

**Helena Pérez-Beltrán**

Uniwersytet Jaumbi

ORCID: 0000-0003-2609-8600

**CONSTITUTIONAL REFLECTIONS  
ON THE DISTRIBUTION OF COMPETENCES REGARDING  
SPANISH CIVIL LEGISLATION**

**Introductory notes**

Spain has one of the most complex civil law systems on the comparative scene. This is mainly due to the existence and subsistence of legal norms of diverse origin. Starting in the 18th century, with the cessation of the normative power of the territories that, historically, had constituted independent kingdoms, the work on the creation of a single civil law for the entire country began. From that moment on, “Common Law”, in its traditional sense, and traditional civil rights coexist. Despite the inferior consideration to which they are relegated, the indigenous civil rights continued to gain strength and became the main difficulty when undertaking the codifying legal of Spanish civil law<sup>1</sup>.

**Current situation and constitutional clarifications  
on the distribution of competences in matters of civil law**

Currently, since the establishment of the democratic and decentralized State in the Spanish Constitution of 1978<sup>2</sup>, the vitality of the traditional civil rights has been growing. Article 148 and 149 of the Spanish Constitution list, respectively, the potential powers of the autonomous communities and those matters over which

---

<sup>1</sup> O. Cardona Guasch, *Semblanza del Derecho civil de las Comunidades Autónomas: Reflexiones sobre la evolución del Derecho civil español a partir de la Constitución de 1978*, “InDret. Revista para el análisis del Derecho” 2019, no. 4, p. 4.

<sup>2</sup> With the Spanish Constitution of 1978, the dictatorial regime based on traditional centralised plans is left behind and Spain is divided into autonomous communities: territorial entities endowed with autonomy, with their own institutions and representatives and certain legislative, executive and administrative powers.

the State reserves exclusive or shared jurisdiction (a total of 22 powers in the first case and 32 in the second). Article 149 adds in its third and last section that all those matters not expressly attributed to the State may correspond to the autonomous communities provided that this is stated in their respective Statutes of Autonomy. Likewise, those matters not assumed by said institutional norms will correspond to the State, “whose norms will prevail, in case of conflict, over those of the Autonomous Communities in everything that is not attributed to their exclusive competence”. The precept concludes by establishing that “State law will be, in any case, supplementary to the law of the Autonomous Communities”, the same that legal reflected in Art. 13.2 of the Civil Code, and that supposes a substantial alteration in the position of the norm in the hierarchy of sources since it implies considering the Autonomic Law as a special Law of preferential application to the civil legislation of the State.

The basic regulation on normative powers in matters of civil law are found in art. 149.1.8 of the Constitution, which dictates the following: The State has exclusive jurisdiction over “civil legislation, without prejudice to the conservation, modification and development by the autonomous communities of civil, regional or special civil rights, where they exist. In any case, the rules related to the application and effectiveness of legal norms, legal-civil relations related to forms of marriage, ordering of records and public instruments, bases of contractual obligations, rules to resolve conflicts of laws and determination of the sources of law, with respect, in the latter case, to the rules of regional or special law”.

This precept, together with the abundant and dispersed civil regulations, is the reason why the Spanish civil law system is so complex and, at legal, incoherent. The precept, as expected, gave rise to various doctrinal interpretations and the Constitutional Court expressed itself in this regard in sentences that were and continue to be the subject of an exacerbated legal and political debate. Thus, in order to know the scope of the political power that the State and the autonomous communities can exercise, it is insufficient to read the Constitution and the statutes of autonomy, but rather it is essential to delve into the dense constitutional doctrine that resolves the numerous competence processes that have been raised from the moment of its creation.

The first pronouncement on the interpretation of Art. 149.1.8<sup>a</sup> of the Constitution is found in STC 121/1992, and the first question that is clarified is the meaning of the statement “civil, regional or special rights”. The Constitutional Court determines that the statement not only refers “to those special civil rights that had been compiled at the time the Constitution entered into force, but also to regional or local customs that pre-existed the Constitution”. The latter is included in this same ruling as an “essential constitutional legal for regional competence”. In this regard, it is necessary to add that in the territories with regional law, the adjective *special* has been suppressed. These territories manage to suppress the adjective with the constitution of the autonomous communities, with

the exception of Aragón and Navarra, which, before the democratic stage, had already dispensed with this adjective. This makes sense since, as Albaladejo<sup>3</sup> argues, regional law is, for the region in which it is in force, as common as the common law for regions without regional law. In the same sense, Badosa<sup>4</sup> reflects with respect to the Civil Law of Catalonia, “the Law of Catalonia cannot be special in the territory in which it is its own Law”.

The next ruling that is worth noting is STC 88/1993, it was a fundamental milestone since it tried to clarify the concepts of “preservation, modification and development” of civil, regional or special rights. These are the concepts that positively give the measure and the first limit of the attributable and exercisable powers and according to which the constitutionality or unconstitutionality of the regional regulations will have to be assessed<sup>5</sup>. The concept that requires greater specificity is that of “development”, and the Constitutional Court understood that the Constitution allows pre-existing special or regional civil rights to be the subject of “legislative action that makes their organic growth possible and recognises in this way not only the historicity and the current validity, but also the vitality towards the future of such pre-constitutional legal systems”. However, next, in the same third legal basis, the Constitutional Court establishes the limits of the concept by saying that “this growth, however, cannot be promoted in any direction or on any objects, since it should not be forgotten here that the possible autonomous legislation in civil law has been admitted by the Constitution not in response to a general and abstract assessment of what the respective interests of the Autonomous Communities could demand, but rather in order to guarantee certain regional or special civil rights in force in certain territories”. Thus, it ends by clarifying that “it is possible, therefore, that the Autonomous Communities endowed with regional or special civil law regulate institutions related to those already regulated in the Compilation within an update or innovation of its contents according to the informative principles of regional law. Which does not mean, of course, in accordance with the above, an unlimited civil legislative competence *ratione materiae* left to the availability of the Autonomous Communities”<sup>6</sup>.

Therefore, the Constitutional Court considers that the term “development” allows the Autonomous Communities that have assumed the corresponding competence to regulate *ex novo* other figures or institutions not regulated in the rules

---

<sup>3</sup> M. Albaladejo, *Derecho civil I. Introducción y Parte General*, vol. I, Bosch 1989, pp. 62–63.

<sup>4</sup> F. Badosa Coll, *Sentencia 31/2010, de 28 de junio*, “Revista catalana de dret públic” 2010, no. 1, p. 334.

<sup>5</sup> R. Bercovitz Rodríguez-Cano, *La conservación, modificación y desarrollo de los derechos civiles, forales o especiales, allí donde existan*, “Derecho privado y Constitución” 1993, no. 1, pp. 55–56.

<sup>6</sup> Judgment STC 156/93 reiterates this doctrine in legal basis 1, section b), and even literally reproduces essential parts of its content. Seventeen years later, in Judgment 31/2010, which resolves the appeal of unconstitutionality against the new Statute of Catalonia, the Constitutional Court once again reiterates the classic arguments of the aforementioned jurisprudence.

of their own civil law, although not in an unlimited way, of course, but only with respect to figures related to those already regulated, always that this responds to an update or innovation of its own civil law in accordance with its reporting principles. The sentence, and specifically this argument, gave rise to two magistrates including their individual opinions in which they defended a more open stance, since they understood that the Autonomous Communities only had as a limit the sub-matters that were reserved “in any case” for the State and they did not consider it justified to require that necessary connection between the content of the new regulations adopted by the regional legislator and that already existing in the civil system. The reality is that the sentence left many questions, such as, for example, whether the proximity of the matter regulated with the legislation for the development of Civil Law should be immediate or if it could also be more remote.

After a few years of silence by the Constitutional Court regarding Art. 148.1.8<sup>a</sup> of the Constitution, in its resolution 31/2010 on the Statute of Autonomy of Catalonia, the Constitutional Court reaffirmed its thesis of related institutions, an intermediate position between the restrictive and the maximalist thesis, but did not use any argument to clarify the questions about this convoluted matter. Currently, this criterion of the related institutions continues to serve to declare the constitutionality or unconstitutionality (in case of not appreciating a sufficient connection) of laws issued by the regional legislators. For example, STC 95/2017 declares Law 19/2015, of 29 July, is in accordance with the Constitution, as it understands that the regulation of temporary property is connected to other pre-existing institutes in Catalan law. The Court adds, in the eleventh legal basis, that its regulation constitutes “a case of organic growth of the special civil law of Catalonia that is protected by the competence attributed to the regional legislator for the «development» of its special civil law”. Otherwise, to also provide an example, it has been the declaration of unconstitutionality of certain articles of Law 2/2006, of 14 June, of the Civil Law of Galicia, to understand in the STC 133/2017 that certain institutions and figures historically practiced in Galicia do not constitute an adequate basis on which to anchor an adequate connection with pre-existing Galician law.

The thesis of related institutions, which, as has been seen in the previously cited examples, is currently maintained, requires the existence of a pre-existing Law, in the autonomous territories, which serves as the basis for building the new regulation. For a part of the doctrine, this component of historicity constitutes an impediment for the Foral Law to be able to develop conveniently and get rid of old adjectives. On the other hand, another sector of the doctrine considers that this thesis has contributed to the civil normative dispersion<sup>7</sup>. The intermediate position adopted by the Constitutional Court with the thesis of the related institutions can be criticised for both excess and defect; In my opinion, this thesis

---

<sup>7</sup> O. Cardona Guasch, *Semblanza del Derecho...*, p. 28.

served in the past to seek a balance between extreme positions, but it does not seem right to continue using hermeneutical criteria established in 1993, at a stage of incipient regulatory development, to determine whether the new laws and regulations are legal or not to the Constitution. It should also be emphasised that the idea of “sufficient connection” is not in the Constitution, legal is difficult to justify the obstinacy of the Constitutional Court in continuing to be anchored to it<sup>8</sup>.

Case that deserves special attention, although briefly due to the main object of this work, is that of the Valencian Community. After the war of Spanish succession in 1707, Felipe V de Borbón, the victorious king, issued The Nueva Planta decrees by which, among others, the regional law of Valencia was abolished and replaced by the laws of Castile<sup>9</sup>. The Statute of Autonomy of the Valencian Community referred to Valencian civil law which, in practice, had not existed since 1707. Thus, Art. 31 of the aforementioned Statute (currently Art. 49.1.2<sup>a</sup>, after its modification by Organic Law 1/2006, of 6 April), in very broad terms, mentioned the following: “The Generalitat Valenciana has exclusive jurisdiction over conservation, modification and development of Valencian civil law”. Following this line, the reform of the Statute of Autonomy of the Valencian Community of 2006 proposed the recovery of the old Regional Law<sup>10</sup>.

There are numerous pronouncements of the Constitutional Court in legal to certain Valencian laws. The STC 121/1992 resolved an appeal of unconstitutionality filed by the State Government against various precepts of Law 6/1986, of 15 December, on Valencian historical leases. The Court recognised the Valencian Community competence to enact certain laws in civil matters even without a pre-constitutional compilation of regional law. The Court recognised the Valencian Community as competent to enact certain laws in civil matters even

---

<sup>8</sup> It is opportune here to collect the words of M.A. Aparicio Pérez (*Alguna consideración sobre la sentencia 31/2010 y el rol atribuido al Tribunal Constitucional*, “Revista catalana de dret públic” 2010, no. 1, p. 26) when he says that the Constitutional Court is a constituted power and that it cannot give any content to the Constitution if the Constitution does not have that content in itself: interpreting is discovering, not inventing.

<sup>9</sup> The Valencian territory, despite having one of the oldest civil rights of the State (since its promulgation in the year 1261), was the only one of the former Crown of Aragon that never recovered its civil law, neither in everything nor in part, unlike the other territories of the former Crown.

<sup>10</sup> The art. 7 of the Statute of Autonomy of the Valencian Community dictates the following: “The legislative development of the powers of the Generalitat will seek the recovery of the corresponding contents of the Fueros of the historic Kingdom of Valencia in full harmony with the Constitution and with the requirements of the Valencian social and economic reality. This reintegration will be applied, in particular, to the institutional framework of the historic Kingdom of Valencia and its own onomastics within the framework of the Spanish Constitution and this Statute of Autonomy”. In the same sense, the 3rd Transitory Provision establishes that: “The exclusive jurisdiction over the Valencian regional civil law will be exercised, by the Generalitat, in the terms established by this Statute, based on the regional regulations of the historic Kingdom of Valencia, which is recovered and updated, under the Spanish Constitution”.

without a pre-constitutional compilation of regional law. In the second legal basis, it states that “It is not, in the first place, doubtful that the historical lease, as a customary figure, has existed and exists in the Valencian territory, whatever its relative importance in the set of lease contracts. This results from the extensive documentation provided by the Autonomous Community, without the State having provided other documents or materials of a different nature to distort it. Taking this into account, it is not possible to discuss the competence of the Autonomous Community to preserve its own customary law”.

However, as of 2016, the Constitutional Court upholds a reductionist interpretation of Art. 149.1.8 of the Constitution in regard to its addressees and declared null and void various regional laws by means of which the Generalitat Valenciana had begun the task of developing the competence that the 2006 Statute of Autonomy recognises in matters of Civil Law. In the STC 82/2016 which resolves the appeal of unconstitutionality filed by the President of the Government regarding the Law of the Valencian Courts 10/2007, of 20 March, of the Valencian matrimonial economic regime, the Court notes that: “With regard to any civil legal institution, whether it has been collected by positive or customary rule, it should be noted that, for the exercise of legislative competence, the accreditation of its existence at the time of entry into force of the Spanish Constitution is erected as an indispensable budget”. That same year, this resolution was succeeded by STC 110/2016 which resolves the appeal of unconstitutionality filed by the President of the Government regarding Law 5/2012, of 15 October, on de facto unions formalised of the Valencian Community and the STC 192/2016 which responds to the appeal of unconstitutionality also filed by the President of the Government regarding the Law of the Valencian Courts 5/2011, of 1 April, on family relations of sons and daughters whose parents do not live together. These two resolutions, with mimetic argumentation, also annulled the two laws cited for contravening the Constitution.

Although the extension of the legal basis of the Constitutional Court in these three resolutions is scarce and there is a political background in this case, it is also necessary to point out that the Valencian legislator has overstepped the limits by disregarding that Art. 149.1.8 of the Constitution refers to the development of regional or special civil rights “where they exist”, not “where they ever existed”. If this second option had been chosen, the Valencian case would have been clearly included among the assumptions provided for in the Constitution. On the other hand, it is true that the expression “where they exist” is more ambiguous since it does not specify when those rights should exist or whether they should be in force or not at the time the 1978 Constitution was approved.

Despite all this, if we analyse the situation of the Autonomous Community of Catalonia, we can see that its Civil Code currently integrates institutions that historically were not part of the Law in force in its territory at the time the Constitution was promulgated (nor in a related way), as institutions on classes of possession,

on the right of retention, or on the categories of goods or fruits<sup>11</sup>. Thus, the comparative grievance is evident and we will have to wait for the Constitutional Court's ruling in the event that a new appeal is filed in similar terms<sup>12</sup>.

On the other hand, regarding the legislative development of civil law, the state legislator has a double task: to legislate on common law in shared competences with the Autonomous Communities (for which the state legislator is also a substitute legislator) and legislate alone in those powers attributed to it exclusively. In theory, this issue may seem clear, but it is common for the state legislator not to differentiate well between these two functions or take the precaution of taking into account the regional regulations when he legislates within his exclusive powers.

In addition, it seems that the civil legislation promulgated by the state parliament is the only one existing in the legal system. For example, when the Voluntary Jurisdiction Law uses the term *patria potestad* (parental authority), the term used in the Spanish Civil Code, it forgets that this term is not used in certain Autonomous Communities. The same law intends to correct it by adding in the First Additional Provision that "The references made in this Law to the Civil Code or to civil legislation must also be understood to be made to regional or special civil laws where they exist", however, this is not entirely in accordance with the principle of equality of all existing civil systems in Spain. In a State as complex as Spain's, it is a fundamental requirement for the proper functioning of the system that there be loyalty between the different powers and institutions.

Once the state of the matter has been described, it becomes clear that the constitutional regime for the distribution of competences in civil matters legal complex and insecure. At the present time, there is no longer any doubt that all the Autonomous Communities approve laws and regulations in matters of civil law, and this normative activity is growing. As a consequence, there are not two autonomous territories in which the same regulation exists and is applied in matters of civil law, so we can affirm that in Spain we have disparate legal regimes<sup>13</sup>. Moreover, appeals and review appeals alleging infringement of the rules of regional or special civil law of the Autonomous Community are currently attributed to the Superior Courts of Justice of each Autonomous Community (unless it legal alleged infringement of constitutional precept), and not to the Supreme Court, the head of the interpretation unit of the jurisprudence in Spain.

---

<sup>11</sup> M. Yzquierdo Tolsada, *¿Por qué Cataluña puede y Valencia no?*, "El Notario del Siglo XXI: Revista del Colegio Notarial de Madrid" 2016, no. 68, pp. 22–25.

<sup>12</sup> C. Castillo Martínez, *Derecho foral valenciano y Derecho civil valenciano. Reflexiones para una recuperación y desarrollo constitucional de nuestro derecho*, "Actualidad Jurídica Iberoamericana" 2020, no. 12, p. 869.

<sup>13</sup> A. Acedo Penco, *Derecho civil autonómico versus Derecho civil estatal: estado de la cuestión tras la sentencia del Tribunal Constitucional 31/2010 de 28 de junio*, "Anuario de la Facultad de Derecho. Universidad de Extremadura" 2010, vol. XXVIII, p. 258.

This dispersion and regulatory diversity, for example, in contractual matters, neither generates legal certainty for citizens (essential constitutional principle contained in Art. 9.3 of the Constitution) nor does it favor economic traffic between autonomous communities. At the international level, on the other hand, such a complex and plural legal system does not attract the different operators either. In a globalised world like ours, having a coherent legal system that generates trust should be a priority.

### **Proposals to restructure the distribution of competences in matters of civil law**

Given these facts, it is necessary to propose proposals for the future to restructure the division of powers in matters of civil law. There are two ways that could open a more coherent future. The first way would consist of the Constitutional Court ceasing its efforts to trivialise the real legislative situation existing in many Autonomous Communities, deciding to put aside the argument based on the ambiguous and old concept of “sufficient connection” and, therefore, a more open, realistic and courageous interpretation.

It is appropriate to point out that since 2020 there has been a reduction in the legal of jurisdictional processes resolved by the Constitutional Court. This is due to two causes that have been consolidated in recent years and that have served as an alternative to access to constitutional justice. In the first place, the use of the bilateral negotiation mechanism between the State Administration and that of the Autonomous Communities regulated in Art. 33.2 of the Organic Law of the Constitutional Court to resolve jurisdictional discrepancies that generate regulations with the rank and force of law, whether state or regional. This allows the State and the Autonomous Communities to recover, through the pact, a leading role in the specification of the system for the distribution of powers. Secondly, the use of the contentious-administrative jurisdiction channel has increased to challenge those norms that are understood to violate the order of distribution of competences. This prevents the initiation of procedures to formalise a potential conflict of jurisdiction before the Constitutional Court<sup>14</sup>.

The second way that could open a future that would provide legal certainty in our system of distribution of powers in matters of civil law would be its modification through the reform of the Constitution. The territorial organisation of the State was one of the most controversial issues when drafting the Spanish Constitution of 1978 and, in order to achieve consensus among the political forces existing at the time, the territorial model was left practically blank. Title VIII of the

---

<sup>14</sup> G. Martín i Alonso, *Tribunal Constitucional i tensions territorials: la doctrina constitucional durant l'any 2020*, “Revista d'estudis autonòmics i federals” 2021, no. 33, pp. 216–217.



Constitution, entitled “On the territorial organisation of the State”, was drafted for the construction of the autonomous State to promote political decentralisation, but it would be necessary to reform it in order to, now, regulate the functioning of the autonomous State that it allowed to create. Achieving the necessary majorities for said reform and reaching an agreement that definitively establishes the framework of the respective powers will not be an easy task, but it is the essential element to achieve the consolidation of the autonomous model.

In this reform of the Constitution, in order to overcome the various dysfunctions generated by the current division of powers in the matter dealt with here, the following aspects should be taken into account: the division of powers between the State and the Autonomous Communities must be established in such a way that be flexible but not enigmatic (it must be remembered that the Rule of Law demands legal certainty and predictability); the concepts used to outline the competencies must be homogeneous and clear; and the wording of the precepts must be simple and transparent.

Neither of the two possible solutions proposed is simple or offers a totally satisfactory response to the difficulties presented by the current scenario, but they can be a good starting point. After verifying the symptoms of our current territorial model, it is evident that it is worth trying.

## Bibliography

- Acedo Penco A., *Derecho civil autonómico versus Derecho civil estatal: estado de la cuestión tras la sentencia del Tribunal Constitucional 31/2010 de 28 de junio*, “Anuario de la Facultad de Derecho. Universidad de Extremadura” 2010, vol. XXVIII.
- Albaladejo M., *Derecho civil I. Introducción y Parte General*, vol. I, Bosch 1989.
- Aparicio Pérez M.A., *Alguna consideración sobre la sentencia 31/2010 y el rol atribuido al Tribunal Constitucional*, “Revista catalana de dret públic” 2010, no. 1.
- Badosa Coll F., *Sentencia 31/2010, de 28 de junio*, “Revista catalana de dret públic” 2010, no. 1.
- Bercovitz Rodríguez-Cano R., *La conservación, modificación y desarrollo de los derechos civiles, forales o especiales, allí donde existan*, “Derecho privado y Constitución” 1993, no. 1.
- Cardona Guasch O., *Semblanza del Derecho civil de las Comunidades Autónomas: Reflexiones sobre la evolución del Derecho civil español a partir de la Constitución de 1978*, “InDret. Revista para el análisis del Derecho” 2019, no. 4, pp. 1–33.
- Castillo Martínez C., *Derecho foral valenciano y Derecho civil valenciano. Reflexiones para una recuperación y desarrollo constitucional de nuestro derecho*, “Actualidad Jurídica Iberoamericana” 2020, no. 12.
- García Rubio M.P., *Presente y futuro del Derecho civil español en clave de competencias normativas*, “Revista de Derecho Civil” 2017, vol. IV.
- Martín i Alonso G., *Tribunal Constitucional i tensions territorials: la doctrina constitucional durant l'any 2020*, “Revista d'estudis autonòmics i federals” 2021, no. 33.
- Yzquierdo Tolsada M., *¿Por qué Cataluña puede y Valencia no?*, “El Notario del Siglo XXI: Revista del Colegio Notarial de Madrid” 2016, no. 68.

## Summary

On the occasion of the fortieth anniversary of the approval and entry into force of a large part of the Statutes of Autonomy, the basic rules of the Autonomous Communities and Autonomous Cities in which the political power of the Spanish State is territorially distributed, this work shows the heterogeneous process of development of civil law in these territorial entities. It also analyses the problem of the future of Spanish civil law from the point of view of its territorial structure. Finally, this work proposes a constitutional solution that could be a starting point to mitigate the difficulties presented by the current scenario.

*Keywords:* Constitution, Constitutional Court, competence, private law

## **ROZWAŻANIA KONSTITUCYJNE DOTYCZĄCE PODZIAŁU KOMPETENCJI W OBSZARZE HISZPAŃSKIEGO PRAWA CYWILNEGO**

### Streszczenie

Z okazji czterdziestej rocznicy zatwierdzenia i wejścia w życie znacznej części statutów autonomicznych, podstawowych przepisów wspólnot autonomicznych i miast autonomicznych, w których kompetencje Państwa Hiszpańskiego zostały przekazane jednostkom podziału terytorialnego, przedstawiono niejednorodny proces rozwoju prawa cywilnego w wymienionych jednostkach. Przeanalizowano również problem przyszłości hiszpańskiego prawa cywilnego z punktu widzenia struktury terytorialnej. Wreszcie opracowanie to przedstawia propozycję rozwiązania konstytucyjnego, które mogłoby stanowić punkt wyjścia do ograniczenia trudności wynikających z obecnego stanu rzeczy.

*Słowa kluczowe:* Konstytucja, Sąd Konstytucyjny, kompetencje, prawo prywatne