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The Spanish Constitution of 1978: Legislative Competence of the Autonomous Communities in Civil Law Matters

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THE SPANISH CONSTITUTION OF 1978: LEGISLATIVE COMPETENCE OF THE AUTONOMOUS COMMUNITIES IN CIVIL LAW MATTERS

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I. INTRODUCTION

The Spanish Constitution of 1978 had to deal with the issues that emerged with the advent of a democratic regime following the death of General Francisco Franco in 1975. Political pluralism, the relationship between church and state, and the official language of the Spanish state were among the dilemmas facing the Constitutional Commission.[1] Yet the historically sensitive issue of the autonomy of the Spanish regions proved to be the most troublesome. Title VIII of the Constitution provides a political compromise in resolution of this issue although scholars and poli-

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1. *See* Garcia de Enterría, *El Techo Constitucional de las Autonomías Territoriales: Un Problema Básico,* El País, Mar. 7-8, 1979; Peces-Barba Martínez, *Las Competencias de las Comunidades Autónomas,* El País, Jan. 24-25, 1980; El Paris, May 26, 1981 (quoting Congressman Oscar Alzaga).

ticians, including some constitutional draftsmen, have criticized the ambiguity of this title.

This study focuses on article 149, paragraph 1, section 8 of the Spanish Constitution and the legislative powers granted therein to the autonomous regions in matters of civil law.[2] Not only should it provide some insight into one of the most perplexing clauses of the founding document of post-Franco Spain, but, moreover, it should prove to be an enlightening case study of the interaction between politics and law in the uneasy relationship between Madrid and the present and aspiring autonomous regions of Spain.

II. Regional Laws in Spain

The term regional laws—*derechos forales*—includes locally codified civil laws which receive the name of Compilations (*Compilaciones*) or Dispositions (*Disposiciones*).[3] Unlike regional legislation in most political systems, however, *foral* codes in Spain do not regulate identical subjects, are not generalized throughout the nation, and do not fit administrative boundaries.[4] The only regions which have promulgated their own *foral* legislation are Catalonia, Galicia, the Basque provinces of Alava, Vizcaya, the Balearic Islands, Aragón, a few isolated towns in the Extremadura region and, arguably, Basque Navarra.[5] Article 13(2)[6] of the

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2. Throughout this article, the term "civil law" shall be employed not as a synonym for "continental law," but rather to denote those matters traditionally covered by the Spanish Civil Code such as marriage and family law, estate questions, personal and real property matters, and civil obligations.

3. *See* M. Albaladejo, 1 Derecho Civil 62 (1978). Throughout these pages we will use the term *"foral"* interchangeably with "regional."

4. *Id.*

5. *See generally* Delgado Echeverria, *Los Derechos Civiles Forales en la Constitución*, in Estudios Sobre la Constitución Española de 1978, at 323 (M. Ramirez ed. 1979).

6. Article 13 provides:

> 1. The provisions of this preliminary title, as far as they determine the effect of laws and of the general rules governing their application, as well as those of title IV, book I, with the exception of the norms of this last section which refer to the economic matrimonial regime, shall be generally and directly applicable in all of Spain.
>
> 2. As for the rest, and with full respect for the special or foral rights of the provinces or territories in which these rights exist, the Civil Code shall be applicable as supplemental law, in the absence of [special or foral] norms therein, according to their special provisions.

Spanish Civil Code provides that in matters of civil law, *foral* regions shall be governed pursuant to their local legislation, with the exceptions of the Preliminary Title of the Code and most contract matters. Every Compilation or Disposition establishes in its preliminary articles rules of interpretation which require the examination of *foral* legislation, local customs, and history before applying the national Civil Code.[7] The national Civil Code governs in those regions without *foral* laws.[8]

Although principally concerned with estate matters and the economic relations between family members, existing *foral* Compilations vary in scope. For example, the Catalonian legislation, enacted on July 21, 1960, regulates family and estate matters (especially those *causa mortis*), real property, obligations, and contracts and their statutes of limitations. The Compilation of the Balearic Islands, promulgated by the Law of April 14, 1961, is quite confusing. Its first Book establishes norms to govern property rights during marriage, and Book II applies principally to the island of Menorca (although its norms on successions are binding on the entire archipelago). Book III, however, includes both real property laws of general application and some precepts dedicated solely to Ibiza and Formentera.

More than any other codification, the Compilation of Navarra demonstrates the diversity of Spain's regional legal system and its potential for conflict with the central government.[9] Comprised of

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CODIGO CIVIL ESPAÑOL art. 13 (translated by the authors).

7. Article 1, paragraph 2 of the Compilation of Catalonia reads as follows: "The legal tradition of Catalonia, as embodied in ancient laws, customs and judicial doctrine, shall be utilized to interpret this Compilation, which derives therefrom." Law of July 21, 1960 (1960), COMPILACIÓN DEL DERECHO CIVIL ESPECIAL DE CATALUÑA (translated by the authors). The Galician and Balearic Compilations contain similar norms. Law of Dec. 2, 1963 (1963), art. 2, COMPILACIÓN DEL DERECHO CIVIL ESPECIAL DE GALICIA; Law of Apr. 19, 1961 (1961), art. 2, COMPILACIÓN DEL DERECHO CIVIL ESPECIAL DE BALEARES. The Aragonese model states the following: "The Aragón Civil law . . . shall be comprised of the precepts of this Compilation together with custom and the general principles which have traditionally inspired its legal regime." Law of Apr. 8, 1967 (1967), art. 1(1), COMPILACIÓN DEL DERECHO CIVIL DE ARAGÓN (translated by the authors). *See also* C. LASARTE, AUTONOMÍAS Y DERECHO PRIVADO EN LA CONSTITUCIÓN ESPAÑOLA 118 (1980).

8. M. ALBALADEJO, *supra* note 3, at 62; C. LASARTE, *supra* note 7, at 134.

9. For an overview of the Compilation of Navarra, see Arregui Gil, *La Recompilación Privada del Derecho Privado Foral de Navarra*, in VI ESTUDIOS DE DERECHO CIVIL EN HONOR DEL PROF. CASTÁN TOBEÑAS 33 (1969).

596 laws divided into three Books, the *Fuero Nuevo* (as it has been termed by its drafters) deals with traditional *foral* concerns of family and estate law in addition to matters which arguably fall beyond the competence delineated by article 13 of the Civil Code,[10] such as loans and guarantees, principal-agent relations, and general obligations. Article 3 of the *Fuero Nuevo* states that "such custom which does not contravene the public order or morals shall prevail over written law, even when such written law is contrary to it." Thus, in most matters of civil law, the Civil Code in Navarra is relegated to an inferior status, for it may be superseded not only by the Compilation but also by the customs of the province.[11] With respect to traditional subjects of *foral* laws, the first source is clearly sanctioned by article 13(2) of the Civil Code, but several scholars have questioned the validity of the rank given to custom in Navarra.[12]

The regional system of legislative jurisdiction embodied in article 149, section 1(8) of the Constitution, while seeking to provide the autonomous regions with a measure of legislative independence, may eventually cause a political tug-of-war with the central authorities in Madrid. Some writers have suggested that Navarra legislators could validly promulgate a regional law nullifying the recently enacted national divorce law pursuant to its Compilation and article 149, paragraph 1, section 8 of the 1978 Constitution.[13] This legislation would arguably fall under the constitutional provision authorizing *foral* regions to "develop" their codifications. It would be based on the strong religious and family principles underlying the Compilation in historically conservative Navarra.[14] If promulgated, the local law would evoke memories of

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10. The potential overbreadth of the Navarra text accounts for the fact that, rather than being promulgated by the Spanish Cortes, it was approved by a "Law of prerogative" of General Franco. *See* Delgado Echeverria, *supra* note 5, at 323.

11. Laws 2 and 6 of the Compilation of Navarra establish the following order of sources of law: custom, laws of the Compilation, general principles of Navarra law, and all other supplemental laws, including the Civil Code and other national legislation. Law of Mar. 1, 1973 (1973), COMPILACIÓN DEL DERECHO CIVIL FORAL DE NAVARRA.

12. *See, e.g.*, M. GARCÍA AMIGO, 1 INSTITUCIONES DE DERECHO CIVIL 139-40 (1979). *See also* C. LASARTE, *supra* note 7, at 127.

13. *See* Delgado Echeverria, *supra* note 5, at 342-43. *But see* C. LASARTE, *supra* note 7, at 127.

14. One of the preliminary provisions of the Compilation begins as follows: "In the name of God omnipotent, and for the best observance of the laws . . . ."

regional matrimonial legislation which caused much conflict between Catalonia and the central authorities during the Second Republic.[15]

III. Historical Development of Regional Laws

To a large extent the changing fortunes of the Spanish regional legislative system mirror 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 *Fueros* (local laws) were not eradicated by the unification of Aragón and Castille or the subsequent expulsion of Islam from the Iberian peninsula.[16] In 1707 Philip V abolished the *Fueros* and the legislative bodies of both the Kingdom of Aragón (which at the time also comprised Catalonia and the Balearic Islands) and the Kingdom of Valencia, in retaliation for their opposition to his claims during the War of the Spanish Succession.[17] Although regional laws were soon returned to all but the Valencians, the defeated regions never regained their legislative powers.

In the nineteenth and twentieth centuries the fate of regional law was intimately tied to the advent of liberalism, the efforts to enact a national civil code, and the various constitutions that made their first appearance in 1812 with the liberal constitution of Cádiz.[18] Article 258 of the Constitution of Cádiz vividly manifested the renewed sense of national unity which followed the War of Independence: "The Civil and Criminal Code, as well as the Commercial one, shall be the same throughout the Monarchy, without prejudice to the variations which the *Cortes* [Spanish parliamentary body] may enact for particular circumstances." Although it has been argued that the second clause of article 258

See also Vallet de Goytisolo, *La Esencia y Principios del Derecho Civil Foral*, Revista Jurídica de Cataluña (75th anniversary issue).

15. *See* text accompanying notes 29-32 *infra*.

16. *See generally* López Jacoiste, *Constitucionalismo y Codificación Española*, in II Lecturas Sobre la Constitución Española (1978); Vallet de Goytisolo, *supra* note 14, at 367.

17. *See generally* M. Garcia Amigo, *supra* note 12, at 129. A similar fate awaited the Basque provinces in 1837 after the Carlist War.

18. We do not consider the Statute of Bayonne, promulgated on July 6, 1808, because it was enacted by the French during their occupation of Spain. This Statute also responded to the codification efforts of its time and stated: "[T]he Spains and the Indies shall be governed by a single Code of Civil and Criminal Laws."

was introduced by Catalan legislators to ensure the possibility of some legislative autonomy, it seems more likely that this section referred instead to the Spanish overseas departments.[19] As would be the case throughout the nineteenth century, in drafting the Constitution of Cádiz, those who advocated the liberal ideas of the Enlightenment led the forces for the codification and centralization of the Spanish civil legal system.[20]

Although the Constitutions of 1837 and 1845 provided that the entire kingdom would be governed by identical Codes,[21] the dispute over *foral* laws did not disappear. In 1851 the champions of regionalism succeeded in defeating a proposed Civil Code that abolished all local civil legislation, but the 1869 Constitution once again recognized regional rights.[22]

The First Spanish Republic lasted only long enough to draft a constitutional project. This effort departed sharply from previous endeavors because it acknowledged 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."[23] Following the downfall of the First Republic, the draftsmen of the 1876 Constitution formulated article 75 on the basis of article 91

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19. *See* Lalinde Abadia, *Ubicación Histórica de la Constitución de 1978*, in ESTUDIOS SOBRE LA CONSTITUCIÓN ESPAÑOLA DE 1978, at 18 (M. Ramirez ed. 1979); Roca i Trias, *El Derecho Civil Catalán en la Constitución de 1978*, 78 REVISTA JURÍDICA DE CATALUÑA 7, 8 (1979).

20. *See, e.g.*, López Jacoiste, *supra* note 16, at 589.

21. Article 4 of the Constitution of June 18, 1837 established that "identical Codes shall rule throughout the Monarchy, and they shall not provide for more than one *fuero* for all Spaniards in all common, civil and criminal trials." Article 4 of the Constitution of 1845 stated that "identical codes shall rule throughout the Monarchy."

22. *See* M. GARCIA AMIGO, *supra* note 12, at 130; López Jacoiste, *supra* note 16, at 591. Article 1992 of the 1851 Project derogated "all *fueros*, laws, uses and customs existing prior to the promulgation of this Code, in all matters that are the object of the same, and they shall not have the force of the law even when not contrary to the present Code." Article 91 of the 1869 Constitution in turn provided that "identical Codes shall rule throughout the Monarchy, without prejudice to the variations determined by law for particular circumstances."

23. *See generally* Roca i Trias, *supra* note 19, at 10.

of its 1869 counterpart.[24]

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 also provided for the complication of *foral* laws and their incorporation into the Code as appendices. With the exception of the Appendix of Aragón in 1925, however, this task remained unrealized until the 1946 Civil Law Congress of Zaragoza, which recommended the codification of the various regional laws.[25]

The 1876 Constitution remained in force until the advent of the Second Spanish Republic in 1931. Article 8 of the Constitution of the Second Republic 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 was exclusively reserved to the central government, although the autonomous regions could promulgate laws to regulate their execution.[26] For those matters 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*."[27]

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24. *Id.* at 14.

25. *See* López Jacoiste, *supra* note 17, at 597; text accompanying notes 33-37 *infra*.

26. Constitution of 1931, art. 15 (Spain).

27. Article 11 of the Statute of Catalonia granted the Generalitat "exclusive legislative powers in matters of civil law, save as provided in the Civil Code."

The Statutes of Autonomy for Catalonia and the Basque provinces were approved on September 15, 1932[28] and on October 6, 1936, respectively. Catalonia and the Basque provinces thus regained the legislative powers they had relinquished during the reign of Philip V in Catalonia, and after the Carlist Wars in the Basque provinces. 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.[29] 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 Catalonian decrees called for their preferential application over the Divorce Law of the Republic. The Madrid norm would be resorted to only when the Catalan laws proved inapposite.[30]

After the Civil War, the Nationalist forces repealed both the 1931 Constitution and the Statutes of Autonomy enacted under its aegis. In 1946 the status of Spanish *foral* law changed further when a Congress of Civil Law, held in Zaragoza, recommended that Compilations be drafted for each *foral* region. After the passage of such a decree on May 23, 1947, Compilations were promulgated in Vizcaya and Alava,[31] Catalonia,[32] the Balearic Islands,[33] Galicia,[34] Aragón,[35] and Navarra.[36]

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 re-

28. *See generally* Roca i Trias, *supra* note 19, at 14-15.

29. Decree of Sept. 18, 1936; Decree of Dec. 23, 1936.

30. *See* Roca i Trias, *supra* note 19, at 14-15. For a modern version of the argument in the context of the 1978 Constitution, see Salellas Puig, *La Recuperación de l'Autonomía Legislativa a l'Ambit del Dret Privado*, 77 REVISTA JURÍDICA DE CATALUÑA 247 (1978). The author states that because the "private civil law" of Catalonia is composed of both regional and national norms, the Generalitat could modify—by "developing"—both local law and the legislation promulgated in Madrid.

31. Law of July 30, 1959.

32. Law of July 21, 1960.

33. Law of Apr. 19, 1961.

34. Law of Dec. 2, 1963.

35. Law of Apr. 8, 1967.

36. Law of Mar. 1, 1973.

spect" owed to *foral* laws and eliminated the term "for the moment" that had appeared in the article prior to amendment.[37] Furthermore, the Statement of Legislative Intent of the Decree (*Exposición de Motivos*) made clear that "the historical and political integration of Spain, instead of suffering therefrom, 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 await the promulgation of the Spanish Constitution of 1978.

IV. Post-Civil War Development of Regional Legislation

Prior to 1946 the historical and popular origins of *foral* legislation traditionally justified its continued existence. After that year the treatment accorded to regional laws by the central government belied these justifications.[38]

While article 12 of the 1889 Civil Code had merely tolerated the preservation of regional laws as residual and purely "appendicular" legislation (those surviving norms collected in appendices to the Civil Code), the 1946 Zaragoza Congress signaled the start of manifest revitalization of *foral* rights in Spain. The resulting codifications did not merely reflect existing legal regimes, but also

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37. *See* note 6 *supra*.

38. The codification of Spanish regional laws after 1946 necessitated a reversal in the thinking of its supporters. During the nineteenth century, those who argued against the national Civil Code advocated by liberal circles based their objections upon the postulates derived from what has been termed in Spain the "German Historical School." This school of thought, deeply conservative and responsive to the *ancien régime,* criticized the codification movement for its vitiation of the allegedly popular and customary essence of law. In the second half of the nineteenth century, however, conservative Spanish forces who fought for the acceptance of regional laws viewed the codification movement as the best guarantee and instrument for the survival and expansion of local customs against the onslaught of the Enlightenment. This objective was achieved only through a radical alteration in the character of *foral* laws. Throughout the 1800s the *foral* laws were justified on the grounds that they best reflected traditional characteristics of distinct economic and social circumstances among the Spanish regions, and that largely unwritten *foral* law could be modified readily to meet changing circumstances. Thus, the supporters of regional rights eventually were forced to accept the form and characteristics of a code system which they had originally vilified.

restored institutions which previously had been eradicated. Most significantly, codifying efforts sought to modernize norms which, as a result of the passage of time, were unfamiliar to the public and of questionable application. Those who sought to apply regional laws to post-war Spain were faced with the constraints imposed by the traditional character of *foral* legislation. After 1946 a short-lived adherence by *foral* law advocates to the preservation objective developed. As a result, current codification efforts are embodied in Compilations that do not fully respond to a strict historical analysis of *foral* rights, but rather result from a partisan characterization of the question.

The Compilations promulgated between 1959 and 1973 may be grouped into two chronologically distinct categories linked by a transitional period.[39] The first phase includes the Compilations of Catalonia, the Balearic Islands, and the provinces of Vizcaya and Alava, whose drafters merely collected existing *foral* norms. These early codifications expressly provided that the Civil Code would be applied in those circumstances not covered by local law. In 1963 the transitional period was initiated by the Compilation of Galicia. Devoid of written local legislation upon which to draw, the Galician drafters adopted regional custom as their principal source. Custom in Galicia was thereby raised to the status of law. As did its predecessors, the Compilation of Galicia provided for application of the Civil Code in those circumstances in which local law proved inapposite. The second phase of the post-Civil War codification movement began in 1967 with the Compilation of Aragón. This phase was characterized by the expansion of *foral* laws into areas not previously governed by local legislation. In Aragón this trend was reflected not only in the increased number of laws comprising the Compilation—153 articles as opposed to 77 in the 1925 Appendix—but also in the order of legal sources cited, which differed from Aragonese precedent and all other previous compilations.[40]

The *foral* evolution outlined concluded in 1973 with the enactment of the Compilation of Navarra. The *Fuero Nuevo* evidenced the unique goal of limiting the Madrid government's power to modify or revise local legislation. It also introduced entirely new sources of law which relegated the status of the more "liberal"

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39. *See generally* L. DIEZ-PICAZO & A. GULLÓN, 1 SISTEMA DE DERECHO CIVIL 94-95 (3d ed. 1979).

40. *See* note 7 *supra.*

Civil Code in Navarra to that of supplemental law.[41] Following the 1974 enactment of the present article 13 of the Civil Code, the post-Civil War codification movement came to contradict the principle of unity that had inspired the recommendations of the Congress of Zaragoza in 1946.[42] Inherent in the "compilation" ideal was the possibility of a definitive rupture with the principle of legislative unity. Although *foral* legislation had never given rise to comprehensive judicial systems, the compilation movement presented a ready-made means to transcend its strict historical confines and become a more comprehensive and formal system.[43] With the ability to create its own legislation, the new system of *foral* laws would ultimately fragment the Spanish legal system and exacerbate Spain's diversity in matters of civil law to an extent unwarranted by previous experience. Before the Civil War, the competence of the Spanish regional legislative system in matters of private civil law had never transcended the confines of estate law or those norms governing economic relations during marriage.[43]

V. The Civil Law Competence of Autonomous Communities Under the 1978 Constitution

Article 2 of the Spanish Constitution acknowledges and guarantees the right to autonomy for the different entities that comprise the Spanish state.[44] Consistent with article 2 of the 1978 Constitution, article 143 provides the following:

> [B]ordering provinces with common historical, cultural and economic characteristics, the island territories, and the provinces with a historical regional entity may accede to self-government and constitute themselves into autonomous communities in accordance with the provisions of that Title and the respective Statutes [of Autonomy].[45]

The Autonomous Communities are granted jurisdiction over certain limited subjects pursuant to article 148 of the Constitu-

41. *See* Law of Mar. 1, 1973 (1973), Leyes 5 and 6 Compilación del Derecho Civil Foral de Navarra.

42. *See generally* de los Mozos, 1 Derecho Civil Español 373 (1971).

43. *See, e.g.*, L. Diez-Picazo & A. Gullón, *supra* note 39, at 96.

44. Constitución art. 2 (Spain), *translated in* XIII Constitutions of the Countries of the World (A.-Blaustein & G. Flanz eds. 1979) [hereinafter cited as A. Blaustein & G. Flanz].

45. *Id.* art. 143.

tion.[46] Article 149, paragraph 1, section 8 limits these autonomous powers by providing the central government with exclusive authority over

> [c]ivil 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 competence of the central government includes] rules relative to the application and effectiveness of juridical 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 conflicts of laws, and the determination of the sources of the law, in this last case, with respect to the norms of the "fueros" and special law.[47]

Article 149, paragraph 1, section 8 contains the principal constitutional demarcation of the legislative competence of the Madrid government and the Autonomous Communities in civil law matters. Unfortunately, the ambiguity of its terms gives rise to varying interpretations.

Spanish scholars have traditionally proved unable to provide uniform definitions for basic and widely utilized concepts such as "civil," "*foral*," and "special" laws. The appearance of these inherently ambiguous terms in the 1978 Constitution has irked Spanish jurists, who would have welcomed more precise and, preferably, statutorily defined terminology. As a result, the characterization of specific disputes for purposes of applying either the Civil or Commercial Code, or the determination of the proper court for matters under the jurisdiction of "Special Tribunals,"[48] have been subjects of inconclusive debate. With the legislative competence of the Autonomous Communities and of the Madrid government contingent largely upon the aforementioned definitional problems, the interpretation of these murky terms will acquire unprecedented significance.

Article 149, paragraph 1, section 8 creates yet additional uncertainty. Scholarly opinions point out that the unification of all civil law norms within Spain not only ceased to be an aspiration after 1978, but today would be unconstitutional if decreed by the Civil

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46. *Id.* art. 148.

47. *Id.* art. 149, para. 1, § 8.

48. Labor cases represent a problematic matter subject to the jurisdiction of the "Special Tribunals."

Code.[49] These writers argued that article 149 of the Constitution guarantees the existing pluralism among the civil law regimes in Spain.[50] A strict reading of title VIII of the Constitution,[51] however, does not support the constitutional arguments against a unified civil law system. Consolidation of all Spanish civil law norms and concomitant eradication of parallel *foral* legislation would not require a constitutional amendment, but merely a modification of the statutes of each Autonomous Community.[52] In practical terms, however, the unlikelihood of such an initiative emerging from the regions, as well as the complicated procedures that would be necessary for such action, have combined to destroy any hopes for the unification of Spanish civil law.

Many of the arguments in favor of expanding regional legislation over civil law are no longer relevant in present-day Spain. One such argument views *foral* legislation as an outgrowth of the liberal bourgeois revolutions, which adopted the Code system to achieve a more centralized state. Centralization efforts, however, also prompted a revival of *foral* rights. With their roots in local custom, regional laws attracted those who recognized their importance to the rapidly changing society. This justification for *foral* laws continues to be advanced by its advocates, but its current validity is questionable. Many would dispute the characterization of local laws as the authentic legal fruit of the popular will. In view of its traditional function in regions such as Navarra, the *foral* legal system may instead be seen as an institution which has allowed the dominant social classes at the local level to retain political power against the pressures of the centralized state.

The current validity of the Spanish regional legislative system is further complicated by the fact that, under the Constitution of 1978, Autonomous Communities exhibit many qualities that could be ascribed to any state. Having been codified, current *foral* law exhibits many of the deficiencies which previously prompted criticisms of unified legal regimes. Charges of excessive uniformity, formalism, and a progressive insensitivity to the wishes of the people also may be levelled against present-day, largely statutory

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49. Delgado Echeverria, *supra* note 5, at 332, 351; López Jacoiste, *supra* note 16, at 599.

50. *Id.*

51. CONSTITUCIÓN arts. 137-158 (Spain), *translated in* A. Blaustein & G. Flanz, *supra* note 44.

52. *See id.* arts. 149, para. 3; 150, para. 3; & 152, para. 2.

foral systems. Any analysis of the benefits of the present regional legal system in Spain must take into account this transformation in the character of *foral* laws.

Article 149, paragraph 1, section 8 of the 1978 Constitution creates potentially unlimited possibilities for expansion of the legislative competence of the Autonomous Communities in matters of civil law. Several advocates of *foral* rights have predicted that the statutory terms "modification and development" may allow local lawmakers to regulate areas previously untouched by *foral* legislation.[53] Such a reading of article 149, paragraph 1, section 8 flounders on the purposely loose interpretation of "civil, foral or special laws" upon which it is premised. In order to support their position, champions of increased local powers must argue that the phrase "foral or special," as employed in the text of the Constitution, was not intended to provide a strict guideline to the legislative competence of the Autonomous Communities. Instead, lacking an established legal definition or interpretation, the ambiguous terminology of article 149, paragraph 1, section 8 must refer simply to the entire civil law field in which the Autonomous Communities could legislate.[54] This approach advanced by regional writers merely assumes away questions concerning the reach of the authority granted to the Autonomous Communities to "conserve, modify and develop" *foral* rights recognized by the 1978 Constitution. If limited only by the subjects covered in the Civil Code, the development and modification of the civil law field will differ radically than it would if restricted to areas historically regulated by *foral* legislation.

The precise use of the phrase "civil, foral or special laws," in addition to the scant information available on its drafting, suggests that article 149, paragraph 1, section 8 of the Constitution was intended to bar unlimited legislative competence of the Autonomous Communities in matters of civil law. The position advanced by *foral* advocates would, in fact, impose on the Constitution an expanded version of the solution reached in the Republican Constitution of 1931. This predecessor to the present Spanish Constitution did not refer to the *foral* laws of Spain's historically distinct regions. Instead, it recognized the legislative competence of the autonomous regions in limited areas of civil

53. *See* Roca i Trias, *supra* note 19. *See also* text accompanying notes 13-15 *supra*.

54. *See* Roca i Trias, *supra* note 19, at 24.

law. In 1978, however, the draftsmen of the Constitution chose a distinct approach to the problem. Faced with an exact reproduction of the 1931 version in article 138 of the constitutional draft, the Parliament narrowed the legislative competence of the autonomous regions to the present "civil, foral or special laws, wherever these exist." Rather than bestowing legislative civil law competence upon every Autonomous Community, the draftsmen chose to grant it only to those regions with a prior tradition of *foral* or special civil legislation. Even these areas saw their competence limited to conservation, modification, and development of existing *foral* law.[55]

The above observations lead us to a further incongruity in the position taken by advocates of extensive *foral* rights. These writers agree that the very reference to *foral* or special laws, which they would ignore, limits the civil law competence granted to those territories in which regional rights previously existed. However, if one may overlook the historical antecedents of Catalonian *foral* rights in order to achieve unlimited legislative powers, for example, the absence of any prior local legislative tradition in a region such as Andalusia should not preclude the region from enacting its own civil law norms. A contrary conclusion would appear inconsistent and would amount to the type of regional discrimination prohibited under the 1978 Constitution. Such an injustice will not follow if the powers granted to the Autonomous Communities to conserve, modify, and develop *foral* legislation are confined to their historical territorial boundaries and are channeled towards traditional areas of regional legislation. Beyond the above framework it is virtually impossible to justify the dismemberment of the legal unity recently achieved in many important areas of civil law in Spain.

VI. Conclusion

To what extent shall *foral* laws be developed or modified by the Autonomous Communities, and when, if at all, shall they be employed to create new regional laws?

Article 149, paragraph 1, section 8 of the Spanish Constitution of 1978 delineates the legislative powers of the central state over civil law matters. In practical terms this constitutional provision frustrates the hopes of those Spaniards who argue in favor of a

55. *See generally* Delgado Echeverria, *supra* note 5, at 328.

national civil code. Because of the inordinate ambiguity of its terms, article 139, paragraph 1, section 8 does not clearly circumscribe the exclusive civil legislative powers of the Autonomous Communities. Its failure to do so creates unlimited possibilities for expansion of the legislative competence of these regions at a point when many of the traditional justifications of *foral* rights are no longer relevant. How far the civil legislative competence of the Autonomous Communities will extend cannot accurately be predicted.