legal pluralism,” see Séan Donlan, *All this together make up our Common Law: legal hybridity in England and Ireland, 1704-1804*, in *MIXED LEGAL SYSTEMS AT NEW FRONTIERS* (Esin Öricü ed., London, Wildy, Simmonds & Hill Publishing, 2010), and bibliographical references concerning this matter contained in Donlan’s article.

9. As said, the *ius commune*, or common law, co-existed with the particular law of every European kingdom or jurisdiction, called *ius proprium*. As a result, from the Late Middle Ages to the Modern Ages, there was a duality between the *ius commune* and *ius proprium*.

legal traditions. In doing so, the legal systems of Castile, Catalonia, Aragon, Valencia, Majorca, Navarre and Basque territories (Guipúzcoa, Alava and Vizcaya) need to be analyzed from different aspects, revolving all of them around the plurality of legal sources. A possible scheme of its structure may be as follows:<sup>10</sup>

- a) brief presentation of the main legal sources (local, territorial and general—or common to the whole kingdom—from the Modern Age, the general legal sources enacted to be in force within the territory of the whole monarchy should also be mentioned);
- b) the role of the *ius commune* in the different Spanish legal traditions;
- c) the *Cortes* and the King as lawmakers;
- d) the enforcement of the law in a juridical system of divergent legal sources: the hierarchy of legal sources; and
- e) the role of the judicial precedent and legal doctrine in developing law and legal science.

Furthermore, the historical approach of Spanish Law shows, leaving aside political and ideological tendencies, the existence of diverse cultures—Christian, Muslim, and Jewish, and different ethnic groups that populated the Iberian Peninsula.<sup>11</sup> Spain was—and is still—“an aggregation of different regions, diverse populations and languages, with historical struggles to maintain a centralized national ‘Spanish’ State in the face of cultural pluralism.”<sup>12</sup>

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10. MASFERRER, *supra* note 7, at 161-219.

11. O. R. CONSTABLE, *MEDIEVAL IBERIA: READINGS FROM CHRISTIAN, MUSLIM AND JEWISH SOURCES* (U. Pa. Press, 1997).

12. JOHN A. CROW, *SPAIN: THE ROOT AND THE FLOWER* (1985); *see also* WOODROW BORAH, *JUSTICE BY INSURANCE: THE GEN. INDIAN COURT OF COLONIAL MEXICO AND THE LEGAL AIDES OF THE HALF-REAL* 6 (1983) (in this sense, it has been said that following the complete Reconquest of Spain by Christians in 1492, the national legal system that emerged was based on beliefs “that there was a natural law binding on all people and peoples whoever they might be,” and there was “a variety of human observance, all of it permissible so long as it did not conflict with natural law and *ius gentium*,” “a common body of law and custom that might be found in the practices of all peoples.”); *but see* PATRICIA SEED, *CEREMONIES OF POSSESSION IN EUROPE’S CONQUEST OF THE NEW WORLD 1492-1640* 69, 99 (1995) (It has also recognized that, when

As said, legal historiography has made clear this important aspect of Spanish legal history, dealing with the legal traditions of different kingdoms from the Middle Ages up until Late Modern Age. Literature on this matter written—and published—in English or/and by non-Spanish scholars have also emphasized this point, distinguishing the different kingdoms and their diverse legal sources and institutions.<sup>13</sup> In doing so, Castile<sup>14</sup> and Aragon<sup>15</sup> have been much more explored than Catalonia,<sup>16</sup> Valencia,<sup>17</sup> and the

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Christians retook control of Spain, “Moslems were allowed to live under their own law and custom and to resort to their own courts for matters concerning themselves”); see also Donald Juneau, *The Light of Dead Stars*, 1 AM. INDIAN L. REV. 11, 13 (1991) (when the Spanish occupied the New World, for example, they also recognized Indian laws and courts. On August 6, 1555, Emperor Don Carlos (Charles V) and Queen Doña Juana issued a decree that “ordered and commanded” that “the laws and good customs” of Indians, along with their “usages and customs,” must “be kept and enforced.” This principle, firmly accepted in Spanish Indian Law, was lost when new states emerged in Latin America following the period of revolutions.).

13. J. HILLGARTH, *THE SPANISH KINGDOMS, 1250-1517*, (2 vols., Oxford, Clarendon Press, 1976-1978); A. MCKAY, *SPAIN IN THE MIDDLE AGES: FROM FRONTIER TO EMPIRE, 1000-1500* (London, Macmillan, 1977); DAVID ABULAFIA, *THE WESTERN MEDITERRANEAN KINGDOMS 1200-1500* (Longman, 1997).

14. Charles Sumner Lobingier, *Las Partidas and its Predecessors*, 1 CALIF. L. REV. 487-498 (1912-1913); Charles Sumner Lobingier, *Las Siete Partidas in Full English Dress*, 15 AM. B. ASS'N J. 356-371 (1929); Madaline W. Nichols, *Las Siete Partidas*, 20 CALIF. L. REV. 260-285 (1931-1932); E.S. PROCTER, *ALFONSO X OF CASTILE* (Oxford, Clarendon, 1951); J. O'CALLAGHAN, *THE LEARNED KING: THE REIGN OF ALFONSO X OF CASTILE* (Philadelphia, 1993); J. O'CALLAGHAN, *THE CORTES OF CASTILE- LEÓN 1188-1350* (U. of Pa. Press, 1989) and E.S. PROCTER, *CURIA AND CORTES IN LEÓN AND CASTILE 1072-1295* both available at THE LIBRARY OF IBERIAN RESOURCES ONLINE <http://libro.uca.edu/title.htm> (Last visited November 7, 2011); T.F. Ruíz, *Unsacred Monarchy: The Kings of Castile in the Late Middle Ages* in T.F. RUIZ, *THE CITY AND THE REALM. BURGOS AND CASTILE 1080-1492* (1992).

On Castile and Aragon, see *THE WORLDS OF ALFONSO THE LEARNED AND JAMES THE CONQUEROR* (R. I. Burns ed., Princeton U. Press, 1985) available at THE LIBRARY OF IBERIAN RESOURCES ONLINE <http://libro.uca.edu/title.htm> (Last visited November 7, 2011).

15. RALPH E. GIESEY, *IF NOT, NOT: THE OATH OF THE ARAGONESE AND THE LEGENDARY LAWS OF SOBRARBE* (Princeton U. Press, 1968); T. BISSON, *THE MEDIEVAL CROWN OF ARAGON: A SHORT HISTORY* (Oxford, 1986).

16. T.N. BISSON, *THE PROBLEM OF FEUDAL MONARCHY: ARAGÓN, CATALONIA AND FRANCE 460-478* (Speculum, 1978); JOSEP M. MAS I SOLENCH, *THE CIVIL LAW OF THE CATALANS* ( Generalitat de Catalunya, Barcelona, 1990); P. FREEMAN, *THE ORIGINS OF PEASANT SERVITUDE IN MEDIEVAL CATALONIA* (Cambridge Univ. Press, 1991); *THE CUSTOMS OF CATALONIA BETWEEN LORDS AND VASSALS BY THE BARCELONA CANON, PERE ALBERT: A PRACTICAL GUIDE*

other Spanish kingdoms.<sup>18</sup> The Spanish historiography also shows the autonomy enjoyed by kingdoms in creating and developing their own legal traditions,<sup>19</sup> synthesizing the peculiarities of

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TO CASTLE FEUDALISM IN MEDIEVAL SPAIN (Donald J. Kagay trans., Arizona Center for Medieval and Renaissance Studies, Tempe, 2002); Ferràn Badosa Coll, "...*Quae ad ius Cathalanicum pertinent*:" *The Civ. L. of Catalonia*, *Ius Commune and the Legal Tradition*, in REGIONAL PRIVATE LAWS AND CODIFICATION IN EUROPE 136-163 (H.L. MacQueen, A. Vaquer and S. Espiau eds., Cambridge Univ. Press, 2003).

17. REMEDIOS FERRERO MICÓ, THE LIMITS TO ROYAL POWER: "CONTRAFUEROS" OR ACTIONS AGAINST VIOLATIONS OF PRIVILEGES IN THE VALENCIAN PARLIAMENTARY ASSEMBLIES UNTIL 1604 145-158 (Parliaments, Estates & Representation 27, 2007); REMEDIOS FERRERO MICÓ, THE FINANCIAL AUTONOMY OF THE MUNICIPALITIES AND THE VALENCIAN PARLIAMENT (Parliaments, Estates & Representation 29, 2009).

18. In the Spanish historiography, see C. Petit, *De Iustitia et Iure Retentionis Regni Navarrae*, in CENTRALISMO Y AUTONOMISMO EN LOS SIGLOS XVI-XVII: HOMENAJE AL PROFESOR JESÚS LAINDE ABADÍA 319-337 (Barcelona, Univ. de Barcelona, 1990); J.L. DE ORELLA UNZÚE, LAS INSTITUCIONES DEL REINO DE NAVARRA EN LA EDAD ANTIGUA Y MEDIA. LAS INSTITUCIONES DE LA BAJA NAVARRA (1530-1620) (San Sebastián, 1991); V. VÁZQUEZ DE PRADA, LAS CORTES DE NAVARRA DESDE SU INCORPORACIÓN A LA CORONA DE CASTILLA: TRES SIGLOS DE ACTIVIDAD LEGISLATIVA (1513-1829) (Pamplona, 1993); M. Galán Lorda, *Los manuscritos del Fuero General de Navarra Existentes en Pamplona*, in 57 ANUARIO DE HISTORIA DEL DERECHO ESPAÑOL 579-607 (1987); Mercedes Galán Lorda, *Los Amejoramientos al Fuero General de Navarra en los Manuscritos de Pamplona* 7 REVISTA JURÍDICA DE NAVARRA 97-132 (Pamplona, 1989); M. Galán Lorda, *Las fuentes del Fuero Reducido de Navarra*, 1 EL FUERO REDUCIDO DE NAVARRA 93-773 (Pamplona, 1989); J. García-Granero Fernández, *Fuero viejo' y 'Fuero nuevo' de Navarra*, in ANUARIO DE DERECHO FORAL 131-216 (1975); Estudio sobre el capítulo 3, 20, 6 in *Fuero General de Navarra: Un Texto Recibido del Derecho Romano*, in 46 ANUARIO DE HISTORIA DEL DERECHO ESPAÑOL 225-345 (1976); J.M. Lacarra, *En torno a la Formación del Fuero General de Navarra* 50 ANUARIO DE HISTORIA DEL DERECHO ESPAÑOL 93-110 (1980) ; A. MARICHALAR & C. MANRIQUE, HISTORIA DE LOS FUEROS DE NAVARRA, VIZCAYA, GUIPUZCOA Y ALAVA (San Sebastián, 1980); A.J. Martín Duque, *El Fuero General de Navarra. Una Redacción Arcaica* 56 ANUARIO DE HISTORIA DEL DERECHO ESPAÑOL 781-861 (1986); see also GREGORIO MONREAL ZIA, THE OLD LAW OF BIZCAIA (1452): INTRODUCTORY STUDY AND CRITICAL EDITION 21-160 (William A. Douglass & Linda White eds., Center for Basque Studies, Univ. of Nevada, 2005).

19. It would be too long to exhaustively cite the Spanish legal historiography dealing with the different Spanish legal traditions; for a quite exhaustive list of articles and books published between 1973 and 1998 dealing with it, see José M<sup>a</sup> Puyol Montero, *Un Balance de 25 Años de Historiografía Histórico-Jurídica en España (1973-1998)*, 5 CUADERNOS DE HISTORIA DEL DERECHO 283-409 (1998).



Castile,<sup>20</sup> Aragon,<sup>21</sup> Catalonia,<sup>22</sup> Valencia,<sup>23</sup> Majorca,<sup>24</sup> Navarre<sup>25</sup> and the Basque Provinces.<sup>26</sup> In the Spanish historiography there

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20. Aquilino Iglesia Ferreirós, *La obra legislativa de Alfonso X El Sabio*, in ESPAÑA Y EUROPA. UN PASADO JURÍDICO COMÚN 275-599 (Murcia, 1986); Antonio Pérez Martín, *La Obra Legislativa Alfonsina y Puesto que en ella Ocupan Las Siete Partidas*, 3 GLOSSAE: REVISTA DE HISTORIA DEL DERECHO EUROPEO 9-63 (1992).

21. J. LALINDE ABADÍA, LOS FUEROS DE ARAGÓN (Zaragoza, 1976); G. Martínez Díez, *En Torno a los Fueros de Aragón de las Cortes de 1247*, 50 ANUARIO DE HISTORIA DEL DERECHO ESPAÑOL 68-92 (1980); A. PÉREZ MARTÍN, LAS GLOSAS DE PÉREZ DE PATOS A LOS FUEROS DE ARAGÓN (Zaragoza, 1993); see also Gobierno de Aragón, *Biblioteca Virtual de Derecho Aragonés*, available at <http://www.bivida.es> (Last visited December 16, 2011).

22. J.M. Gay i Escoda: *Eficàcia de les Normes a la Tradició Jurídica Catalana des de la Baixa Edat Mitjana Fins al Decret de Nova Planta*, 78 REVISTA JURÍDICA DE CATALUNYA 249-94, 505-586 (1979); T. de Montagut Estragués: *Pactisme o Absolutisme a Catalunya: Les Grans Institucions de Govern (siglos XV–XVI)*, 19 ANUARIO DE ESTUDIOS MEDIEVALES, 669-679 (1989); S. SOBREQUÉS VIDAL, HISTORIA GENERAL DEL DERECHO CATALÁN HASTA EL SIGLO XVIII (Nuria Mir trans., Barcelona, 1989); VÍCTOR FERRO, EL DRET PUBLIC CATALÀ. LES INSTITUCIONS A CATALUNYA FINS AL DECRET DE NOVA PLANTA (3rd ed. Eumo Vic ed., 1999); JOSEP M<sup>a</sup> MAS I SOLENCH, EL DRET CIVIL DELS CATALANS (3rd ed., Barcelona, Generalitat de Catalunya, 1990).

23. VICENTE GRAULLERA SANZ, HISTORIA DEL DERECHO FORAL VALENCIANO (Valencia, 1994); M. PESET, ET. AL., DERECHO FORAL VALENCIANO (Valencia, 1995); VICENTE L. SIMÓ SANTOJA, DERECHO HISTÓRICO VALENCIANO: PASADO, PRESENTE Y FUTURO (Valencia, Universidad Cardenal Herrera-CEU, 2002); J.A. OBARRIO MORENO, DE IUSTITIA ET IURE REGNI VALENTIAE: LA TRADICIÓN DE LAS FUENTES JURÍDICAS ROMANAS EN LA DOCTRINA VALENCIANA (Edisofer ed., Madrid, 2005); ANICETO MASFERRER & OBARRIO MORENO, J.A: LA FORMACIÓN DEL DERECHO FORAL VALENCIANO (Madrid, Dykinson, forthcoming).

24. ROMÁN PIÑA HOMS EL DERECHO HISTÓRICO DEL REINO DE MALLORCA (Ediciones Cort, Palma de Mallorca, 1993); Antonio Planas Rosselló, *La sucesión intestada de los impúberes y la supuesta aplicación de las Constituciones de Cataluña en Mallorca. Reflexiones en torno a un pleito, 1365–1378*, 8-9 IUS FUGIT 95-126 (1999-2000).

25. J. Angulo y de la Hornaza, *La abolición de los fueros e instituciones vascongadas. En torno a un centenario, 1876-1976*, 2 SAN SEBASTIÁN (1976); R. GÓMEZ RIVERO, EL PASE FORAL EN GUIPÚZCOA EN EL SIGLO XVIII (Sevilla, 1982); R. Gómez Rivero, *Análisis comparado del pase foral en el País Vasco a partir del siglo XVIII*, 39 BOLETÍN DE LA REAL SOCIEDAD VASCONGADA DE AMIGOS DEL PAÍS 3-4 (1983); J.M. del Portillo Valdés, *El “provincialismo exacerbado.” La consolidación del régimen foral vasco 1845-1850*, 56 ANUARIO DE HISTORIA DEL DERECHO ESPAÑOL 167-218 (1986); see also RAFAEL D. GARCÍA PÉREZ ANTES LEYES QUE REYES: CULTURA JURÍDICA Y CONSTITUCIÓN POLÍTICA EN LA EDAD MODERNA, NAVARRA, 1512-1808 (Milano, Giuffrè Editore, 2008).

are also works containing the making and development of both legal sources<sup>27</sup> and institutions governing several kingdoms, either belonging to the same crown,<sup>28</sup> or from different crowns.<sup>29</sup>

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26. See e.g. Rivero, *supra* note 25, at 3-4; for a panoramic overview of the legal traditions of the different kingdoms, see ANICETO MASFERRER, SPANISH LEGAL TRADITIONS, *supra* note 7, at 161-219.

27. See e.g. Ana M<sup>a</sup> Barrero García, *El Derecho local, el territorial, el general y el común de Castilla, Aragón y Navarra*, in DIRITTO COMUNE E DIRITTO LOCALI NELLA STORIA DELL'EUROPA 263 (1980); ENRIQUE ÁLVAREZ CORA, LA PRODUCCIÓN NORMATIVA MEDIEVAL SEGÚN LAS COMPILACIONES DE SICILIA, ARAGÓN Y CASTILLA (1998).

28. Concerning the crown of Aragón, see Lalinde Abadía, "Las instituciones de la Corona de Aragón en la crisis del siglo XIV", in *La mutación de la segunda mitad del siglo XIV en España*, 8 CUADERNOS DE HISTORIA. ANEXOS DE LA REVISTA 155-170 (1977); *El Derecho y las instituciones político-administrativas del Reino de Aragón hasta el siglo XVIII (Situación actual de los estudios)*, in 2 I JORNADAS SOBRE EL ESTADO ACTUAL DE LOS ESTUDIOS SOBRE ARAGÓN, TERUEL, DEC. 18-20, 1978 599-624 (Zaragoza, 1979); *El pactismo en los reinos de Aragón y de Valencia*, in EL PACTISMO EN LA HISTORIA DE ESPAÑA (Madrid, 1980); *El Derecho común en los territorios ibéricos de la Corona de Aragón*, in ESPAÑA Y EUROPA: UN PASADO JURÍDICO COMÚN 145-178 (Murcia, 1986); T. de Montagut Estragués, *El renacimiento del poder legislativo y la Corona de Aragón (siglos XIII-XIV)*, in ANDRÉ GOURON & ALBERT RIGAUDIÈRE, RENAISSANCE DU POUVOIR LEGISLATIF ET GENÈSE DE L'ÉTAT 165-177 (Montpellier, 1988).

29. P. DOMÍNGUEZ LOZANO, LAS CIRCUNSTANCIAS PERSONALES DETERMINANTES DE LA VINCULACIÓN CON EL DERECHO LOCAL: ESTUDIO SOBRE EL DERECHO LOCAL ALTOMEDIEVAL Y EL DERECHO LOCAL ARAGÓN, NAVARRA Y CATALUÑA (Madrid, 1988); concerning the custom as a legal source, see F.L. Pacheco, *Ley, costumbre y uso en la experiencia jurídica peninsular bajomedieval y moderna*, in EL DRET COMÚ I CATALUNYA. ACTES DEL IV SIMPOSI INTERNACIONAL. HOMENATGE AL PROFESSOR JOSEP M. GAY ESCODA 75-146 (Barcelona, Fundació Noguera, 1995).

Concerning the history of criminal law, see MANUEL TORRES AGUILAR, EL PARRICIDIO: DEL PASADO AL PRESENTE DE UN DELITO (1991); MIGUEL ÁNGEL MORALES PAYÁN, LA CONFIGURACIÓN LEGISLATIVA DEL DELITO DE LESIONES EN EL DERECHO HISTÓRICO ESPAÑOL (Madrid, 1997); MIGUEL PINO ABAD, LA PENA DE CONFISCACIÓN DE BIENES EN EL DERECHO HISTÓRICO ESPAÑOL (1999); F.J. BURILLO ALBACETE, EL NACIMIENTO DE LA PENA PRIVATIVA DE LIBERTAD (1999); ANICETO MASFERRER, LA PENA DE INFAMIA EN EL DERECHO HISTÓRICO ESPAÑOL: CONTRIBUCIÓN AL ESTUDIO DE LA TRADICIÓN PENAL EUROPEA EN EL MARCO DEL IUS COMMUNE (2001); JUAN SAINZ GUERRA, LA EVOLUCIÓN DEL DERECHO PENAL EN ESPAÑA (2004); ISABEL RAMOS VÁZQUEZ, ARRESTOS, CÁRCELES Y PRISIONES EN LOS DERECHOS HISTÓRICOS ESPAÑOLES (Dirección General de Instituciones Penitenciarias, 2008).

### III. SPANISH LEGAL TRADITIONS, LEGAL UNIFICATION AND CODIFICATION

The current Spanish legal system constitutes perhaps the clearest European model of codification without aiming at a complete unification of the law. Despite the French influence,<sup>30</sup> it could be said that the Spanish codification of private law was original and attached to its own legal tradition. An important aspect of that legal tradition consisted precisely in the co-existence of different legal traditions, enjoying all of the legislative powers in developing their own legal institutions. Is that compatible with the codification scheme? How did Spanish legal traditions manage to survive when going through a codification movement seems to aim—theoretically—at legal unification?

Spanish legal traditions show that it is not accurate to maintain that codification is a legal source or tool whose main purpose consists in complete unification of law. Whoever may think this way should make up his mind after considering the Spanish case.

It is true that in the nineteenth-century European codification movement, which took place in the context of two legal theories, namely, the iusnaturalism (or natural law theory) and the historicism, theoretically aimed at the unification of law, no matter its main source, was supposed to be found either in nature and reason, or in culture, history, and tradition.

I do not deny that in Spain the codification process did somehow lead to unify the law since, in fact, Spanish codification

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30. Merino-Blanco states that:

Prussia, Austria and France were the first European countries to have codes. However, it was the French *Code Civil* of 1804 which was the greatest of them all because of its technical perfection and the fact that it was elaborated in a country which already had a bourgeois revolution. The influence of the French Civil Code has been enormous. It was implemented and copied in several countries and inspired the codification of Civil law in many others, among them, Spain.

ELENA MERINO-BLANCO, THE SPANISH LEGAL SYSTEM 20-21 (Sweet and Maxwell, 1996). *But see*, Charles Sumner Lobingier, *A Spanish Object-Lesson in Code-Making*, 16 YALE L.J.411 (1906-1907) (defending a different thesis: "Doubtless the Spanish codifiers profited much from the Code Napoleon, but we have it on the authority of the eminent French jurist Levé, that the Spanish Code is the superior.").

constituted an important step towards unification. It could be said, then, that Spanish codification tended to unify private law, but not in a complete way. More specifically, if it is true that the codification of criminal law,<sup>31</sup> commercial law,<sup>32</sup> criminal procedure, and civil procedure<sup>33</sup> sought such an utter unification of law, the codification of private law never pursued to entirely unify the law.<sup>34</sup>

It is very well-known that technical and political obstacles were to be overcome to codify the law. In private law, political and technical problems arose in such a way that the whole nineteenth

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31. On the codification of Spanish criminal law, see Aniceto Masferrer, *Liberal State and Criminal Law Reform in Spain, The Rule of Law in Comparative Perspective*, 3 IUS GENTIUM: COMP. PERSP. ON L. AND JUST. 19-40 (2010); Aniceto Masferrer, *Codification of Spanish Criminal Law in the Nineteenth Century. A Comparative Legal History Approach*, 4 J. OF COMP. L. 96-139 (2009); ANICETO MASFERRER, *TRADICIÓN Y REFORMISMO EN LA CODIFICACIÓN PENAL ESPAÑOLA: HACIA EL OCASO DE UN MITO: MATERIALES, APUNTES Y REFLEXIONES PARA UN NUEVO ENFOQUE METODOLÓGICO E HISTORIOGRÁFICO DEL MOVIMIENTO CODIFICADOR PENAL EUROPEO* (2003); M<sup>a</sup> D. M. SÁNCHEZ GONZÁLEZ, *LA CODIFICACIÓN PENAL EN ESPAÑA: LOS CÓDIGOS DE 1848 Y 1850* (2004).

32. J. RUBIO, *SAINZ DE ANDINO Y LA CODIFICACIÓN MERCANTIL* (1950); see also J.M. EIZAGUIRRE, *EL DERECHO MERCANTIL EN LA CODIFICACIÓN DEL SIGLO XIX* (1987); E. GACTO, *El Código de comercio de 1885*, in *LA ESPAÑA DE LA RESTAURACIÓN. POLÍTICA, ECONOMÍA, LEGISLACIÓN Y CULTURA* 401-412 (1985); M. Peset Reig, *Arreglo de consulados' y Revolución burguesa: en los orígenes del moderno Derecho mercantil español*, 11 HISTORIA, INSTITUCIONES, DOCUMENTOS 255 (1984); Carlos Petit Calvo, *Oposición foral al Código de Comercio (1829)*, 59 ANUARIO DE HISTORIA DEL DERECHO ESPAÑOL 699-736 (1989); CARLOS PETIT CALVO, *DERECHO PRIVADO Y REVOLUCIÓN BURGUESA: II SEMINARIO DE HISTORIA DEL DERECHO PRIVADO, GERONA, 25-27 DE MAYO 1988* (Marcial Pons ed., 1990); CARLOS PETIT, *DERECHO MERCANTIL: ENTRE CORPORACIONES Y CÓDIGOS, HISPANIA: ENTRE DERECHOS PROPIOS Y DERECHOS NACIONALES* 315-500 (1990).

33. A. Fiestas Loza, *Codificación procesal y estado de la Administración de Justicia, 1875-1915*, in *LA ESPAÑA DE LA RESTAURACIÓN. POLÍTICA, LEGISLACIÓN, ECONOMÍA Y CULTURA* (Madrid, 1985); E. ÁLVAREZ CORA, *LA ARQUITECTURA DE LA JUSTICIA BURGUESA: UNA INTRODUCCIÓN AL ENJUICIAMIENTO CIVIL EN EL SIGLO XIX* (2002).

34. On the codification of Spanish civil law, see J.BARÓ PAZOS, *LA CODIFICACIÓN DEL DERECHO CIVIL EN ESPAÑA (1808-1889)* (1993); MASFERRER, *supra* note 7, at 354-370; Judit Valls Salada, *The Codification of Civil Law in Spain*, in *TURNING POINTS AND BREAKLINES* (S. Hornyák, B. Juhász, K. Korsós, and Z. Peres eds., 2009); see also Aniceto Masferrer, *Relations Between Neighbours in Spanish Law (1850-2000)*, in *THE DEVELOPMENT OF LIABILITY BETWEEN NEIGHBOURS: COMPARATIVE STUDIES IN THE DEVELOPMENT ON THE LAW OF TORTS IN EUROPE* 173-204 (James Gordley, ed., 2010).

century was needed to enact the current Spanish Civil Code. While the first code was passed in 1822 (Criminal Code), the Civil Code was enacted in 1889, with private law being the last legal branch to be codified.

That was because the promulgation of the Civil Code was not wished by everybody. The conservative elite did not want it for different reasons, being afraid of entering into the school of liberal thought, and preferring the Roman, Canonical and Spanish law that they had been acquainted. Besides, the nineteenth century was politically complex: the War of Independence, the Carlist Wars, the military uprisings, changes of governments, the First Republic and the restoration of the monarchy.

Nonetheless, such delay was not much due to a lack of interest or political will to codify the private law, but because of the difficulty to assert the best way of codifying this legal branch without sweeping away some regional laws (*Derechos forales*), whose validity came from the Middle Ages and whose regions (particularly, some territories of the Crown of Aragon) did not accept the abolition of their own legal tradition.

The political will of codifying private law was clear from the beginning of the codification movement. Moreover, all Spanish constitutions contained expressed provisions dealing with the matter. Moreover, article 169 of the Statute of Bayonne, promulgated by the French during their occupation of Spain on July 6, 1808, stated, “[t]he Spaniards and the Indies shall be governed by a single Code of Civil and Criminal Laws.”

This provision of the Statute of Bayonne influenced the article 258 of the 1812 Spanish Constitution, which prescribed:

The Civil and Criminal Codes, as well as the Commercial one, shall be the same throughout the Monarchy, without prejudice to the variations which the *Cortes* may enact for particular circumstances.<sup>35</sup>

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35. Diverse provisions on this matter can be found in other Spanish Constitutions (1937 SC, art. 4 (1937); 1845 SC, art. 4 (1845); 1869 SC, art. 91 (1869); art. 75 1876 SC adopted art. 91 of 1869 SC; 1931 SC, art. 8 (1931); see M.C. Mirow, *Codification and the Constitution of Cádiz*, in ESTUDIOS JURIDICOS

The current 1978 SC eventually makes clear that the legislative competence in civil law matters does not exclusively belong to the Spanish government and parliament, since the Autonomous Communities also enjoy legislative powers.<sup>36</sup> Article 149.1.8 of the Spanish Constitution tried to settle a very complicated problem whose origin and development belong to Spanish legal history.

It is very well-known that the legal diversity in the Iberian Peninsula started in the Early Middle Ages, particularly in the context of the Christian Reconquest (*Reconquista*) over the Muslim dominance.<sup>37</sup> In the long process of such Reconquest, which lasted almost eight centuries (from 722 to 1492), five Hispanic Kingdoms emerged. In the thirteenth century, the Peninsula had already been transformed into the territory of Leon,

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EN HOMENAJE AL PROFESOR ALEJANDRO GUZMAN BRITO (Patricio-Ignacio Carvajal and Massimo Miglietta eds., Edizioni dell'Orso, forthcoming).

36. 1978 SC, art. 149.1 (1978) reads:

The State has exclusive authority over the following matters:

8. Civil legislation without prejudice to the preservation, amendment, and development by the Autonomous Communities of civil, local, and special laws wherever in existence. In any event, the rules of application and enforcement of legal norms, civil law with respect to the form of marriage, regulation of public registers and instruments, foundations of contractual obligations, norms for the determination of conflict of laws, and the determination of sources of law concerning norms of local and special law.

37. The Islamic conquest of the Christian Visigothic kingdom in the eighth century (begun 710-712) extended over almost the entire peninsula (except major parts of Galicia, the Asturias, Cantabria and the Basque Country). Given the failure of the Muslims to occupy the entire Iberian Peninsula, several independent kingdoms and counties emerged in the foothills of the Cantabrian and Pyrenees mountains (Asturias, León, Castile, Navarre, Aragón, and Catalonia). The idea of Reconquest originated in Asturias, where King Pelayo (718-737), the leader of a hardy band of mountaineers, proclaimed his intention to achieve the *salus Spanie*—the “salvation of Spain”—and the restoration of the Gothic people. His victory over the Muslims at Covadonga in 722 is traditionally regarded as the beginning of the Reconquest. The Reconquest constituted a period of 800 years in the Middle Ages during which several Christian kingdoms of the Iberian Peninsula succeeded in retaking Hispania from the Muslims. By the thirteenth century all that remained was the Kingdom of Granada, to be conquered in 1492, bringing the entire peninsula under Christian leadership. On this matter, *see*, for example, JOSEPH F. O'CALLAGHAN, *RECONQUEST AND CRUSADE IN MEDIEVAL SPAIN* (2003); Lucas Villegas-Aristizábal, *Norman and Anglo-Norman Participation in the Iberian Reconquista* (unpublished Ph.D. thesis, Nottingham University, 2007).

Castile, Aragon-Catalonia, Navarre and Portugal, kingdoms which from the beginning enjoyed political and juridical autonomy. Spain then went through a further metamorphosis in the last stage of the Reconquest when the marriage of the Catholic monarchs united the kingdoms of Castile and Aragon. The kingdom of Navarre was then incorporated into this unified political entity (1512) and the period of the Reconquest ended with the surrender of the last Muslim territory, Granada (1492).

The political unity achieved by the Catholic monarchs did not bring with it legal unification. In fact, one of the main—if not the main one—features of the Spanish monarchy from the marriage of Fernando and Isabel (October 19, 1469) was precisely the compatibility of political unity with legal diversity or plurality of laws. Every kingdom had not only its own laws but also its own legal institutions to make the law and develop it throughout time. The unification of Castile and Aragon did not then imply the unification of the law, although the law itself, due to several causes (mainly, because of the Royal legislation and the ever-increasing, wide-pervading influence of the *ius commune* over the different Spanish legal traditions), would experience a clear, progressive tendency towards unification.

The uneasy balance between political unity and legal diversity changed drastically when the last king of the house of Austria (Carlos II) was succeeded by Felipe V, a king from another Royal dynasty, called bourbon, after the Spanish War of Succession whose origin, causes and development cannot be here dealt with.<sup>38</sup> What is really worth noting is how it was precisely the legal consequences of the Spanish Succession War that constituted an important shift on the development of Spanish private law tradition. The main legal consequence was the abolition of the

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38. On this matter, see GÉNESIS TERRITORIAL DE ESPAÑA (José A Escudero ed., 2007); as known, the circumstances which led to the War of Spanish Succession went beyond to the Spanish interest, affecting many other European countries. In fact, the final outcome of the war was the result of diplomatic negotiations seeking a peaceful solution to the Spanish royal succession.

legislative power enjoyed by all the Crown of Aragon kingdoms (Aragon and Valencia,<sup>39</sup> Catalonia,<sup>40</sup> Majorca and Ibiza,<sup>41</sup> and

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39. The first Decree of *Nueva Planta* was promulgated by Felipe V on June 29 (NR, 3, 2, 3; NoR 3, 3, 1), 1707, by which the legal systems of the kingdoms of Valencia and Aragon were abolished. Later on, subsequent Decrees of *Nueva Planta* were enacted by Felipe V, affecting both kingdoms, namely, Valencia and Aragon. The main difference between the final outcome of the Decrees imposed to Valencia and Aragon was remarkable, namely, while Felipe V returned to Aragon its *fueros* concerning private and criminal law matters, the *Furs* of Valencia were never returned in these general terms. In this regard, on April 3, 1711 (NoR 5, 7, 2), Felipe V promulgated a Decree for Aragon, by which, among other things, a General Commanding Officer was established as the supreme authority (concerning military, political, economic, and governmental matters). Furthermore, a tribunal (*Audiencia*) with two chambers was created to settle judicial disputes in private and procedural law matters, being the former ones resolved according to the *fueros* of Aragon. Consequently, the civil law chamber could resolve the lawsuits related to the laws of the kingdom of Aragon, although they turned to the Council of Castile in the second instance of the appellation procedure. In other words, Felipe V eventually allowed Aragon to maintain its proper private law but abolished all public law by imposing the Castilian law; on Valencia, see A. MASFERRER, *LA PERVIVENCIA DEL DERECHO FORAL VALENCIANO TRAS LOS DECRETOS DE NUEVA PLANTA* (Madrid, 2008); see also Mariano Peset Reig, *Notas sobre la abolición de los Fueros de los Fueros de Valencia*, 42 ANUARIO DE HISTORIA DEL DERECHO ESPAÑOL 657-716 (1972); *Apuntes sobre la abolición de los Fueros y la Nueva Planta valenciana*, in 3 PRIMER CONGRESO DE HISTORIA DEL PAÍS VALENCIANO 525-536 (1976); Mariano Peset, *La creación de la Chancillería de Valencia y su reducción a Audiencia en los años de la nueva Planta*, in ESTUDIOS DE HISTORIA DE VALENCIA 309-334 (1978); GÉNESIS TERRITORIAL DE ESPAÑA 41-201, 333-460 (José Antonio Escudero López ed., 2007); on Aragon, see JESÚS MORALES ARRIZABALAGA, *LA DEROGACIÓN DE LOS FUEROS DE ARAGÓN (1707-1711)* (Huesca, 1986).

40. Catalonia was the next territory affected by the Decrees of *Nueva Planta*. More specifically, the new legal regime of Catalonia was established by the Decree of January 16, 1716 (NoR 5, 9, 1), by which a new legal-administrative system was imposed, abolishing and re-establishing in the same Decree the civil law, commercial law, criminal law and procedural law. Felipe V also wanted to make clear that the political constitution of Catalonia which had not been explicitly abolished was equally replaced by the new law, that is, the Castilian one. In doing so, chapter 42 of the Decree provided: "Regarding that which is not foreseen in the preceding chapters of this Decree, I command that the former Constitutions of Catalonia be observed; by which it is to be understood that they are established anew by this Decree." It is true that the civil, commercial, criminal and procedural law were all maintained, but they were not affirmed through a pact, but rather by the absolute power of the king, being legitimated retroactively: "... by which it is to be understood that they are established anew by this Decree." This was a concept of absolute power which, while referring to the past, projected itself much more into the future, definitely abolishing the political notion of pactism; see J.M<sup>a</sup> Gay I Escoda, *La gènesi del Decret de nova planta de Catalunya. Edició de la consulta original del 'Consejo de Castilla' de 13 de juny de 1715*, 81 REVISTA JURÍDICA DE CATALUNYA 7-41,



Sardinia<sup>42</sup>), although they all—apart from Valencia—were allowed to apply their own private legal institutions, not by virtue of their own political and juridical autonomy, but because of an express Royal concession. In other words, since then, in the whole of the Spanish monarchy's territory there was only one source of political and juridical power, namely, the monarchy and its own administrative machinery.

In this regard, the Decrees of *Nueva Planta* promulgated by Felipe V (1707-1717) brought with it the definitive abolition of the political and juridical autonomy that the current Spanish Constitution established again. Setting aside the 1931 Constitution which, although it was never in force, was of great value in terms of influencing the making of the 1978 Constitution,<sup>43</sup> the

263-348 (1982); *Notas sobre el Derecho supletorio en Cataluña desde el Decreto de Nueva Planta (1715) hasta la jurisprudencia del Tribunal Supremo (1845)*, 34/35 HISPANIA. ENTRE DERECHOS PROPIOS Y DERECHOS NACIONALES. REVISTA PER LA STORIA DEL PENSIERO GIURIDICO MODERNO 805-865 (1990); GÉNESIS TERRITORIAL DE ESPAÑA, *supra* note 39, 205-330.

41. The *Nueva Planta* for Majorca and Ibiza was laid down through the Decree of November 28, 1715 (NoR 5, 10, 1), by which the main public institution, the *Jurats* and the *Gran i General Consell*, were abolished, while the *Consolat de Mar* and the *Sindicat de fora* were maintained. The Decree created the *Audiencia* of Majorca. Since then the Castilian law had to be applied concerning public law matters, while the Majorcan law sources (including the *ius commune* as subsidiary law) could be applied concerning private (including civil and commercial), criminal and procedural law matters; *see* GÉNESIS TERRITORIAL DE ESPAÑA, *supra* note 39, at 463-545. On Menorca, *see* PIÑA HOMS, ROMÁN: LA REINCORPORACIÓN DE MENORCA A LA CORONA ESPAÑOLA 1781-1798: MEDIDAS DE GOBIERNO Y ADMINISTRACIÓN (Palma de Mallorca, 1983); *Las fuentes del Derecho en la Menorca británica*, in ESTUDIOS EN HOMENAJE A MIGUEL COLL CARRERAS 523-540 (Palma de Mallorca, 2006).

42. Sardinia (*Cerdeña*), incorporated to the Spanish monarchy for a short period of time (1717-1720), was also affected by two Decrees of *Nueva Planta* of similar content of those which were granted to Catalonia and Majorca: Decree of November 24, 1717, and *Real Cédula* of February 16, 1719; *see* Regina Mª Perez Marcos, *Cerdeña en el marco de la Guerra de Sucesión: Administración y gobierno*, 13/14 IUS FUGIT 479 (2004-2006); GÉNESIS TERRITORIAL DE ESPAÑA, *supra* note 39, at 549-578.

43. Between the Decrees of *Nueva Planta* and the current Constitution, only the 1931 Constitution laid down a provision granting political and juridical autonomy to regional territories. In this sense, article 8 of 1931 C.E. envisioned autonomy for those regions meeting the requirements specified therein, which included the approval of a Statute of Autonomy. Power to legislate on matters such as forms of marriage and contractual obligations were exclusively reserved to the central government, although the autonomous regions could promulgate laws to regulate their execution C.E. of 1931, article 15 (1931)). For the matters

development of the legal diversity in the current territory of Spain has three marked, different periods:

- From the Reconquest (722-1492) to the Decrees of Felipe V (1707-1717), in which the kingdoms enjoyed legal diversity and legislative powers to develop their legal institutions;
- From the Decrees of Felipe V (1707-1717) to the current Constitution (1978), in which, leaving aside the short Spanish II Republic, old regional kingdoms (apart from Valencia) were allowed to use and apply their own private legal institutions without any possibility of developing them by means of legislative bodies, since they had been abolished; and
- From the creation of the 1978 Spanish Constitution to nowadays, in which only some Autonomous Communities (the name currently used for the different regional territories), have been granted political and legislative autonomy in civil matters which enables them to preserve, amend, and develop “wherever in existence” (article 149.1.8 of 1978 SC).

It could be said, then, that plurality of laws and legal diversity enjoyed by the old Spanish regions experienced two different contexts depending on whether the kingdoms had legislative (or institutional) autonomy or not. The legal diversity with legislative powers enjoyed by the kingdoms before the Decrees of Felipe V experienced a decisive shift after the Spanish Succession War whose legal consequences belong not just to the past, but also to the present.

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over which Madrid did not enjoy exclusive competence, however, article 16 of the 1931 Constitution granted the autonomous regions “exclusive legislative powers and direct powers of execution pursuant to the provisions of their respective Statutes of Autonomy as approved by the *Cortes*.” The Catalan Government, for example, took advantage of this legal context to push the enactment of a Statute in which article 11 granted the Catalan Government (*Generalitat*) “exclusive legislative powers in civil law matters save those provided in the Civil Code.”

In effect, to a large extent the changing fortunes of the current Spanish regional legislative system mirrors the history of modern Spain. Granted by monarchs who amassed victories during the Reconquest but then proved unable to establish strong central governing institutions, the regional laws (*fueros*) were not eradicated by the unification of Aragon and Castile or the subsequent expulsion of Islam from the Iberian Peninsula. As noted, in 1707 Felipe V abolished the *fueros* and the legislative bodies of both the Crown of Aragon (including Aragon, Catalonia, Valencia and the Balearic Islands) in retaliation for their opposition to his claims during the War of the Spanish Succession. Although regional laws were soon returned to all but the Valencians, the defeated regions never regained their legislative powers.

In consequence, the Spanish history shows how *fueros* had to overcome two difficult periods, without which they would be unable to survive the strong tendency towards legal unification, first with Felipe V, and later with the codification movement.<sup>44</sup>

Concerning the codification period, the first thing that should be kept in mind is that, leaving aside the 1931 and the current Spanish Constitution, the other SCs did not provide the possibility of granting legislative powers to the territories that had regional laws. On the contrary, if some regional laws were allowed to be in force, they should be passed by the Spanish parliament (*Cortes*).<sup>45</sup> In fact, the exercise of legislative powers was

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44. Moreover, the distinction between the new “common law” (that is, the Castilian law) and the regional laws (the laws of Catalonia, Aragon, Valencia, etc.), had succeeded and the regional laws were considered as local (or municipal) and exceptional. In this regard, regional laws were considered to be an exception to the Spanish “common law” (*Derecho común*). In fact, the distinction between the “common law” (*Derecho común*) and regional law (*Derecho foral*) appeared after the Decrees of Felipe V and was invented by Gregorio Mayans y Siscar, an outstanding Valencian lawyer and scholar, and brought with it an important controversy concerning the adjudication law process, particularly in Catalonia; See Gay I. Escoda, *supra* note 40. Despite of all, the old regional laws managed to survive after the Decrees of Felipe V without any possibility of updating the law to the new political, social and economic context of the societies of Catalonia, Aragon and Majorca. Valencia, since Felipe V never returned its legal institutions, theoretically—not in practice—had no need of survival.

45. See, Javier Moreno-Luzón, *Nationalist Conflict in Spanish Parliament (1898-1919)*, in *SEPARATION OF POWERS AND PARLIAMENTARISM, THE PAST AND THE PRESENT: LAW DOCTRINE, PRACTICE* 584 (Waclaw Uruszczak, Kazimierz Baran, & Anna Karabowic eds., 2007).

something which surpassed the codification scheme, being a constitutional issue which went beyond codifiers' powers.

The codification movement began in Spain at the beginning of the nineteenth century, one century after the Decrees of Felipe V were passed. During the whole eighteenth century some old regional territories had to make great efforts to find effective ways to develop their own legal institutions without legislative institutions. Catalonia is in this regard the paramount example.

Some of the Spanish Constitutions made explicit reference to the regional laws in civil matters when providing the convenience of enacting codes for the whole Monarchy. Everybody agreed with the goodness of codes, even the members of the *Cortes* representing old regional territories. They never envisioned the civil code as a legal tool not compatible with the respect of the regional laws which constitute an important part of their legal identity.

If that is the case, one could ask why the enactment of the Civil Code experienced such a delay. Such delay was due not to the lack of acceptance of the Code itself as a convenient legal tool to modernize the law, but rather to the difficulty to reach an agreement about the role of the regional laws within the new code system, as well as the specific way or method to include them in the codification sketch (or outline). In fact, the regional aspirations did not hinder the codification of private law up to the Civil Code Project of 1851. Regional lawyers, who up until then had supported the codification enterprise, changed—some of them, radically—their attitude once the 1851 Project came out.

The main evil of the 1851 Civil Code Project could be found in its article 1992 which stated as follows:

All *fueros*, laws, uses and customs existing prior to the promulgation of this Code, in all matters that are the object of the same, shall not have the force of the law even when not contrary to the present Code.

The provision disregarded regional laws, since they were abrogated no matter whether they were not against the Project or compatible with it. In addition to it, the Project contained many institutions from Castilian Law, ignoring the other regional legal traditions, option which did not please Spanish jurists from some

Spanish territories like Catalonia, Aragon, and the Basque Provinces, among others.

This provision and the immediate reaction against it generated among the regional lawyers, particularly the Catalans,<sup>46</sup> marked the beginning of a fierce and difficult controversy, similar somehow to that which originated in Germany (between Savigny and Thibaut) or in New York (between David Dudley Field and James Coolidge Carter) about the advantages and disadvantages of codes, although in Spain, like in Germany, the discussion did not revolve around the convenience to codify the law or not, rather around the sort of codification that was most suitable.<sup>47</sup>

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46. See Pablo Salvador Coderch, *El Proyecto de Código Civil de 1851 y el Derecho Civil Catalán*, in LA COMPILACIÓN Y SU HISTORIA 10 (1986). The attitude of resistance against this project can be also understood considering that in the second half of the 19th century emerged a renewed flourishing of regionalism in different Spanish regions. From a politico-legal point of view, these movements drew notably from Savigny's ideas concerning the *Volksgeist* ("spirit of the people"), based on the Historical School of Law and, consequently, against a iusrationalist codification. Regionalist movement strove to preserve the regional differences and to maintain those established differences both in the same language and form of law. It is noteworthy that the ideas of Savigny came to Spain through the works of Duran y Bas, an outstanding Catalan lawyer who, after spending time in Germany, introduced Savigny's legal theory in Spain. Logically, the Historical School was not much of a supporter of codification projects based on rational law rather than on the legal culture and tradition of the different territories where the people live and interact. As Badosa states:

Nineteenth-century opposition to the codification process had its roots in the ideology of the historical school of law and its rejection of codification. This influence is clear in the setting up in Barcelona of a 'Spanish Committee' linked to the Savigny Foundation of Berlin, under the honorary presidency of Pere Nolasc Vives i Cebrià, although Duran y Bas was effectively its leader. It was this Committee that requested a change in the statutes of the Foundation (12 September 1871) so that studies written in Spanish might be accepted.

Badosa Coll, *supra* note 16, at 159. On the existence of "ein Spanisches Savigny-Comite," founded at the College of Lawyers of Barcelona on July 11, 1869, see Karl Georg Bruns, *Die Savigny Stiftung*, I ZSS (1880) 6 (I) (cited in Badosa's article).

47. On Field's attempts to pass a civil code in New York, see Aniceto Masferrer, *The Passionate Discussion among Common Lawyers about postbellum American Codification: An approach to its Leal Argumentation*, 40 ARIZ. ST. L.J. 173 (2008); Aniceto Masferrer, *Defense of the Common Law against Postbellum American Codification: Reasonable and Fallacious Argumentation*, 50 AM. J. LEGAL HIST. 355 (2009).

It is true that the Spanish Constitutions of 1837 and 1845 provided that the entire kingdom would be governed by identical Codes. In this regard, article 4 of the Constitution of June 18, 1837 provided, “identical Codes shall rule throughout the Monarchy, and they shall not provide more than one *fuero* for all Spaniards in all common, civil and criminal trials.” The same principle contained the article 4 of the Constitution of 1845, “identical Codes shall rule throughout the Monarchy.”

However, the dispute over *foral* laws arose intensely in 1851, because such constitutional articles did not necessarily imply to ignore the different regional legal traditions. It did not imply it theoretically, but the 1851 Civil Code Project was clear enough in this regard, generating a reaction led by the champions of regionalism who succeeded in defeating the aforementioned Civil Code Project that intended to abolish all regional civil legislation. The Government, taking for granted that this Project had been killed before being born, did not go further with its approval, although it ordered its publication to bring it to general use and obtain opinions from the members of the law schools, the Judiciary and other institutions. After such a failure, the practicability of the codification in civil law was always questioned in connection with the problem of respecting or removing the regional (or *foral*) civil laws.

Not surprisingly, the 1869 Constitution once again recognized regional rights. In this sense, article 91 of the 1869 Constitution provided, “identical Codes shall rule throughout the Monarchy, without prejudice to the variations determined by law for particular circumstances.”

The First Spanish Republic lasted only long enough to draft a constitutional project.<sup>48</sup> Following the downfall of the First

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48. This effort departed sharply from previous endeavors because it acknowledged, as we said, the existence and validity of regional laws and sought to incorporate them into a Constitution. Legislative powers were reserved exclusively to the *Cortes*, and the Federal Government was instructed to draft comprehensive codes. The federal entities comprising the Republic were not prohibited from legislating, and they were assured by article 92 full economic and administrative autonomy and as much political autonomy as compatible with the existence of the Nation.

Republic, the draftsmen of the 1876 Constitution formulated article 75 on the basis of article 91 of its 1869 counterpart.<sup>49</sup>

By a Royal Decree on February 2, 1880, Minister Álvarez Bugallal expressed the agreement to respect regional private law traditions in the future Civil Code, although not in their entirety, preserving only those legal institutions which deserved to be kept in force in their own territory. Moreover, he wanted regional territories to put them in a written form.<sup>50</sup>

At that time it was already clear that codification could not succeed unless room was made for regional laws. This explains why Manuel Alonso Martínez's *Ley de Bases* of 1881, a project containing fundamental legal provisions to be developed in the future Civil Code, contained some regional civil institutions called to have validity for all Spanish citizens in the future Civil Code. Regional territories could conserve their own institutions, but the Civil Code would be a stopgap for all regional legislation, bringing to an end the validity of Roman law.<sup>51</sup> Nevertheless, the *Cortes* did not accept this *Ley de Bases*.

After a private law conference, held in 1886, in which the majority of participants agreed with the idea of drafting a Civil Code respecting regional laws, Francisco Silvela, the Minister of Justice, presented another *Ley de Bases*, establishing that regional territories could conserve their legal institutions. In addition, the future Civil Code would be a stopgap only if Roman or Canon law could not be applied. Once the code would be completed, the government would proceed to draft appendices, containing the regional institutions. Silvela's *Ley de Bases* was approved on May

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49. 1876 SC, article 75 (adopting article 91 of 1869 SC); and later it would be incorporated in article 8 of 1931 SC.

50. Article 4 of the Royal Decree of February 2, 1880; to that undertaking several lawyers were appointed as members of the Codification Committee (*Comisión de Codificación*) (which had been re-established five years before by the Minister Cárdenas, by Decree of May 10, 1875): Manuel Duran i Bas for Catalonia, Luis Franco López for Aragon, Antonio Morales Gómez for Navarra, Rafael López de Lago for Galicia, Manuel Lecanda Mendieta for the Basque Provinces, and Pedro Ripoll Palou for the Balearic Islands. Everyone presented his report containing the private law institutions which needed to be kept of his own region. The most important reports were written by the Catalan Duran i Bas, and the Aragonese Franco López.

51. The *Cortes* should not have to discuss every article, but just the main principles and fundamental bases of the civil legislation. Afterwards, the Codification Committee could draft the entire Code.

11, 1888.<sup>52</sup> According to it, provinces and regional territories had to conserve all their legal institutions, the code being a stopgap just in these territories; later on, every regional territory would write appendices containing the legal institutions they considered to be conserved.

Taking into account the *Ley de Bases* of 1888, the current Civil Code was elaborated and published on October 6, 1888, coming into force on May 1, 1889.<sup>53</sup> The Civil Code of 1889 granted regional civil laws temporary validity, a status they maintained until the amendment of the Code in 1974. The 1889 version of article 13 of the Code read as follows:

First. The provisions of this Title [Preliminary Section] shall be mandatory in all the provinces of the reign to the extent that they determine the effect of the laws, statutes and general rules for its application. The provisions of title IV, book I of the Code shall also be mandatory.

Second. As for the rest, the provinces and territories in which *foral* law endures shall conserve them *for the moment* in their integrity; and their actual legal regime, whether written or customary, shall not be altered by the publication of this Code, which shall be applied only as supplementary law, in the absence of what is set forth in the special laws of the *foral* regions. [Emphasis added]

The Civil Code did allow then the existence of territorial laws, considered as a supplementary legal source. The Civil Code also provided matters for the compilation of *foral* laws and their incorporation into the Code as appendices. The Government appointed commissions to prepare the appendices. They devised a six month plan at the end of which they were to present their conclusions to the Government. It is important to note that the system was not comprehensive but restrictive, requiring a partial

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52. The Codification Committee had to draft the Civil Code following that *Ley de Bases*, being published by the Government and then revised by the *Cortes*; the Code should mainly follow the 1851 Project.

53. However, on July 24, 1889, a new version of it was published, containing some necessary amendments and additions proposed by the *Cortes*.



sacrifice of the *foral* regions, since they knew that they could only preserve certain elements. This explains why provinces and regional territories were not willing to write their appendices, preferring to extend indefinitely a situation in which their traditional law would continue to be in force in all their territories. It may be that this issue led to the ultimate breakdown of the system, where neither conclusions nor appendix were finally reached or approved, except that of Aragon.<sup>54</sup>

In the context of the Spanish II Republic, the Statutes of Autonomy for Catalonia and the Basque Provinces were approved on September 15, 1932 and on October 6, 1936, respectively, Catalonia and the Basque Provinces thus regained the legislative powers they had relinquished during the reign of Felipe V in Catalonia, and after the Third Carlist War in the Basque provinces (1876).<sup>55</sup>

In 1946 the status of Spanish *foral* laws changed even more when a Civil law conference, held in Saragossa, recommended that “Compilations” (instead of “Appendices”) be drafted for each *foral* region. The compilation system allowed codifying all *foral* laws without any restriction, so regional territories were not required to select some legal institutions refusing others. As from the decree on May 23, 1947 compilation committees were designated to draft

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54. The Government approved the appendix of Aragon’s *foral* law by a Royal Decree of December 7, 1925. This appendix found a way to smooth over the differences between the Civil Code. It did this not so much by suppressing institutions that were of doubtful validity, but more by replacing those that were well-established, though they diverged from the “common law.” This appendix was arranged casuistically, with little order and with limited legal reasoning to its 78 articles and a single transitory provision. It was very unfavorably received. Other Regional territories that made some projects which never received approval were Galicia (published in 1915), Balearic Islands (finished in 1903), Navarre (1900), and Catalonia (published in 1896).

55. The Basque Parliament never enacted civil legislation. The application of the Statute of Autonomy in Catalonia, however, provoked tension between the Madrid government and local legislators when the latter, purporting to execute the Republican mandate, promulgated two decrees in 1936 which added new causes of divorce to the 1932 Divorce Law (Decree of September 18, 1936; Decree of December 23, 1936; among the new causes allowed following the Nationalist uprising of July 18, 1936 was “culpable” absence from the marital home without minimum requirement as to the time spent away). The 1936 Catalanian decrees called for their preferential application over the Divorce Law of the Republic. The Madrid norm would be resorted only when the Catalan laws proved inapposite. After the Civil War, the Nationalist forces repealed both the 1931 Constitution and the Statutes of Autonomy enacted under its *aegis*.

*foral* compilations of all *foral* territories. After the passage of such a decree on May 23, 1947, the following compilations were promulgated:

- Compilation of Vizcaya and Alava civil law: Law of July 30, 1959.
- Compilation of Catalonia civil law: Law of July 21, 1960.
- Compilation of Balearic Islands civil law: Law of April 19, 1961.
- Compilation of Galicia civil law: Law of December 2, 1963.
- Compilation of Aragon civil law: Law of April 8, 1967.
- Compilation of Navarre civil law: Law of March 1, 1973.

In all these territories the Compilation had to be applied before the Spanish Civil code, which was considered a supplementary legal source. Moreover, all *foral* laws not contained in the special compilations were abolished at the moment of the Compilations approval.

Consequently, the Decree of May 31, 1974 changed the temporary status of regional laws by revising the Preliminary Title of the Civil Code. As amended, paragraph 2 of article 13 emphasized the “full respect” owed to *foral* laws and eliminated the term “for the moment” that had appeared in the article prior to amendment:

. . . [F]ully respecting the special and local or *foral* laws of the provinces or territories in which these are in force, the Civil code shall be in force as general principle applying in default of specific regulation, when the *foral* law does not exist, in accordance with its special rules.<sup>56</sup>

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56. Accordingly, article 1 of Compilation of Special Civil law of Catalonia, for example, stated: “In accordance to what is established in the Constitution and the Statute of Autonomy, the provisions of the Civil law of Catalonia shall prevail over the Civil Code and other provisions of an equal general application.”

Furthermore, the Statement of Legislative Intent (*Exposición de Motivos*) of the Decree made clear that “the historical and political integration of Spain, instead of suffering there from, is completely realized by the acknowledgement of *foral* rights.” Suppressed by early nineteenth century liberal movements and briefly restored during the Second Republic, regional legislation was finally recognized as an integral part of the Spanish legal system by the 1974 amendment of the Civil Code. The creation of *foral* legislative bodies, however, would have to wait for the promulgation of the Spanish Constitution of 1978, whereby *foral* (and non-*foral*) regions would regain the legislative powers they had relinquished in the eighteenth century with the reign of Felipe V (kingdoms from the crown of Aragon), and in the nineteenth century (the Basque provinces as a consequence of the Third Carlist War, 1876; and Navarre through the *Ley Paccionada*, August 16, 1841).

#### IV. LEGAL DIVERSITY AND SPANISH LEGAL TRADITIONS TODAY: THE PRESENCE OF THE PAST

As said, the current 1978 SC eventually tries to make clear that the legislative competence in civil law matters does not exclusively belong to the Spanish government and parliament, since the Autonomous Communities also enjoy legislative powers.<sup>57</sup> While some authors regard this system as similar to that of a Federal system,<sup>58</sup> others seem to be less optimistic, pointing out its weaknesses and dangers.<sup>59</sup> It is true that article 149.1.8 SC tried to settle a very complicated problem whose origin and development belong to Spanish legal history. It may seem unlikely, but that provision did not settle the problem, and in recent years the controversy about this matter has increased considerably. In fact, there has been constant, real friction between the Central Government and the Autonomous Communities. Furthermore, in

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57. See article 149.1.8. SC, at *supra* note 36.

58. See Encarna Roca I. Trias, *Spanish System of Federalism and Self Government: Regional Law in Catalonia*, 10 SUFFOLK TRANSNAT'L L.J. 39 (1986).

59. Juan Cadarso Paulau & Jose W. Fernandez, *The Spanish Constitution of 1978 Legislative Competence of the Autonomous Communities in Civil Law Matters*, 15 VAND. J. TRANSNAT'L L. 47 (1982).

the last few years, controversies have arisen because of discriminatory treatment of different Autonomous Communities, with political reasons rather than strictly historical or juridical.

As said, the legal diversity with legislative powers enjoyed by the kingdoms before the Decrees of Felipe V experienced a decisive shift after the Spanish Succession War whose legal consequences drastically affected both the history of the Spanish legal system, and also the present.

Historically, up to Felipe V Hispanic or Spanish kingdoms enjoyed not only legal but also institutional (or legislative) autonomy, since they were provided by legislative bodies to develop their own laws and institutions. From then up to the 1978 Spanish Constitution (leaving aside the 1931 Constitution which never received legal enactment), the majority of regional identities were granted their *fueros* without legislative autonomy, so they had to find out different ways to develop their institutions without resorting to legislative outcomes.

However, Felipe V's measures affected also the current Spanish legal system. Let me explain this very briefly. When article 149.1.8 SC provided that only Autonomous Communities which had some regional laws at the time when the Constitution was approved (1978) would enjoy legislative powers "to preserve, amend, and develop" their own private institutions, it was clear that only those old regions which managed to keep their laws in force were called to enjoy legislative competence in civil law matters. Interestingly though, there was an old regional territory, Valencia, with a considerable body of old laws which, according to a strict interpretation of the Spanish Constitution, had a very limited scope of legislative competences in civil law (because Felipe V never gave back in general terms their civil laws), while others (like Galicia), not being an old region at all and, hence, lacking old laws, enjoyed a great deal of legislative competence because in the twentieth century this territory took good advantage of the position of some Galician politicians who achieved the making of a private law compilation (1963) without old regional written legislation; so the Galician drafters adopted regional custom as their principal source.

Furthermore, while in some old regions, in drafting their compilations, drafters merely collected existing *foral* norms (it is

the case of Catalonia, Balearic Islands, and the provinces of Vizcaya), others either expanded their *foral* laws into areas not previously governed by regional legislation (Aragon, 1967), or pursued to limit the Madrid government's power to modify or revise regional legislation, introducing entirely new sources of law which relegated the status of the more liberal Civil Code in Navarre to that of supplemental law (see Law of March 1, 1973, *Leyes 5 and 6 Compilación del Derecho Foral de Navarra*).

Moreover, since 2004 that problem became worse: Autonomous Communities, old and not that old regions, attempted to make good use of some advantageous, political context to promulgate new regional laws or even new Statutes of Autonomy, modifying the scope of the legislative competence in civil law matters, causing discriminatory outcomes whose justification could not be found in historical or legal reasons but only in political ones.<sup>60</sup>

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60. The cases of Galicia, Catalonia and Valencia constituted a paradigm in this regard. Galicia, lacking written legal tradition, currently enjoys legislative competence thanks to political reasons, just because some influent politicians held positions which enabled them to ensure and expand Galician private legal tradition.

Catalonia, since it had a written Compilation of Catalan private law at the time of the promulgation of the Spanish Constitution, from 1978 onwards was allowed to legislate in civil law matters inasmuch as they had been contained in the aforementioned Compilation. However, since 2004, the political context has favoured the expansion of its legislative competence to other private institutions which had never been regulated by this regional identity. Such expansion even acquired a legislative nature when in 2005 a new Statute of Autonomy was passed thanks to the support (that is, the votes) of the Socialist Party and the different parties governing Catalonia.

Valencia, trying to follow in the Catalonia's footsteps, prepared a new Statute of Autonomy attempting to expand the scope of the legislative competence of the Valencian region in civil matters. Such law was, in fact, enacted with the support the Socialist party. According to such legal reform, Valencian Parliament was allowed to "conserve, amend and develop" the customary institutions not abolished by Felipe V and which were in force at the time of the approval of the Spanish Constitution, as well as all the private institutions which had been abolished, and not returned, by Felipe V. The new Statute was very celebrated in Valencia. Nonetheless, a year later, when the Valencian Parliament, passed the first law on a private institution whose validity had been interrupted because of the Felipe V's decrees, the state government presented an appeal to the Spanish Constitutional Court against that law arguing that its content violated the state jurisdiction concerning the legislative competence in civil law matters. Later on, because of new political circumstances which surpass our interest now, the stated government rectified and renounced to keep the appeal forward.

Nevertheless, it could be said that the current Spanish legal system shows that the coexistence of autonomous regions with their own legal traditions within a centralized State is possible. That all the Autonomous Communities currently enjoy legal and institutional autonomy is undeniable. The question at stake is the scope of legislative competence they have to “conserve, amend and develop” (article 149.1.8 SC) their civil law.<sup>61</sup>

Theoretically, one may think that the scope of legislative competence on civil law matters should depend on historical reasons. In practice, the historical basis has been and is being biased out of political motives which sometimes constitute the driving argument and basis in determining the scope of legislative competence of Autonomous Communities in civil law issues.

## V. CONCLUSION

Considering the evolution of the Spanish private law tradition, and particularly the impact of the codification movement, the following conclusions could be drawn. Codification does not mean complete legal unification; as said at the beginning of this paper, the Spanish case shows that it is not accurate to maintain that codification is a legal source or tool whose main purpose consists in complete unification of law. In fact, the compatibility of codification with the different legal traditions delayed the enactment of the Spanish Civil Code (1889).

Legal diversity entails necessarily the possibility of developing legal institutions, through either legislative bodies or doctrine (*ius commune*), as it happened in Spain in some territories from the eighteenth century onwards.

The balance between state and regional, legislative competence in civil law matters has become a source of constant controversy, and its development is nowadays uncertain. While some regional identities are allowed to expand the scope of their legislative competence in civil law matters, others are forbidden, creating sometimes a discriminating and unequal treatment out of

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61. See, María Pilar Ferrer Vanrell, *State Powers Regarding Civil Law Versus Balearic Parliament Powers—The Section 30.27 of the Charter of Autonomy of the Balearic Islands*, 3 INDRET (2008).

political motives, disregarding strictly juridical or historical reasons.

The variety of legal sources of the different Hispanic kingdoms was, like in other European territories, considerable. In exploring and describing such complexity, a comparative approach is highly recommended. Otherwise, it would be difficult to capture a clear picture of the different Spanish legal traditions. Applying the comparative approach to the Spanish mixed, complex legal system constitutes a necessary requirement to appreciate a plurality of laws and legal traditions in force as of today. Although these legal traditions underwent a significant process of legal unification, it is important to keep in mind that in Spain legal unification never was entirely achieved, and different Spanish legal traditions are (and will be) in force.<sup>62</sup>

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62. See Aniceto Masferrer, *Spanish Legal History: A Need for its Comparative Approach*, in HOW TO TEACH EUROPEAN COMPARATIVE LEGAL HISTORY: WORKSHOP, FACULTY OF LAW, LUND UNIVERSITY, 19-20 AUGUST 2009 107-142 (Kjell Å. Modéer and Per Nilsén eds., Lund University, 2011).