

# *Between **Auctoritas** and **Potestas***

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## *What Spanish Legal History can teach European Legal Integration*

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*“The philosophy in the soul of my people appears to me as the expression of an innermost tragedy analogous to the tragedy of the soul of Don Quijote, as the expression of a fight between what the world is as shown to us by the reason of science, and what we want the world to be as told to us by our religion”*

(M. DE UNAMUNO, *On the Tragic Feeling of Life* [Del sentimiento trágico de la vida], 1913)<sup>1</sup>

*“Spain symbolises all that Europe wants to achieve”*

(Guy VERHOFSTADT, Belgian Prime Minister, when handing over the Presidency of the EU to Spain, December 30<sup>th</sup>, 2001)

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<sup>1</sup> The original text reads: “Aparéceseme la filosofía en el alma de mi pueblo como la expresión de una tragedia íntima análoga a la tragedia del alma de Don Quijote, como la expresión de una lucha entre lo que el mundo es según la razón de la ciencia nos lo muestra, y lo que queremos que sea, según la fe de nuestra religión nos dice” (UNAMUNO 1913:321).

## 1. *Introduction: Can History teach?*

Spanish legal history depicts an on-going struggle for homogenisation against the centrifugal force of legal particularism. This state of struggle can be traced back to the very first civilisations on Spanish territory of which contemporary historical research has notice. The outcome of such struggle – what we today regard as the outcome – is what I shall call the “Spanish modern State”. In the preamble to his ambitious *Study of History*, Arnold TOYNBEE warned that

[h]istorians generally illustrate rather than correct the ideas of the communities within which they live and work (TOYNBEE 1947:15).

Obviously, a discrete study of (a part of a) history like the present one is with more reason contaminated by the bias of contemporary time and space co-ordinates – indeed, the use of the adjective “Spanish” reveals a reading of the process through the prism of the (provisional) outcome. More: the very conceptualisation as a “process” of a succession of states of things adulterates, to a certain extent, the genuine character of the described reality. However, such as total absence of ethnocentricity is not conceivable even for anthropologists of law<sup>2</sup>, the awareness that the “national sovereign state has led historians to choose nations as the normal fields of historical study” (TOYNBEE 1947:15) shall not prevent us from reproducing the findings of such historians in relation to the formation of present-day (legal) Spain. Also in our case, in our meta-discourse about the historians’ discourse on history, the account of the process will be biased by the finality of such account: the presentation of the different techniques with which Spain has answered, all over history, to the challenge of Diversity, culminating in the creation of a constitutional federal (autonomic) State (§ 2), shall highlight successful patterns that could provide, *mutatis mutandis*, suited guidelines for contemporary European integration (§ 3).

“Successful”, as well as “*mutatis mutandis*”, are the clue expressions in the last sentence. We shall in short refer to the first one. As regards to the second, it directly hints at the delicate question, which touches the core of social science in general, of the comparability of explanatory schemes that refer to different states of affairs. Such comparability needs to be assessed from a double point of view: namely, from that of the goals (outcomes) and from that of the processes. The former should not concern us at this stage: certainly, the goal of a modern Spanish State partially differs from the goal of a viable post-modern Europe, and we shall dwell on that under § 3. More importantly, however, and as a logical *prius*, it needs to be shown that overall cross-fertilisation between the processes is possible. This requires a degree of commensurability between (largely) disconnected historical evolutions that is not self-evident. Since it constitutes the methodological basis of this paper, a brief comment on this issue is necessary.

To talk about *similar* starting points, and to predict that *similar* techniques will yield *similar* results implies that historical events follow, at least to some extent, internal

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<sup>2</sup> According to them, complete identification with the “Other” is utopic (EBERHARD 2001:7; ROULAND 1988:*pr.*) and would even be damaging (*ibid.*:165).

regularities. Historiography can be said to have endorsed two extreme models to account for past human conduct<sup>3</sup>: irrationalism and determinism. According to the former, history can only be grasped if the psychology of its actors is penetrated; human freedom of election is the *alpha* and *omega* of the course of history<sup>4</sup>. By contrast, the latter leaves no room whatsoever to human intervention, by postulating the existence of hidden forces – material or ideal – that, being unknown to the historical actors, guide the succession of events. It is obvious that none of the extreme models can allow for a *fecund comparability* of states of affairs: the first one, because it does not recognise any pattern (“comparability”); the second one, because identity of patterns could serve, in the best of the cases, at predicting future developments – it thus precludes any reformist (“fecund”) attempt derived from human reflection, like the one proposed in this paper.

I suggest to stick to TOYNBEE’S account of “challenges and responses”, which can be conceived of as an intermediate position between the above-mentioned two. Indeed, TOYNBEE began his *Study* – apparently – inspired by seeing Bulgarian peasants wearing similar head-gear to that described in an historical Greek epic; nevertheless, his distinction between “stimuli” and “responses” is aimed at not eliminating arbitrariness from the scene. Briefly put, TOYNBEE analyses up to 26 civilisations and faces the problem of determining why, under similar external circumstances, different societies have evolved differently, have undertaken differently the step “out of ‘the integration of custom’ into ‘the differentiation of civilisation’”<sup>5</sup>. He acknowledges as insufficient (indeed, as methodologically mistaken) the “tactics of the classical school of modern physical science” which applies “to historical thought, which is a study of living creatures, a scientific method devised for the study of inanimate nature” (*ibid.*:81): History is not (only) guided by “inanimate forces” such as race or environment, but by an “indefinable factor”<sup>6</sup> that shapes the unpredictable answers of human actors to both material or (especially) human challenges. In the author’s words:

A society (...) is confronted in the course of its life by a succession of problems which each member has to solve for itself as best it may. The presentation of each problem is a challenge to undergo an ordeal (...). The unknown quantity is the reaction of the actors to the ordeal when it actually comes<sup>7</sup>.

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<sup>3</sup> “Historical sensitivity” – concern for the past as it was (a tendency inaugurated in literature by the historical novels of Walter SCOTT), not with any desire of instrumentalisation for a present-day purpose – , together with the focus on (wilful) human conduct as opposed to a fact, can be considered the major landmarks that allow for a talk about a jump from pre-historiography to historiography.

<sup>4</sup> *Comprehensive* positions are, in this sense, more moderate than *empathic* ones, in so far as they stop before the freedom of election, thus not purporting a thorough identification of the character at stake.

<sup>5</sup> TOYNBEE 1947:89; he terms this also the difference “between the primitive and the higher societies” (*ibid.*:87) and draws a parallel with the Sinic “Yin” and “Yang” (“civilisation” thus is equivalent to “human life set into motion”; *ibid.*:70, 84).

<sup>6</sup> Toynbee quotes at this point an archaeologist, P.A. MEANS (“*Ancient Civilisation of the Andes*”), whose words are worth reproducing: “Environment... is not the total causation in culture-shaping... [T]here is still an indefinable factor which may best be designated quite frankly as x, the unknown quantity, apparently psychological in kind” (*ibid.*:83).

<sup>7</sup> *Ibid.*:18, 80. Please note that, for TOYNBEE, the notion of “society” represents the “intelligible field of study” and contains itself a number of human communities (*ibid.*:17 *et seq.*).

Such “reactions”, also termed as “psychological momenta”, are peculiar to each civilisation and historical moment. They constitute the particular responses derived from “stimuli” (motives) that a series of external (and conceptualisable) challenges inject into the *Yin*-state of whole societies. Challenges, consequently, are homogeneous (within a group of communities), whilst responses are particular (to each community). What is especially interesting about this dualist determinist-irrationalist approach is that it allows for an evaluation of responses pursuant to their degree of successfulness. Indeed, TOYNBEE spends large parts of his analysis in *comparing* the responses of civilisations to similar challenges: a *successful* response is one that leads to a growth of the civilisation at stake. In the words of D.C. SOMERVELL, the author of the abridgement of the *Study*,

Growth occurs when the response to a particular challenge is not only successful in itself but provokes a further challenge which again meets with a successful response (TOYNBEE 1947:657).

So, we could say, there are three aspects to consider: (i) the challenges, (ii) the responses and (iii) the goal of growth. (i) would be homogeneous within a group of communities pertaining to the same “family”, and would only need to be identified. (ii) would be the open variable, the one subject to influence and thus the one that justifies a critical work. (iii) ought to be identified with something like “**viability**” of a community’s organisation, which must not be confused with stagnation (the worst enemy of any social system) but at the same time excludes destabilising, damaging, innaturally fast change. The goal being more or less constant (it is certainly a broad *concept*, that allows for different *conceptions*), it is clear that different means (ii) will lead to different goals (iii), and it is the task of a critical reflection like ours to suggest appropriate means to reach a certain goal, given a certain starting point (i).

Now, this abstract talk can be translated into the language of Spanish history in connection to European integration. I shall take as a common challenge (i) of both historical Spain and (at least) contemporary Europe the fact of “**Diversity**”. By that notion, I understand a sociologically determinable state of affairs in which different human groups – distinguished by their background, beliefs and needs – share nevertheless a broader, geographically determined, framework which in a way makes the different groups appear as a whole. In other words: the diverse parts do share, to some extent, some background, beliefs and needs (all the parts share them to a comparable extent, and no group who shares them similarly can, under normal circumstances, not be part of the whole). This combination of a particular and a common element is furthermore inherent to the semantic denotation of the word “diversity”: there can only be diversity within a pre-defined category or framework, to which consequently the diverse elements somehow pertain.

Diversity thus defined aims at being free from any legal or political *Vorverständnis* (GADAMER). It simply accounts for a factual situation of instability due to a tension of opposed forces, namely a centrifugal and a centripetal one. That way, it can play the role of a

Toynbeenian “challenge”<sup>8</sup>. Where there is diversity, social life – the raw material that law must confront – presents a rather self-contradictory shape that – one might think – would lead irredeemably to the disintegration of the community at stake unless the appropriate response was adopted to achieve the goal of “viability”. Intuitively, one can suppose that this response cannot consist in giving in to either of the opposed forces, for both the complete uniformisation to which the centripetal force would lead and the atomisation to which the centrifugal force(s) would lead imply a state of a-temporality incompatible with the dynamism inherent to the goal of viability (iii).

It remains to convince the reader that in the different phases of Spanish history, as in present-day Europe, Diversity represents a major challenge. We hope to offer some evidence for that in the course of the next sections. Given, then, the similarity of the goals – the construction of a viable Spain and of a viable Europe –, Spanish **responses** might offer interesting clues from which European integration could, *mutatis mutandis*, certainly learn.

As HOMER’S seer KALCHAS, who could not devise the future (nor even recognise the present) without considering the past<sup>9</sup>, we shall look back to *what was* to better depict *what is* and to suggest a silhouette of *what could*, or even *ought to, be* in the future<sup>10</sup>.

## **2. Spain until Modernity: pluralism as the separation of Auctoritas and Potestas**

We shall start by defining the theoretical prism through which we suggest to read – and accordingly periodify – Spanish legal history (§ 2.1), and we will, in a second step, schematically project such findings on a series of shots that may be isolated within the complex historical background of what we today know as Spain (§ 2.2).

### **2.1. The “essential tension” between Auctoritas and Potestas...**

Law needs what HABERMAS calls a “moment of inconditionality”: it is the metasocial element that allows Law to mediate between, on the one hand, politics and, on the other hand, morals. If completely absorbed by politics (*potestas*), Law vanishes in an instrumentalisation; separated from both politics and morals, law loses its identity; when submerged in inconditionality (*auctoritas*), it is but a deficient and, in any case, impotent morality<sup>11</sup>.

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<sup>8</sup> According to TOYNBEE, “affiliated civilisations” (those that derived from “civilised” predecessors) have been exposed to explainable physical and human challenges, by contrast to the “unrelated” ones, about whose eventual human challenges historical evidence is lacking (*ibid.*:102). Obviously the determination of the physical or human nature of the challenge of Diversity we are commenting upon is a too complex question that lies beyond the scope of this paper.

<sup>9</sup> Referred to in GADAMER 1989:20.

<sup>10</sup> It might be worth noting at this point that this paper intends to be distilled from any politico-philosophical approach and wants to use, to the extent possible, legal historical tools. Nevertheless, prescriptive discourse, “would-be” discourse, is inseparably associated with political theory, and I shall not deny this “family resemblance”. Suggestions regarding viability do only partially overlap with programs leading to justice; in the end, it can be seen as a question of emphasis (viability is important because what wants to be maintained is seen as “good”; theories of justice, such as the Rawlsian, fight heavily with their apparent lack of viability – see RAWLS 1993). In comparing starting points, instruments and goals, we shall therefore mainly imply the “goodness” of the goals and concentrate on the strategic comparison of the other two.

<sup>11</sup> HABERMAS 1987; HABERMAS exemplifies these positions, respectively, with J. AUSTIN, H. KELSEN and I. KANT. For KELSEN’S moral sterilisation of Law, *cf.* also WINTGENS 2000 (what he calls “radical legalist

However, in the world of *empiria* equilibrium is difficult to maintain. What is theoretically described as a delicate mediation is easily converted into an increasingly virulent *tension*. Like the opposite poles in a magnetic field, *auctoritas* and *potestas* – both dependent on each other – tend naturally to become united under the same roof. Our Diversity-challenge could even be reframed, more generally, in terms of *auctoritas* and *potestas*. The latter arises naturally at a “local” level, at a level close to the object of the *potestas*: the shorter the distance, the stronger the physical strength. Conversely, it is of the essence of *auctoritas* to take place at a more “global” level, if only because the notion of “authority” implies a symbolic power of a single instance upon a group<sup>12</sup>. *Auctoritas* and *potestas* being thus conceivable, in principle, as centripetal and centrifugal forces, their “essential tension” within the realm of a legal system could be said to consist of *auctoritas* and *potestas* being (a) both required for a legal order to exist, whilst at the same time (b) attracting each other and nevertheless (c) incompatible if totally fused<sup>13</sup>. Like two sides of the same coin, both of them are necessary but need to look into different directions.

This is connected to the periodification of Spanish legal history we have chosen in this paper. Often enough, history is explained **by hegemonies**. Applied to Spain, this method would require us to highlight the fact that Spain did not become a State in the modern sense until it succeeded in establishing an efficacious common law for the whole territory (and each time it failed to do so, Spain disintegrated again in independent regions). Whilst all this is true, it represents a partial approach: it focuses only on one pole of the tension, the pole of physical *potestas*. More enriching, at least for our present purposes, is to outline history **by acts of resistance of legal particularism**. Instead of remaining at the surface-level of the verification that Spain only very late became a State, it can be interesting to explore the *reasons* for Spain’s late “success”. The enquiry on *why* it did fail so often may shed light upon what was new to the model that has lasted (so far).

Eventually, it was the recognition by the effective “*iura propria*” of the *auctoritas* of a flexible “*ius commune*”.

## **2.2. ... and its reflection in the periods of Spanish legal history**

The “challenge” of Diversity, consisting of a centripetal (global) and a centrifugal (local) force, together with the “essential tension” of *auctoritas* and *potestas*, shall constitute the red line through the following analysis. We shall refer as “responses” to the strategies used (not always by conscious, individual people) in each moment to make compatible this two-fold tension with the “goal” of viability.

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positivism”). On the necessary mediation of Law between force (politics) and good (morals), see PECES-BARBA 1995, where he *inter alia* quotes B. PASCAL: “Justice without force is powerless; force without justice is tyrannical”.

<sup>12</sup> One could add: the common *opinio* is what essentially provides the authority’s source (*vide infra* on the conception of law as institutional fact, § 3.2). Hence, the broader the group, the stronger the single authority – and the stronger the authority, the more global.

<sup>13</sup> Cf. the three-dimensional theory of validity (consisting of the secant circles of effectiveness, justice and legality) elaborated by OST and van de KERCHOVE (OST and VAN DE KERCHOVE 2002, ch. 6).

### 2.2.1. Pre-roman hospitality and military clientele

Roman Law being the indisputable starting and reference point of the historical study of any legal institution, the scarce information about previous modes of social organisation that are available to historians is usually labelled under the denominator of “Pre-roman”. So, too, as regards to the Iberian Peninsula.

Without considering the different migration movements into and out of the Peninsula since the appearance of the Cro-Magnon man around the year 3000 BC, it is of interest for us to evoke the heterogeneous spread of people all over the territory, starting around the year 1000 BC with the migration of the Iberians, the subsequent migration of the Celts (900 and 600 BC), the manifold mestissage phenomena between them and the Capsiens, as well as the arrival and integration of “foreign” people (Phoenicians, Greeks).

The autochthonous people were organised, from a socio-political viewpoint, on a personalist basis (the organisation was “national” in the etymological sense of the term). “Populi” (as opposed to the later Roman “tribes” based upon territory) were divided into *gentilitates*, thus stressing the common birth-determined origin of its components. *Gentilitates* had their own law, meaning a set of privileges that only the community’s members shared: having an own law was meant as a sign that the group was free (not foreign and subdued). The clue idea was protection: members’ protection by the leaders in exchange for a defence obligation. Even running the risk to oversimplify, we could put it as a situation in which *auctoritas* and *potestas* fell together in the same territory. Thus, the Spanish “map” consisted of a *juxtaposition* of *closed* communities. Hostility between *gentilitates* was an extended phenomenon (hence the need for defence), which does not allow to speak of any common *auctoritas* recognised by them all.

This situation progressively changed. Precisely the wish to avoid a permanent state of war lead some communities to establish so-called “*general clientele pacts*” between each other. (Today we would speak, *mutatis mutandis*, of international treaties). By such a pact, each *gentilitate* agreed to extend its privileges to the members of the other *gentilitate* that was party to the agreement. Assimilation of the alien citizen to the own ones took place both as regards to (the obligation of) defence as well as to (the right of) protection. A different modality of pacts aimed at reducing hostility were the “*particular clientele pacts*”, undertaken between a *gentilitate* and an individual of another *gentilitate*, and the contents of which did not essentially differ from the general ones (the *gentilitate* extended its privileges to the citizen, who remained bound to defend his new *gentilitate*).

“Particular clientele pacts” had a fundamental repercussion in such people’s evolution due to their progressive conversion into so-called “*military clientele pacts*”. These were relations from person to person: the client linked his life to the life of the patron who received him. Such attachment derived from clientele (called “*devotio*” in especially strong cases) ended up by being stronger than the link of the client to his original *gens*. And, not surprisingly, the proliferation of “military clienteles” increasingly diluted the blood relations, i.e. the political organisation based on personality.

At that moment of history one could not speak of Diversity as defined above. *Gentilitates* that co-existed had all, in its inside, a *potestas* backed up by an *auctoritas* – both pertaining more or less to the same scope. “General clientele pacts” did probably not significantly alter this structure; still, one could guess that there was already the germ of an extension of the *potestas* beyond the *auctoritas*: individuals owed a defence duty to their “secondary” (if I may use this term) *gens* whilst remaining *ex hypothesi* psychologically more attached to what they felt to be their “original” (native) *gens*. Probably “particular clientele pacts” did further stress this “dissociation by extension” of *potestas* from *auctoritas* due to the individual character of one of the parties: the assimilated citizen must have more strongly felt the *potestas* of his secondary *gens*, and rather weakly its *auctoritas* – provided the latter is conceived of as an essentially collective phenomenon, so that the sharing of authority-feeling is cosubstantial with (psychological) integration in the group.

As an ulterior step in this evolution, person-to-person “military clientele pacts” extended and strengthened *potestas* outside the borders of the original *gens*, whilst almost neutralising the *auctoritas* of such *gens* over the client (whose *devotio* to the patron surpassed all sense of being bound by the law of the *gentilitate*). This destroyed, little by little, the organisation of the autochthonous free people. Their social ties being weakened, they lost immunity against the invasion of foreign conquerors. At the time of the Punic Wars, that opened the door for the Roman *conquest*, the Peninsula was largely *dominated* by the Carthaginians. The dispersion of *potestas*, alongside with the reduction and vulgarisation of (“legal”) *auctoritas*, had visibly been an inadequate response to the factual interaction of centripetal and centrifugal forces within the Spanish geography<sup>14</sup>.

### *2.2.2. Roman Empire and vulgarisation of Roman Law*

For our present purposes we shall consider Roman legal history as divided into two phases, the line being drawn in the 3<sup>rd</sup> century AD. The Spanish Peninsula, conquered and structured by the Romans in the year 197 BC, experimented very closely the vicissitudes of Roman political growth (first phase) and decline (second phase).

The essential feature, from a legal point of view, of the incorporation into the Roman structure of conquered territories was the respect by the Republic of their law and political organisation. In its early days – the days of splendour – the Roman world was a Republic of cities, characterised by an asymmetry between them: *ius civile* was only applied in Rome and its *pomerium*, which made the condition of Roman citizen (*liberii*) appear as a privilege attached to the idea of *libertas*. *Libertas* was only secured *in* Rome and *for* Roman citizen. Which does not mean that *civitates* in provinces were oppressed. Roman law being a privilege, indigenous cities were respected as such, according to a principle of personality similar to the one that prevailed under pre-Roman *gens*. Autonomy of the cities was, however,

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<sup>14</sup> To be precise, we should not talk about “centrifugal” and “centripetal” in the same sense as used above (and in the rest of this paper), for at this point of Spanish history there was no common element that could account for a “centripetal” force. However, we could invert the terms and use “centripetal” to refer to the inside of every closed community, and “centrifugal” to allude to the rivalry between them and subsequent tensions and relations engendered. In fact, it was precisely the absence of a positive common element (the negative common element being mutual aggression and war) that led to a disintegration of that form of organisation.

also seen as something positive, when opposed both to submission to the Provincial Governor and to subjection to pay taxes to the Republic. Consequently, according to the degree of resistance the territories had offered to the Roman annexation, their recognised autonomy could range from precarious (stipendiary cities) to significant (immune cities). In all such cases, autonomy had a *negative* meaning: *non*-subjection to taxes, *non*-submission to the Provincial Governor's power to change the city's "public law" status; by no means there was an extension of the benefits of *ius civile* in the "private" sphere, nor *a fortiori* an institutionalised procedure that allowed an appeal to Rome's highest instances (*intercessio*).

This respect for legal particularism also marked the first centuries of Spanish integration into the Roman Empire<sup>15</sup>. The multiplicity of status of the different regions did not allow for any unification of local *potestas* that could represent a challenge to the global *auctoritas* anchored in the "Res-Publica" and secured regionally by the Provincial Governor. The latter had the two-fold mission of preserving the pre-eminence of the Republic, and of recognising the cities' singularities. I do not consider it a logical aberration to speak of a **horizontal** separation of *auctoritas* and *potestas* in the first phase of the Roman hegemony. To this, also a **vertical** separation could be added, taking place within both Roman and indigenous cities. Within the realm of the indigenous cities, such separation can be understood as the separation between the Governors' formal "say" and the actual substantive sources that impregnated (private) legal life: whereas the Governor officially held *potestas* (the absence of *libertas* implied, besides the absence of *intercessio*, the absence of collegiate magistrates), his source of inspiration had of necessity to be local laws and customs. As regards to Rome and romanised territories, the separation of *potestas* and *auctoritas* connects to the well-known conceptualisation of classical Roman law as "a law of jurists" progressively created through cases resolved *ad hoc* by the *praetores* (magistrates). *Auctoritas*, in this sense, would have pertained to the jurists (*ius respondendi*) – whose condition precisely was based upon social recognition. *Potestas*, then, would have been in the hands of the (multiple) *praetores*. One can generally say that the basic forces of the Republic lied in the people and the magistrates as regards to *potestas* (socially recognised physical power), and in the Senate as regards to *auctoritas* (socially recognised intellectual knowledge). And some of the most valuable and influential treasures of classical Roman Law were construed thanks to this pluralism in the sources of the law, an equilibrated interaction of a global with a particular element, the first allowing for the necessary flexibility to adapt the Twelve Tables to the evolution of society, the second precluding any overriding of the constitutive framework of *libertas* that nourished and hold together the flourishing Res Publica.

The process of the decline of the Roman Empire can be said to have been initiated when a series of phenomena gradually arose, all of them having in common a contribution to the unification and the strengthening of the power derived from Rome. In the **political** realm, one must refer to the transformation of the Republic into an Empire, eventually announced by

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<sup>15</sup> In the year 197 BC the Republic divided the conquered part of Spain into provinces (*Citerior* and *Uterior*), whilst it was only in the year 19 BC that AUGUSTUS incorporated the whole of the Peninsula (by defeating Cantabrians and Asturians).

AUGUSTUS' self-proclamation of "Princeps" – a subtle device (previously theorised by CICERO) that did formally not alter the Republican foundations (Princeps = the first citizen), but substantially introduced the germ of uniform and paternalistic power of a *dominus* over individuals who increasingly appeared as *subiecti* rather than as adult, self-determined co-creators of the Res Publica. In the **federate** realm, there was a growing assimilation between the status of Roman and indigenous cities, achieved through a gradual erosion of *ius civile* privileges coupled with a gradual injection of *ius civile* into the laws of the provinces. AUGUSTUS' reform of the provincial administration had as a consequence, from the point of view of the Peninsula, that most of its territory (the whole *citerior*, plus *lusitania*) was directly administered by Governors appointed by the Princeps (*legati augustii*) whose status of government officials – and subsequent detachment from the actual territory to which they formerly "served" – was reinforced by the fact that they were directly paid a salary from Rome, and by their being granted broad judicial as well as military functions within their circumscription. Indigenous people and *peregrinii* would soon have rights (actions!) directly enforceable *vis-à-vis* the Principate and against the Provincial Governor through "provincial assemblies" (*concilia*), initially conceived as organisers of the imperial cultus. Organisation of *municipii* and colonies increasingly emulated the one of Rome and of its guaranties of *libertas*. Guaranties of something that did not exist anymore in its genuine shape – the process of concentration of power was accompanied by a voiding of the classical notion of *libertas*, that culminated with the emperors DIOCLETIAN and THEODOSIUS: what had seemed as an act of progress – the extension of the condition of Roman citizen officially sanctioned by the Edict of Caracalla (212 AD) – turned out to be a reduction of the citizen's condition to *subiectii* and *servii* of the *sacratissimus dominus*. There is an ulterior explanation: the political and the economic realms are highly interdependent, so that a crisis in one of them bears an effect upon the other. The weakening of the Roman organisation obviously increased the danger of foreign invasion (Germanic people had constituted a threat for many years, and had partially penetrated the Roman Empire through "hospitality agreements"). The Empire needed money to strengthen the army, and money was with people (no matter if Roman or indigenous).

*Potestas* had intervened in *auctoritas*. From a horizontal point of view, there was no more a global *auctoritas* covering a multiple map of local *potestas*, but an ever-growing centralised *potestas* that absorbed, at least legally, any sparkle of heterogeneity. From a vertical point of view, the interception of *potestas* into classical *auctoritas* gave birth to post-classical Roman law. AUGUSTUS had already done the first move by limiting the *ius respondendi* to certain jurists designated by him. HADRIAN lead this to its ultimate consequences by abolishing references to singular jurists and substituting them by appeals to the jurists that formed part of the Imperial Chancery, through the figure of *rescriptii*. With CONSTANTIN'S introduction of the general and abstract *leges*, the political absolutism was definitely culminated. Proliferation of *leges* lead to their (private, later public<sup>16</sup>) collections,

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<sup>16</sup> Private collections of vulgar law, such as the Gregorian and the Hermogenian *Codici*, as well as other legal texts, began to be falsified in the post-classical period due both to the appearance of the *cognitio extra ordinem* (with its requirement of *recitatio legis*) and to the ecclesiastic editorial reform consisting in the substitution of

and *ius* was fixed in a similar way. Collections like the *fragmenta vaticana* were a mixture of both sources. That is why, in the **legal** realm, the natural dynamism of law had been stagnated by a fusion of *auctoritas* and *potestas*, and the result is referred to as “vulgar law”.

“Vulgar Roman law” was substantively influenced by provincial law. The latter is the body of law progressively developed in the provinces under the auspices of the Provincial Governor. The latter’s increasing (jurisdictional) power in his circumscription could not avoid cross-fertilisation of Roman and indigenous law. In fact, cross-fertilisation of both Roman and provincial law must be seen as an ulterior consequence of the homogenisation-unification tendency. Law is a social phenomenon, and its effectiveness requires firm roots in tradition and in daily practice of all the actors (not just of the leading elite). To a certain extent, the body of law developed in the provinces served at enriching the decadent “central” Roman law: whilst the latter incarnated more and more the Orientalist ideals of abstraction, naturalism and synthesis, the former’s connection with “law in action” eventually was perceived as a gust of fresh air and consequently incorporated to legal reasoning.

“Vulgar” stands both for “bad” and “common”. *Potestas*, when made common under the absolutist flag, asphyxiated *auctoritas*. The Roman Empire, by its very nature, had to face from its start a major challenge of Diversity. Roman cosmos was flourishing – we could say it was “viable” – as long as, and to the extent that, particularism was respected within a broader legitimating organisation. The classical Republic had successfully managed to harmonise the centrifugal forces of conquered cities and their laws, with the centripetal impetus of the centre of the Empire. While there was heterogeneity, almost “disorder”, law was adapted to life. As soon as artificial homogenising supra-structures<sup>17</sup> were applied with a view to increase a power that had no social roots, law started to become dead letter. DIOCLETIAN’S administrative reform meant an heteronomous drawing of boundaries in a way disconnected to legal practice, as if acting from a “God’s eye point of view” (not surprisingly, this administrative division later formed the basis of the organisation of the Catholic Church and its homogenising vertebral column of infallibility). *De facto* physical and, *a fortiori*, political power had progressively fled from the cities to the countryside latidunds, where incipient phenomena of private protection (as a substitute for the lacking public one that could no longer be provided by a disintegrating Empire) announced medieval feudalism, i.e. the return to legal dispersion (in the Occident Empire).

### *2.2.3. The illusion of a Visigoth Empire*

Visigoths were a Germanic people. Starting from around the year 300 AD, they had approached and collaborated with the Roman imperial administration, formally as parties to a “hospitality agreement”: the Empire was supposed to offer them protection in exchange for military defence. Quite soon, however, the Visigoths’ bellicosity came to the foreground – in

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the roles by bound sheets. This gave rise to official publication of legislative texts (what we today conceive, in civil law countries, as an essential requirement of the validity of most part of the law), such as the Theodosian *Codex* and the “law of citations”.

<sup>17</sup> DIOCLETIAN divided the Empire into Orient and Occident, and further into prefectures, dioceses and provinces (in *Hispania*: *Galecia*, *Lusitania*, *Betica*, *Tarraconense*, *Balearica*, *Cartaginense*).

the year 410, ALARICUS, the elected king of the Visigoths, plunders Rome. The Empire's strengths give progressively in, so that the *foedus*' conditions are revised in favour of the Visigoths: by the pact of *Valia*, the Visigoths obtain the territory of Aquitania in exchange for the expulsion of other Germanic people (Suivi, Vandals, Alans) from imperial land. They install their capital in Toulouse, whilst progressively extending their influence towards the South of the Pyrenees. Under EURICUS (470) the Visigoth Empire reaches its moment of highest splendour, that will last until the Visigoths (under ALARICUS II) are defeated by the Franks in the battle of *Vouillé* (507). As a consequence, the Visigoth reign is transferred to Hispania (LEOVIGILD will install his capital in Toledo in 568).

It is often hold that it is under the Visigoths that Spain, for the first time, has something equivalent to what we today call "international personality": its legal particularism stands alone as a consistent organisation, not being part of a greater structure. Such assertion, however, needs to be toned down.

For one thing, Visigoth leaders had to deal with an heterogeneous population, divided rather strongly into groups according to the race (Visigoths, Hispano-romans, Suivi, Vascons and *de facto* independent lords). Despite the discrete (and controverted) attempt by EURICUS to legislate at a general level through his "*Codex*" (470; which was formally still an edict of the Roman administration), and the (equally controverted) "*Breviarius*" of ALARICUS II, LEOVIGILD did patently attempt to establish a true Visigoth Empire that was independent from (and rival with) the Orient Empire. His "*Codex revisus*", that thoroughly modified of Roman *leges* and *iura*, was only the top of the iceberg of an inconfusable imperial cultus that included issue of money, grant of imperial titles, coronation and original counting of the years. Still, LEOVIGILD did not achieve unity, not even through his official religious uniformisation (a hybrid between Catholicism and Aryanism). "No people can truly live from a borrowed myth" (PANIKKAR 1991), and so, too, inhabitants could not live by an artificial religious *auctoritas*. Nor even the subsequent alliance between the Visigoth Empire and the Catholic Church under RECAREDUS did succeed in maintaining the cohesion of the diverse population<sup>18</sup>. The life of the Visigoth Empire, contrary to the will of homogeneisation of its kings, was largely determined by the rivalry of internal clans, which ultimately lead to the reign's fall in the hands of the Muslims<sup>19</sup>.

For another thing, and more at the level of *potestas*, there is sufficient reason to believe that the mentioned texts themselves were not even effectively applied (despite failing in achieving their mediate goal). There has been an on-going discussion amongst (not only Spanish) legal historians regarding the personalist or territorialist character of the principal Visigoth legal texts. In case they were issued on a *personalist* basis (as the traditional vision

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<sup>18</sup> It is undisputed that during the Middle Ages in Europe the monopoly of (political) morality resided in the Pope's infallibility. Theological doctrines served as legitimation for positive law before the birth of the State (and the substitution of the "Catholic" God by the "mortal" God): "*rex eres, si recte facis*". However, this logic cannot be applied to the late Visigoth Empire, and the reason can be that is still was too early for the Catholic *auctoritas* to be internalised by the population. *Auctoritas* – this cannot be overemphasised – is an essentially social phenomenon.

<sup>19</sup> It is pretenders to the throne who, in an act of treason, ask the Arabs for help in defeating Don RODRIGO (711).

holds), both EURICUS' and LEOVIGILD'S "Codicī" would have been only meant for Visigoths (since their contents are heavily germanised), whilst ALARICUS' "Breviarius" would have applied to Hispano-romans. According to this doctrinal position, only the subsequent "*Liber Iudiciorum*" – with its express mandate to the judges to "disregard the Roman laws" – would have had a territorial character. More recent authors, such as García GALLO, D'ORS or TOMÁS y VALIENTE, defend the view that all such laws were meant as *territorial*, with the logical implication that they derogated one another and hence did not coexist<sup>20</sup>. The discussion itself reveals a potential gap between the "law in the books" and the "law in action" – indeed, the controversy was activated after the analysis of the law that emerged under Spanish population during the Reconquest, which proved to be different from the one contained in the Visigoth texts. In other words, though Visigoth legislation – especially LEOVIGILD'S "Revisus" – was probably intended as territorial (general) law and was (also probably) to a great extent Roman vulgar law<sup>21</sup>, it was never lived as law by the people. Whether the emerging customary law after the defeat of the Arabs was formed in the late Roman Empire (as a private alternative to "official" vulgar Roman law), or whether it had pre-Roman roots (as some authors contend), will possibly remain always an enigma. What seems to be clear, though, is that Visigoths, as well as post-classical Romans, failed at creating a "viable" organisation because of their obstination in fitting *de facto* particularism into the tight mould of a uniform *potestas*. One must not say that Visigoth organisation fell *because* Visigoth law was not applied, nor that Visigoth law was not applied *because* Visigoth organisation was deemed to fail; rather, one should say that Visigoth law was not applied *because* it was not sensitive to people's heterogeneous "living law" – and that *therefore* the Visigoth Empire fell.

#### 2.2.4. Middle Ages: from legal dispersion to integration under a king

Whatever had been applied in the private sphere, Visigoth "public" law offered a protection that disappeared with the collapse of the Visigoth organisation. The emerging law had to play the role of both a private and public system, for Spanish kings had almost no *de facto potestas* (let alone *auctoritas*). Politically, this was translated into the feudal structure, with multiple nuclei of power providing protection in return for usually abusive conditions. Precisely the exemption to such abuses by feudal lords (*malos usos señoriales*) was used as an incentive to promote the creation of *municipii*, of urban nuclei. The legal device were so-called "municipal charters" (*fueros municipales*), which included (i) privileges and exemptions (from feudal abuses), (ii) detailed municipal organisation and (iii) a recollection of the law that was applied. According to MARTÍNEZ-MARINA, most of such *fueros* were granted by the king (*confirmaciones regis*), which, from the latter's perspective, must be inscribed in the dynamics of the Reconquest. Other *fueros* were granted by feudal or ecclesiastical lords, whilst in some cases it was the *municipium* that self-privileged itself – the literal meaning of "autonomy". *Potestas*, in any case, but also *auctoritas*, concentrated

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<sup>20</sup> TOMAS Y VALIENTE 1979:105 *et seq.* The manifold and rather complex reasons adduced by each of such authors to support their theses cannot be developed here.

<sup>21</sup> Alvaro D'ORS realised a paligenesy of the *Codex* of EURICUS to conclude its high similarity to the "*lex romana burgundiorum*", i.e. to vulgar Roman law.

increasingly in autonomous *municipii*, with the strikingly fast proliferation of *fueros* (their formulation in writing is massively undertaken during the 11<sup>th</sup> and until the 13<sup>th</sup> century).

Two basic families of *fueros* must be distinguished: the brief and the extensive ones. Their difference is far from only formal (length), but concerns the very substance: brief *fueros* had only “public law” rules, whilst extensive *fueros* aimed at reproducing the whole body of law (some even reaching over 1000 provisions). They are also chronologically successive, the brief ones having appeared first and being progressively replaced from the 13<sup>th</sup> century onwards by the extensive ones. The reason for this evolution follows from their very aim: in a first moment, what was essential was to obtain an exemption from feudal abuses; progressively, as such exemptions became generalised, *municipii* strove towards a more consistent autonomous personality, therefore requiring also “private law” provisions to single them out. These provisions were in each case the more or less systematic reproduction of the customary law of the region.

But there is more to extensive *fueros*. Seen from an overall perspective, their rapid extension must be primarily connected to the transition from the High to the Low Middle Ages, for the proliferation of extensive *fueros* is intimately related to the event usually taken to be the cornerstone of the transition: the reception of Justinian Roman Law as studied in Bologna (*mos italicus*).

Justinian Roman Law, far from remaining an academic research field, was regarded by the Spanish king as an ideal instrument to achieve uniformisation, centralisation of power and monopoly of law creation against the centrifugal municipal forces (thus recreating the law of the late Roman Empire, with its adversity towards autonomies as well as towards privileges and exemptions). Indeed, at the time where only brief *fueros* guaranteed the status of *municipii*, it was feared that the king might rely upon gaps in the local law to impose “his” homogenising Roman provisions. Anticipating this intervention, *municipii* wrote extensive *fueros*, which were either a conjunction of their brief *fuero* and the “*Liber Iudiciorum*”, or – what progressively became the rule – a copy of existing extensive *fueros*<sup>22</sup>.

It is here where the device of the “*libro de las leyes de Castilla*” (book of the laws of Castilla) comes into the scene. ALFONS X created a text that only apparently was a model of extensive *fuero*. In reality, it was a monarchic text, that – though formally being a synthesis of the brief *fueros* of Castilla and the “*Liber*”, in fact – acknowledged exclusive normative and jurisdictional capacity to the king (*ergo*, at the antipodes of municipal legislative and judicial autonomy). By recognising local laws *as they were* at the moment of the adoption of the “*libro de las leyes*”, it congealed them thus precluding any further locally based development. Understandably, the text became despectively known as “*fuero real*” (royal *fuero*), which is of course a *contradictio in terminis*.

The politics of the “*fuero real*” were a failure – at least, at first sight. Municipal and feudal powers unified against the king and his false *fuero*. Most *municipii* refrained from

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<sup>22</sup> Frequently used “models” were the “*fuero of Cuenca*” or a so-called “*fuero of N*” – discovered by ROUDIN – that was conceived from the beginning as a template.

adopting it, and others – such as Soria – managed to introduce the necessary amendments so as to dilute its imperialistic effect. However, the failure was not total: the “*fuero real*” was the law applied by the central appeal court of Castilla<sup>23</sup>. This way, the centralised exclusive normative capacity progressively imposed itself over the municipal hierarchy of sources. It was the first decisive step towards a unified Spain, and the germ of a global *auctoritas* that, though still very weak at the time of the “*fuero real*”, would significantly increase with time, as a consequence of repeated homogenising practice<sup>24</sup>.

The monarchic normative capacity recognised by the “*fuero real*” was exercised solemnly in what can be seen as the true inaugural act of the tendency to homogenisation: “**The Partidas**” (around 1263), a magnificent synthesis of Roman and Castilian law. This piece of monarchic legislation, by developing the Roman hierarchy of sources that placed legislation above custom and precedent, contributed to emphasising the subordination of local *fueros* to central dispositions (other than itself). Formally it established itself as subsidiary law to the “*fuero real*”, but *de facto* it had the effect of turning extensive *fueros* more and more into dead letter: for one thing, the “Partidas” themselves provided a synthesis of local law, which understandably was more updated than the congealed *fueros*; for another thing, and as a logical consequence thereof, extensive *fueros* were increasingly regarded as custom and were subjected to the Roman requirements for custom *secundum, contra* and *praeter legem*<sup>25</sup>. Though some authors hold that the aim of the “Partidas” never was to be applied as positive law but instead they were conceived as a scholarly device (a doctrinal encyclopædia of law), the fact remains that it indeed worked as subsidiary law at least from the 14<sup>th</sup> century onwards<sup>26</sup>.

The legislative act that culminated the tendency towards centralisation in the Low Middle Ages – in a moment where Castilla and Leon were already unified – was the “**Ordenamiento de Alcalá**” (1348), that could be called the first Spanish “constitutional” order. It lasted until the Contemporary Age (1716, “Decretos de Nueva Planta”, *vide infra*) and was mainly a synthesis of feudal law. What is crucial is the hierarchy of sources it consecrated in its Title 29: according to it, judges ought to apply, in the first place, the “Ordenamiento de Alcalá” and any monarchic legislation; in the second place, the *fueros* if their used was proved; and, thirdly, the “Partidas”. In added that, *pro futuro*, only the king was allowed to create, modify and interpret laws and *fueros*.

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<sup>23</sup> First it was imposed in the royal court and, subsequently, the “Chambers of Zamora” (“*Cortes de Zamora*”, 1274) ordered its application in the “trials of the king” (as opposed to foral trials).

<sup>24</sup> Another important factor is the early monarchic legislation in the kingdom of Leon (Decrees of ALFONSO V of Leon of 1017 and 1020), which precluded extensive *fueros* from arising. Leonais centralisation-mentality clearly influenced the Castilian kingdom upon their ulterior unification.

<sup>25</sup> The pre-eminence of Roman over local Law can further be explained in connection to ALFONSO X’s exterior politics, since he aspired to the European Sacred Empire.

<sup>26</sup> In case the latter position regarding the “Partidas” didascalical value was accurate, its fate would perfectly fit into the double role (academic, plus subsidiary positive law) that Roman-canonical “*ius commune*” had in Europe before the period of the *usus modernus* (*vide infra* § 3.1).

Several aspects of the promulgation of the “Ordenamiento de Alcalá” allow for the reading that it aimed at furnishing the global *auctoritas* of the king with an equally global *potestas*. For one thing, the “Ordenamiento” was not issued by Parliament, who was only heard to that occasion. Clearly, the representatives integrating the Parliament – partly because they were sent by the territories, partly due to a nationalistic attitude – were reluctant to the increasing penetration of Roman Law and to its growing erosion of the deeply rooted Spanish tradition. For another thing, municipal autonomy can be said to have been definitively asphyxiated by the “Ordenamiento”. Municipal laws were not even granted the status of custom *contra legem* as a superficial reading of the “Ordenamiento” might suggest. On the contrary, they needed to be granted/recognised by the king himself to maintain their (subordinate, and congealed) validity: this transformed customs into real *laws* of the king. Finally, it is noteworthy that, with the “Ordenamiento”’s hierarchy of sources, the reception of Roman Law was made official (though it was a partial reception, since it was canalised through the “Partidas”).

In central Spain, the Diversity characteristic of the High Middle Ages, at that time source of instability and insecurity, was in the Low Middle Ages combated by the opposite movement, namely the fusion of *auctoritas* and *potestas* in a central instance. Other territories, notably **Catalunya**, experienced a rather different evolution. Catalunya’s early monarchic unification as part of the Carolingian Empire did not deprive traditional, customary law from developing<sup>27</sup>. Between the fall of the Carolingian Empire and Catalunya’s political unity under a king (11<sup>th</sup>-13<sup>th</sup> century), Catalunya experiences a flourishing of municipal law analogous to the Castillian one<sup>28</sup>. Such customary law is later collected by the Catalan king (“*Usatges*”), who furthermore enjoys unique normative capacity. Earlier than in central Spain, the Catalan king establishes Roman Law (in its entirety) as subsidiary for Catalunya (this is maintained until 1960!). Still, and as opposed to the evolution in central Spain, the Catalan king remains heavily tied to Parliament and, in an ulterior moment, to the strong middle classes that claim pre-eminence of feudal and municipal law. Upon promulgation of the “*Usatges*”, traditional law reacts against the supremacy of the king by imposing *de facto* priority of their own sources (*costuma*, “*Conmemoracions*”). As a reaction, the king (JAUME I) acknowledges that there is no priority of monarchic over traditional law (constitutions of 1243 and 1251), and the Parliament (Chambers of Barcelona) consecrates the pre-eminence of traditional law, whereas at the same time recognising itself normative capacity. The latter event takes place in 1283 and is formally comparable to the sanction of the “Ordenamiento de Alcalá”, though it clearly differs in substance: whilst the “Ordenamiento” was an initiative *by* the king that recognised normative capacity *to* the king, the Chambers of Barcelona of 1283 were instantiated by the territories’ representatives and acknowledged legislative capacity to

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<sup>27</sup> This is especially due to the fact that the Franks applied the principle of personality. Even at the moment (from the year 800 onwards) in which the Franks’ power in Europe is clear, imperial legislation applied in Catalunya (*Capitulares*) is only aimed at completing the “*Liber Iudiciorum*”, which is permanently effective.

<sup>28</sup> Due to the disintegration of the public power, the Catalan Counts (called *Principes* in the case of Barcelona) take over the function of law-making. Heterogeneous arrangements amongst themselves (*convenientiaes*) more and more substitute the “*Liber*”. As in Castilla, there is a customary law at the municipal level.

Parliament. Whilst in central Spain traditional law was asphyxiated, in Catalunya it was recognised official validity.

It is interesting to point out this duality between Catalunya and central Spain since the subsequent absorption by central Spain of Catalan autonomy, in the year 1716, can thereby be fully appreciated in its homogenising, imperialistic flavour<sup>29</sup>.

### *2.2.5. Recompilations and Contemporary Age: the “foral question” and liberal pluralist codification*

There was no “Modern Age” in Spain. Scholars speak of the “missed historical period” and argue that the Low Middle Ages reached until the Contemporary Age. Indeed, in Spain no “*Leviathan*” did arise out of the waters, nor was there an immediate reason for this to happen (no religious wars, as in central Europe). The features of early Modernity, as regards to politics, can be schematically stated as the uniformisation of power, the pre-eminence of legislative sources and the protagonism of the king<sup>30</sup>. In fact, they perfectly synthesise the aims of the Spanish monarchy. However, the reason why Spain *did not* experience Modernity is that the monarchic plans of homogenisation did not crystallise. Similar to BACHELARD’S “*loi de la bipolarité des erreurs*” (BACHELARD 1938), the instrument of radical uniformisation proved to be as unsuccessful as the early medieval normative dispersion in their function of viable answers to the Spanish challenge of Diversity.

Both in central Spain and in Catalunya there was a chaotic proliferation of normative sources, mainly due to an exaggerated application of Roman Law. Municipal law had disappeared as a concept, whereas doctrine – in the best Bolognese/Gaulic tradition – acquired importance in its function of clarifying applicable law. As a rule – and as opposed to the Bolognese/Gaulic tradition – it tended to make Roman Law prevail over national law in case of conflict. The resulting synthesis gave pre-eminence to Roman sources.

This background explains the appearance of “Recompilations”, the clearest antithesis of enlightened codification. Recompilations have mainly a practical, auxiliary use in the task of determining valid law. As opposed to codes, recompilations do not fuse heterogeneous material in a systematised whole but merely juxtapose existing headings. They neither elaborate any new law and therefore have no derogative effect upon previous sources. Finally, recompilations do not show the rationalist pretension to comprehensiveness that characterised most European civil codes at the time of their promulgation.

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<sup>29</sup> The reason for the *asymmetry* of the Catalan and the Spanish evolutions, as well as the ground for the Catalan *failure* in maintaining its independence *vis-à-vis* central Spain, are quite understandable. The first one is related to the imperial adventure of Catalunya, that made the king dependant upon the middle classes that were enriched through (maritime) commerce. The second one was a consequence of the equal entitlement of all states (*estamentos*) to participate in the norm creation: the possibility of veto required unanimity in most decisions, and this was hard to achieve due to the clash of interests between social classes. As an effect of this, legislative activity was paralysed and left the door open for an intervention of the king who, by means of the “Pragmatic Sanction” (“*Pragmática Sanción*”), ordered that the application and development of law be done exclusively by the administration of the king. The states had not succeeded in leading politics.

<sup>30</sup> Authors like HOBBS (*Leviathan*) and BODIN (*Republic*) provide most patent theorisations of a phenomenon that certainly was lived in practice.

Hence, “recompilations” can be conceptually assimilated to “failure”. A failure by the Spanish monarchy to make out of Spain something that it was not, and could not be. This is proven by the successive discredit (and inefficacy) of the three recompilations ordered by the kings. The first one, “**Ordenanzas de Montalbo**”, was promoted by the Catholic Kings (1484). It confirmed, from a substantive point of view, by means of the use of Roman categories what *de facto* already happened: that only the King’s Court (who controlled all jurisdictions) could create or renovate law. A clue moment in Spanish legal history was the Chambers’ reaction to this piece of law. In 1505 they issued the “**Leyes de Toro**”, a body of traditional private law. The reason for its promulgation was to fight against the annihilation of national law through the Roman law invasion. It dealt with traditional institutions, solving contradictions and even regulating new institutions. Formally, though, the “Leyes de Toro” restates the hierarchy of sources of the “Ordenamiento de Alcalá” – though with a slight but significant change: both the first and the third sources (“Ordenamiento”, monarchic legislation and Partidas) would be valid “even though it is proven that they are not used by the King’s Court”. This way, some of the original contents especially of the “Ordenamiento” – which had been feudal law – were preserved, at least *in potentia*, against the monarch’s tergiversation of Roman and feudal Law for the purposes of an ever-growing hegemony. Though the “Leyes de Toro” were soon relegated to the status of special and exceptional law within the panorama of monarchic absolutism, it is widely acknowledged that the act of resistance undertaken by the Chambers by means of the “Leyes de Toro” significantly stopped the influence of Roman law and rescued the “foral” law that today constitutes the basis of the regional civil legislation.

Despite the Chambers’ challenge of the “Ordenanzas of Montalbo”, this recompilation was also *technically* non-operative due to its many formal defects, ambiguities and gaps. The lack of systematisation inherent to any recompilation had to be added to multiple stylistic and semantic impurities, and to innumerable generalisations resulting from an improper use of synthesis. The second recompilation, “**Nueva Recopilación**” (1567), had very similar deficiencies though specifically aimed at overcoming the inconvenients of the first recompilation. From the half of the 17<sup>th</sup> century onwards, several attempts had been made at developing a code, but all of them had failed for different reasons, *inter alia* due to the proposed codes’ incapability of satisfactorily dealing with the still living centrifugal local forces. The aberration of the “recompilations” was taken so far as that the third one (“**Novísima Recopilación**”) was promulgated in 1804 – the same year the French *Code Civile* entered into force and almost one century after the event that marked the beginning of the Contemporary Age in Spain.

This event was the sanction of the “**Decretos de Nueva Planta**” (1714-1716). Though formally Spain had been unified at the end of the 15<sup>th</sup> century (under the Catholic Kings), materially the kingdom of Catalunya and Aragón had remained independent, thus having its own sources of the law and its own recompilations. This situation was altered with the “Decretos”, whereby all autonomous “public law”-institutions of the territories were abolished. The Spain of FELIPE V – supported by his victory in the Spanish succession war – was now formally a centralised State, mirroring the French one. If we assume that a change in

a legal order is marked by a change in the organisation (Santi ROMANO), the “Decretos” justify that 18<sup>th</sup> century Spain is classified under the co-ordinates of a new Age.

Interestingly enough, however, the “Decretos” respected private laws (except in Valencia). The centrifugal strength of the deeply rooted autonomous laws was impossible to override. However, in places like Catalunya it was provided that the local laws “are considered re-established” – to mark that from then on they were to be laws of the king. In addition, Castillian private law was conceived as subsidiary for the whole Spanish territory, and the central Supreme Court had an important power of homogenisation. Nevertheless, foral jurists, and notably the Catalan, managed to soften centralisation to a considerable degree by means of interpretation. They ended up by restoring Roman Law as the subsidiary source in Catalunya.

Foral particularism, on the one hand, and central recompilations, on the other, are the panorama that the 19<sup>th</sup> century encounters at its dawn. It is a panorama of chaos and uncertainty, of changing regimes and of internal tensions between centrifugal and centripetal forces. At the centre of the political debate is the gradual transition from absolutism to liberalism, thus echoing the European trend of the time. The first Spanish liberal Constitution dates from 1812, and a series of constitutions follow within a short period of time, revealing once more Spain’s hesitation regarding its future shape. Constitutional history highlights that the clue question in the representatives’ agenda was to decide upon the horizontal distribution of powers within Spain: in resonance of the European nation-discourses (the French and the German ones), the Spanish discussion concerned the number and nature of the nations that Spain had to be composed of. Ought it to be a one-nation State? Ought there to be several “historic” as well as “political” nations? Only one “political” and a plurality of “historic”?

Within the specific realm of private law – upon which the outcome to the political debate would obviously have a bearing – the controversy was labelled as the “foral question”. It was the “foral question” what mainly delayed Spanish civil codification, that had been again claimed for, with growing virulence, since 1804. The original text of the present Spanish *Código Civil* dates from 1889 – from the beginning of the century until that date, several documented proposals, notably the one of 1851 of GARCÍA GOYENA, had been successively rejected. The reason for their non success was the pressure of the regions: the projected civil codes, almost with no exception, aimed at creating a common civil law for the whole of Spain. Had any of such attempts succeeded, the centralisation established by the 1716 “Decretos” would have been led to its ultimate consequences with a uniformisation of private law.

But the projects did never see the light, until a body of law was conceived that overwhelmingly maintained the force of regional civil orders with the exception of very few subject-matters. For the rest, the 1889 Civil Code imposed its validity as subsidiary in the regions that had an autochthonous private law. The change of the century brought new political agitations, that culminated in the 1936-1939 Civil War that preceded the 40-year-dictatorship by General FRANCO. His hegemony was a parenthesis in the so far described

evolution of Spanish private law, at the end on which again foral sources were revived<sup>31</sup>. The present-day democratic Constitution of Spain stems from 1978 and incarnates the achievements and guaranties of a democratic and pluralist “*Rechtsstaat*” (*Estado de Derecho*). The Constitution consecrates in its title VIII the divisibility of Spain into “autonomous communities”, following the recognition of centrifugal autonomy in article 2, which reads:

The Constitution is founded upon the indissoluble unity of the Spanish Nation, common and indivisible fatherland of all Spaniards, and recognises and guarantees the right to autonomy of the nationalities and regions who integrate it and the solidarity between them<sup>32</sup>.

A certain ambiguity is perceptible in the use of the word “nation”/“nationality”, as well as in the general structure of the article which could also be read as containing an internal contradiction (“indissoluble” v. “autonomy”). Such nuances, of which the constitutional text is full, are a direct consequence of the compromise-character of the Spanish fundamental law: it was conceived in a moment of political uneasiness and radicalisation, and only vague formulations could render plausible a majoritary consensus on the definitive text. Uneasiness concerned as well – but of course not exclusively – the “foral question”, and hence the delicacy with which the Constitution provides for a *possibility* of “neighbouring provinces” to “access their self-government and to constitute themselves in Autonomous Communities”<sup>33</sup>. Autonomous Communities were not recognised *ab initio* but their status, so to speak, had to be “granted” by the constitutional framework<sup>34</sup>. However, once constituted as such, communities are recognised “autonomy for the management of their respective interests” (article 137, sentence II), an autonomy that is proportional to the deepness of the community’s historical roots<sup>35</sup>. Generally speaking, provisions ensuring autonomy (such as article 148

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<sup>31</sup> Franco’s regime did not, especially in the later years, completely abolish foral legislation and custom, but asphyxiated it with the use of different strategies that, in general, proved effective.

<sup>32</sup> The original text reads: “*La Constitución se fundamenta en la indisoluble unidad de la Nación española, patria común e indivisible de todos los españoles, y reconoce y garantiza el derecho a la autonomía de las nacionalidades y regiones que la integran y la solidaridad entre todas ellas*”.

<sup>33</sup> Article 143, section 1, reads originally: “*En el ejercicio del derecho a la autonomía reconocido en el artículo 2 de la Constitución, las provincias limítrofes con características históricas, culturales y económicas comunes, los territorios insulares y las provincias con entidad regional histórica podrán acceder a su autogobierno y constituirse en Comunidades Autónomas con arreglo a lo previsto en este Título y en los respectivos Estatutos*”. Also article 137, dealing with the territorial organisation of the State, provides that the State is subdivided into municipalities, provinces and “the Autonomous Communities *that may be constituted*” (emphasis added; originally: “*El Estado se organiza territorialmente en municipios, en provincias y en las Comunidades Autónomas que se constituyan*”).

<sup>34</sup> This is especially emphasised by the fact that the fundamental law of any Autonomous Community is formally an organic law (*ley orgánica*) approved by the central Parliament (article 146 of the Spanish Constitution).

<sup>35</sup> This is first of all reflected in article 143 (reproduced above), when it requires for the regions to form an autonomous community a certain degree of “common historical, cultural and economic characteristics”. More importantly, the complex procedure that needs to be fulfilled to gain the autonomous status has different modalities according to the percentage of population that votes in favour of the Constitution within an Autonomous Community (articles 144 *et seq.*) as well as to the community’s historical degree of autonomy (Second Additional Disposition): the higher the percentage, or the deeper rooted the autonomy, the easier the procedure. Finally, also the amount and intensity of competencies that the Community may acquire depends upon the procedure used to gain the autonomy (articles 148 *et seq.*). One could say that the greater the (local) *auctoritas*, the stronger the *potestas*. This is of course without prejudice of the global *auctoritas* incarnated by the “indissoluble unity” of the Spanish State.

stating all competencies an Autonomous Community may adopt) do have their counterparts in provisions that care for the horizontal application of the principle of equality<sup>36</sup>. Precisely this double principle, autonomy and solidarity, governs the design of the “foral question” in the field of private law.

According to article 149, section 1,

The State has exclusive competence over the following matters:

(...) 8. Civil legislation, without prejudice to the conservation, modification and development by the Autonomous Communities of the civil, foral or special laws, where they exist.

It immediately adds, materialising the solidarity principle, a series of subject-matters – including the “rules relating to the application and effectiveness of the legal rules”, the rules governing the forms of matrimony, the “bases of contractual obligations”, the regulation of official registries or the conflict of laws rules – that are “in any case” of exclusive competence of the central State<sup>37</sup>.

*Ergo*, there is a room for the unfolding of the local *potestas* in the realm of private law. The vague formulation “conservation, modification and development” has been much discussed, to the extent that even the Constitutional Court has issued contradictory judgements as to the extension of, notably, the word “development”. For one thing, it is clear that “the Constitution protects and respects the historical laws of foral territories” (First Additional Disposition), and that it acknowledges their need to be “updated” (*ibid.*). For another thing, however, a broad interpretation of “development” could interfere with the principle of solidarity as materialised in the exclusive competencies of the State. The debate still goes on. *De facto*, Autonomous Communities such as Catalunya do pass a notable amount of civil laws that substantively have hardly any link with pre-constitutional foral legislation<sup>38</sup>. The central executive’s reaction is typically to challenge the law before the Constitutional Court, a strategy that more often than less proves unsuccessful.

Whilst Autonomies and State go on arguing about the present, and the future, distribution of competencies within Spain, with a great deal of frontal clashes of positions and interests, Catalan jurists are eagerly studying the possibility of fusing existing plus new material into a comprehensive “Catalan Civil Code”.

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<sup>36</sup> E.g., article 138. 2, originally reading: “*Las diferencias entre los Estatutos de las distintas Comunidades Autónomas no podrán implicar, en ningún caso, privilegios económicos o sociales*”, or article 139.1, that states: “*Todos los españoles tienen los mismos derechos y obligaciones en cualquier parte de territorio del Estado*”.

<sup>37</sup> The full article reads: “*El Estado tiene competencia exclusiva sobre las siguientes materias: (...) 8. Legislación civil, sin perjuicio de la conservación, modificación y desarrollo por las Comunidades Autónomas de los derechos civiles, forales o especiales, allí donde existan. En todo caso, las reglas relativas a la aplicación y eficacia de las normas jurídicas, relaciones jurídico-civiles relativas a las formas de matrimonio, ordenación de los registros e instrumentos públicos, bases de las obligaciones contractuales, normas para resolver los conflictos de leyes y determinación de las fuentes del derecho, con respeto, en este último caso, a las normas de derecho foral o especial*”.

<sup>38</sup> In 1991, it approved a systematised “Succession Code” (law 40/1991, of 30<sup>th</sup> December) and seven years later, in 1998, it sanctioned a “Family Code” (law 9/1998, of 15<sup>th</sup> July), to name just some prominent recent examples.

Spain is a pluralist State – meaning: *auctoritas* is global and *potestas* is local. This is, of course, a caricature, but – as nutshells generally (WATSON 1994) – it has a great heuristic value. Certainly, there is global *potestas* (we have just seen that), as there is local *auctoritas* (*vide supra*, note 35). But what, in my opinion, characterises this point in Spanish legal history is that, by contrast to previous moments, Spain is both a State and a federation of fairly self-sufficient regions. And this takes place without a major tension in its inside that threatens to make the structure explode. Viability, as pointed out in the beginning, necessarily includes a certain dynamism, which here is materialised by the on-going play between the autonomous centrifugal and the central centripetal forces. It is that combination that keeps the system going – as well as it is dissensus that assures the flexibility and adaptability of consensus<sup>39</sup>.

UNAMUNO rightly felt the pervasive tension between “what is” (*potestas*) and “what ought to be” (*auctoritas*) as the inner impulse that has guided the evolution and determined the personality of Spain<sup>40</sup>.

The future of Spain, its possibility or not to keep on turning the autonomy-heteronomy wheel, partly depends upon the shape of the European construction. Recursively, European integration – as claimed in this paper – has a lot to learn from the Spanish experience. Typically, in post-modernity<sup>41</sup> hierarchical relationships are replaced by intertwinements and mutual interdependencies<sup>42</sup> – so, too, we can conceive the duality Spain-Europe. And we shall now turn to the second variable.

### ***3. Europe in Post-modernity: guidelines for a successful response to the challenge of Diversity***

This section will try to approach some of the paradoxes that faces contemporary Europe in its quest for identity. After formulating the terms of several open questions (§ 3.1) we shall suggest the framework of an answer by first outlining its epistemological presuppositions (§ 3.2) and, ultimately, formulating a possible version of it (§ 3.3).

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<sup>39</sup> OST and van de KERCHOVE 1987:511 *et seq.* (ch. X); in a very similar sense, MUGUERZA 1990:325.

<sup>40</sup> The entirety of the works of this author are characterised by an apology of fragility, of contingency, of uncertainty (though in some cases – notably in UNAMUNO 1913 – the author develops this in connection to the philosophical problem of immortality): “I want to establish that uncertainty, doubt, the perpetual struggle with the mystery of our final destiny, mental desperation and the lack of a solid and stable dogmatic foundation, can be a base of morality” (“*quiero establecer que la incertidumbre, la duda, el perpetuo combate con el misterio de nuestro final destino, la desesperación mental y la falta de sólido y estable fundamento dogmático, pueden ser base de moral*”; UNAMUNO 1913:267). In a strikingly similar sense, F. OST’s book on political philosophy (OST 1999) emphasises that “*ce qui est impossible est pourtant nécessaire*” (*ibid.*:59 *passim*).

<sup>41</sup> I am using this term in the moderate sense depicted in the following words of LYOTARD: “[the end of the big stories] does not mean that there can be no credible story anymore. Under meta-story or big story I understand precisely the narrations that have a legitimating or legitimising function. Their decadence does not prevent from existing thousands of histories, small or not that small, that continue to interweave daily life” (LYOTARD 1986:31); hence, I will not endorse the radically deconstructivist meaning of “post-modernity”.

<sup>42</sup> For a detailed account of the epistemological foundations of this approach, *cf.* VOGLIOTTI 1997 (“moderate constructivism”), as well as OST and van de KERCHOVE 2002, ch. 1 and 8 (“intertwined hierarchies”, “flue logic”). A suggestive application of the “network”-paradigm to contemporary criminal law creation can be found

### 3.1. The notions of “challenge”, “goal” and “response” revisited

The historical fate of European “*ius commune*” – meaning the one resulting from the medieval reception of Roman and Canon Law – was to evolve from being largely a doctrinal endeavour to substantively informing positive legal practice. Roughly, the sequence can be characterised by opposing the Italian to the Modern Method (*mos italicus, usus modernus*). Nevertheless, there is an interesting analogy between both periods, which often remains in the shadow of the patent divergences in method (asystemity v. systematisation) and in substance (purely Roman law v. integration of “*iura propria*”): namely, that “*ius commune*” was practically always an *self-proclaimed subsidiary* source of law.

The **subsidiary** character is widely acknowledged, though it arose from different logics in both periods. Though the *mos italicus* essentially pervaded academic learning, it progressively acquired also the character of a complementary source used in legal practice (notably through the *consilia*). The *usus modernus*, much more clearly, contains in itself a vocation towards practical application: however, what is applied is not in the first place Roman “*ius commune*”, due to the significant absorption of particular (national or territorial) laws (“*iura propria*”) by the Modern Method. Actually, “*iura propria*” had the leading role within the Modern Method (first, through the bias of the territorial *usus modernus*; then, by the definitive *montée en puissance* of national law with natural law as the principal ally), thus allowing for the reading that, even during the *usus modernus*, “*iura propria*” always prevailed in the European “*ius commune*” tradition<sup>43</sup>.

That such subsidiarity was **self-proclaimed** follows from the fact that both the *mos italicus* and the Modern Method elaborated theories about the sources of the law. Hence, whilst the relationship between “*ius commune*” and “*iura propria*” during the Italian Method can be labelled as a “formal” one (the Method was aware of the complexity of the sources of the law and therefore focused upon the relations between them), the “substantive” cross-fertilisation of global and local laws under the Modern Method also resulted in an acknowledgement, albeit a more indirect one, of the supplementary character of the increasingly asphyxiated “*ius commune*”.

*Usus modernus* allied with the school of rationalist natural law at a moment in which, from a point of view of political theory, the need for a unification of *auctoritas* and *potestas* was heavily felt: two intrinsically interrelated phenomena – the decline of the global European Catholic *auctoritas* (Reform) and the proven insufficiency of dispersed *potestas* (religion wars) – lead to concentrate in the hands of one only “*potentior personae*” the sword of law and the staff of legitimacy (the lithography of the Leviathan is much-telling). Whilst secular voices proclaimed that “*auctoritas, non veritas, facit ius*” (*auctoritas* meaning something very close to *potestas*), legalist political theories backed up the moral infallibility of the State’s

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under VOGLIOTTI 2001 (cf. pp. 168 *et seq.* on the metamorphose of the notion of substantive properties into the notion of relational properties).

<sup>43</sup> WIJFFELS 2000:114. On the substantive absorption of particular laws by the Modern Method, and the subsequent alliance between *usus modernus* and the school of natural law to derive in liberal codification, cf. WIJFFELS 1998:42-43.

positive legislation, from HOBBS to ROUSSEAU (WINTGENS 1999). Codifications were, in many senses, the culmination of such mystic concentrations of power, thus turning the European cosmos from “geocentric” to “heliocentric”<sup>44</sup>. With codification, the direct authority of the medieval “*ius commune*” reached its *terminus ad quem* (WIJFFELS 1998:43).

However, the traumatic 20<sup>th</sup> century revealed the insufficiency of juxtaposed *Leviathans* to cope with an ideal that we can again call “viability”. The *specific* challenge of “*plus jamais ça*” (DELMAS-MARTY 1996:59), and the *generic* challenge of internationalisation/globalisation, render the “responses” of codification and impermeable sovereignties inappropriate to meet the “goal” of peace and equal prosperity. Precisely this is the basic idea enshrined in most Preambles to EU (formerly ECCS, EEC and EC) treaties.

Both challenges just mentioned reflect the idea of Diversity, but it is clear that the latter’s meaning differs from the meaning of the Diversity that Spain encountered at most points of its history. In post-modernity, Diversity is an inherent, essential part of human life<sup>45</sup>. No “response” to Diversity ought to ignore this fact, nor try to annihilate it. The “goal” of viability implies now a even more flexible state of affairs: not only is it required to separate *auctoritas* from *potestas*, but neither of them – whether *auctoritas* or *potestas* – ought to be too rigid as a mould. Solidity and linearity would have to give way to porosity and circularity – an ever-changing reality cannot be locked up in an a-temporal law nor political structure.

Which leads us closer to the necessary “response” of contemporary Europe, at least in the negative way: by no means the future Europe can aspire to become a constitutional State in the modern sense of the word (such as contemporary Spain). And, in this sense, it seems that, so far, the European project *de iure constituendo* (WIJFFELS 2000:111) has not deviated much from the right path. Indeed, the Europe of the EU – and, *a fortiori*, the other Europes<sup>46</sup> – is largely a federation of sovereign nation-States. The “vertical” element impregnates most European policies, starting from the decision-making procedures (co-decision, decision by unanimity, veto power, etc.), all way through the substantive contents of the law (each State keeps a separate private law system, and harmonisation tends to be “soft”<sup>47</sup>) and up to the

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<sup>44</sup> Indeed, one can speak of a “Copernican turn” in relation to the appearance of the modern State. What is important about the Copernican cosmic vision is not the central role of the sun, but the multiplication of the earths. In a geocentric worldview, the world to which the subject pertains (earth) is, the same time, the centaur of the universe (in medieval Europe, such centre was the Pope’s infallibility, that extended over the whole “medieval Christendom”). The Copernican turn of such a vision – a turn that, like the real one in Physics, was condemned by the Church – implies the recognition that there are other communities of members at equal footing with the own, i.e. that the universe does not end within the boundaries of the “own” but that there are comparable world that equally turn around a sun (later, it would be added that there is even more than one sun, but this brings us close to contemporary moral relativism).

<sup>45</sup> Cf. ARNAUD’S “*éloge de la différence*” (ARNAUD 1991:298 *et seq.*) and GADAMER’S argument that it is legal diversity that allows communities to be formed (GADAMER 1989:39, 62-63).

<sup>46</sup> ARNAUD speaks in this respect of an instance of “*polysystémie simultanée*” (ARNAUD 1997).

<sup>47</sup> European Law doctrine usually opposes “soft” to “hard” law, thus stressing the difference between harmonisation and unification or: between non-binding and binding instruments. Many, probably most part of the official documents issued so far by the EU fall within the categories of either “guidelines”, “recommendations”, “green/white papers” or similar notions. As regards to private law, and without prejudice to what will later be said, it is true that, at least formally, there are 15 different system within the realm of the EU. This fact is what justifies the adoption of common conflict of laws rules such as the Brussels Convention of 1968

implementation stage, which as well is left to a great extent in the hands of individual States (transposition of directives). The well-known tension between the (original) economic nature and the (increasing) personal nature of the European construction is but another instance of the lack of a consolidated “horizontal element”: although, to a certain extent, economic growth favours the well-being of society at large, not even libertarians deny that there is a certain point in which “economic” and “civil” liberties clash, and if the recent discourse about “European citizenship” is to be taken seriously, a great deal of market-related provisions (including the “four constitutive freedoms”) will need to be revised. Apart from the “verticality” enshrined in the black-letter-law of the treaties and secondary legislation, there is as well a “sociological verticality” translated into a lack of commitment to, and knowledge of, the European legal order amongst European legal practitioners and population. In a caricature, such “minimalist” approach can be represented by Lord MACKAY’S idea of a naturally flowing “legal symbiosis”<sup>48</sup>.

But there is more to EU law than inertia. Partly against some of the (mentioned) foundations (or at least some people would argue this), the EU system is doctrinally based upon two essential notions which are logically interconnected: *direct effect* and *primacy*. It is the primary sources of EU Law that state such pre-eminence in the hierarchy of sources (even though, it is true, primary sources are by their nature conventional and, furthermore, almost each State has constitutionally recognised the two principles), together with the marked “activism” of the ECJ (VAN GERVEN 1996). Which allows to point out a major structural difference between the medieval and the emerging European “*ius commune*”. The medieval one lacked primacy and confined itself to a subsidiary position<sup>49</sup>. And medieval “*ius commune*” never succeeded in establishing a viable system under its influence: in the case of the *mos italicus*, because there was no single system, and in case of the *usus modernus* and codification, because the ones who really established the system were national sovereigns. The contemporary “*ius commune*”, by contrast, commands its own hierarchy through legally binding provisions. In this respect, it seems to have learned from history. Consequently, it is not only the territorial scope that distinguishes the old from the new “*ius commune*”<sup>50</sup>.

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(on jurisdiction and enforcement of foreign judgements in matters of law of obligations), meanwhile turned into a Regulation (Council Regulation 44/2001 of 22<sup>nd</sup> December 2000). Common rules of private international law certainly lead to a degree of homogenisation, but such degree does not extend to the substantive level: with the current rules, a substantive solution given by the courts of any Member State will be the same *the “foreign element” being equal*. Which makes the homogenisation merely procedural (and this, of course, simplifying; because differences in rule application largely determine the substantive outcome of legal conflicts). Substantive homogenisation, by contrast, will only take place either when substantive solutions in the different States are the same, or when all States are governed by a common set of substantive solutions.

<sup>48</sup> MACKAY 1992; on the “conservative” character of this proposal, see WIJFFELS 2002:pr.

<sup>49</sup> Which, of course, creates a logical *non sequitur*, because a rule, to be able to command a hierarchisation of sources, needs to be itself of higher order than the sources with which it deals. A theory of legal sources contained in a hierarchically subordinated instance can at most be a *secundum legem* acknowledgement (a legalistic *obiter dictum*), i.e., void of normative contents.

<sup>50</sup> M. DELMAS-MARTY, during the interview with Ph. PETIT, connects current European construction to a wider hypothetical world-wide common-law, and states that “*on y retrouve le jus commune du Moyen Âge, mais dans la perspective mondiale!*” (DELMAS-MARTY 1996:67). Contrary to the view expressed in this quotation, the

The previous sketch of current EU law instruments should, first of all, reveal that the alternative to “impos[ing] rigid, uniform, legal rules in all of the Community States” is not necessarily to “respect their national identities” (MACKAY 1992:22) in a literal sense. It should furthermore draw attention to the existence of an internal tension in the very foundations of the EU system, that undoubtedly is connected to the political indefiniteness of the construction’s goal (WIJFFELS 1998:41). State-based “verticalism”, or the centrifugal force, struggles against Union-based “horizontalism”, or the centripetal force. Both forces are characteristic of Diversity and, as happened with Aristotelian ideal forms of government (ARISTOTELES *Politics*, III, 7), both of them are susceptible of degenerating into extreme forms that imply perversions: the local current, into a chaotic symbiosis; the global current, into a constitutional igloo.

The virtue – ARISTOTLE *dixit* – is to be found in between.

### **3.2. Law as “institutional fact” and the “social sources of the law”**

“In between” (“*entre-deux*”) is an idea that guides what can be called the legal theory of post-modernity (always in the moderate sense of the word). What OST and van de KERCHOVE (2002) present as the “network-paradigm” might serve to illustrate the epistemological bases for the proper response by the EU to present-day Diversity.

The starting point of the approach is epistemological. The legal phenomenon can only be known by endorsing a “*moderate external point of view*”, which implies a three-fold movement: first, an analysis from an internal viewpoint thus using a hermeneutics that is close to the object; second, an epistemological rupture that places the scientist in the external (behaviouralist?) perspective of a non-committed observer; finally, a return to the object’s internality in order to put into perspective the categories determined in the first step<sup>51</sup>. The crucial insight is that true juridicity can only be found by penetrating the subjects who participate in the game of law. It follows, furthermore, that law is envisaged as an essentially collective phenomenon<sup>52</sup>.

Both points are interconnected: the internal point of view of the participant that the scientist must endorse in order to *moderate* his external observation is the atom that, once multiplied, creates the “social pressure” of which HART spoke as one constitutive element of the normativity of rules (and the existence of a system). Thus, the attitude of the committed citizen turns out to have a *recursive, self-referential* function: whilst implying awareness that there is a “social pressure” in favour of the (majority of the) rule(s), it contributes itself to the creation of such collective pressure<sup>53</sup>. This is what DWORKIN, in his critique to

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present paper argues that a major change of orientation (almost a metamorphose) needs to be (and is) undertaken by EU “*ius commune*” in order for it to accomplish its projected goals.

<sup>51</sup> Cf. OST and van de KERCHOVE 2002, ch. 8; OST 1988:365.

<sup>52</sup> There is a parallel with SAVIGNY’S appeal to the “*Volksgeist*” as the ultimate foundation of all juridicity; see also GADAMER’S reference to “natural linguistic communities” within his plea against the “unity of science” (GADAMER 1989:38).

<sup>53</sup> The crucial characteristic of the “internal point of view”, according to HART, is that the committed actor is aware that he “has an obligation” and does not merely feel that he “is obliged” (HART 1961:82). Such

“conventionalism”, labelled as the positivistic thesis of the “social sources of the law” (DWORKIN 1977).

Such approach connects to Max WEBER’S claim that the aims of sociology are to understand (“*deutend verstehen*”) and to explain (“*ursächlich erklären*”) *purposive social* behaviour (WEBER 1922:19). In a sense, WEBER’S “purposive social” action is equivalent to the notion of “reflective practitioners” introduced notably by comparatists following WEINBERGER and MACCORMICK’S characterisation of law as “institutional fact”: they point out that law is not a set of “natural facts” that can be inspected directly; rather, it is an interpretative reality under which certain physical events take on a special significance (MACCORMICK and WEINBERGER 1986, ch. 3). SEARLE’S analogy with a cocktail party offers a similar representation<sup>54</sup>. In short, (committed) citizen *constitute* the system with which they comply: their reason for compliance is, reflexively, the effect of their compliance<sup>55</sup>.

The resulting picture of law, the *descriptive* theory of law<sup>56</sup>, thus combines a classical “pyramidal” external viewpoint with the information gained “from inside”, in a “dialectics without synthesis” (MERLEAU-PONTY 1955). Neither the vertical nor the horizontal element can go alone (VOGLIOTTI 2001). Law becomes pluralist, and not just plural<sup>57</sup>. The idea of relation substitutes both hier-archy and an-archy; multiperspectivism substitutes Cartesian linearity. And, *pro futuro*, this confirms that a viable law can neither passively contemplate from outside the internal symbiosis (that procreates itself *autopoietically*), nor eradicate through its intervention all existing bio-diversity. The internal recursivity, for which the classical paradigm did not account, needs to be joined by an external element of heteronomy.

This is, very roughly, the “new paradigm” of law.

### **3.3. Pluralism applied to the contemporary “convergence debate”, and the place of a European Civil Code**

Pursuant to the analysis of Thomas KUHN (KUHN 1970), scientific communities are usually reluctant to abandon a certain paradigm even in presence of patent “anomalies”, i.e.,

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“awareness” comprises all three elements that, according to HART, form the notion of an “obligation”: social pressure, importance for preservation of social life, and capability of conflicting with subject’s desires (*ibid.* :86 *et seq.*). Out of the three, the first element (“social pressure”) connects with the need of majoritary endorsement of an “internal point of view” for the system to exist at all. It follows that the “internal point of view” both presupposes and creates social pressure.

<sup>54</sup> According to him, the gathering of individuals drinking wine in a common location is only a ‘cocktail party’ because participants have a common intention to treat it as such an event (SEARLE 1995:26).

<sup>55</sup> As Prof. BELL explains, what constitutes the legal phenomenon is both the citizen’s *behaviour* as well as *the way they (consciously) conceive* such behaviour (*cf.*, in general, BELL 2001, ch. 1).

<sup>56</sup> I am using the etiquette “descriptive” in a broad sense, thus encompassing descriptivism *stricto sensu* and constructivism (as KUHN opposes them), and as essentially opposed to “prescription”.

<sup>57</sup> The difference between (juxtaposed) plurality and (integrated) pluralism is probably what DELMAS-MARTY wants to stress by using the expression “*pluralisme ordonné*” (DELMAS-MARTY 1996:42; DELMAS-MARTY 1994:225).

of dissociations between the theory and reality. Intrinsic to the idea of scientific paradigm is a vocation of comprehensiveness – of being capable to explain everything within the domain at stake. Consequently, the appearance of “anomalies” leads scientific communities first of all to try to adapt the traditional paradigm by means of a series of amendments (“*ad hoc* hypotheses”) that, once they get multiplied, finish by deforming the regard on the analysed reality. The period of the crisis of the paradigm opens the phase of the extraordinary science, characterised by a desperate research endeavour and by the presence of several theories in competition<sup>58</sup>. Only a change of paradigm (“scientific revolution”) will restore the stability of the “normal” phase of science.

Might some aspects of current European construction reflect “ad hoc hypotheses”? In how far is the tension between the sovereignty and the primacy principle an internal contradiction of EU law and, as such, deforming the reality upon which it acts? The many paradoxes of the EU system<sup>59</sup>, must they be regarded as features of an embryonic evolution-state of a consistent law, or rather as compromise amendments introduced to the traditional paradigm justified by a fear of frontally facing the need for a scientific revolution? It is difficult to answer these questions with a binary yes/no, but formulating them ought, at least, to shed light on the complexity of the question. Open questions generally call for open answers.

And the answer, in this case, ought to be doubly “open”. “Openness” implying dynamism and uncertainty, our answer is not only formally but also substantively open. The latter aspects connects to the need for a flexible institutional design of the future EU. This concerns both the material and the procedural aspects of European Law.

From a point of view of **contents**, *auctoritas* ought to be definitively transferred from the States to the Community (although porosity would even here allow for local *auctoritates* to be kept, as long as they did not prevail when conflicting with the global one). This is, in my view, the necessary corollary of the contemporary “erosion” of the State (Garapon) and at the same time ensures the maintenance of the minimum redoubt of a “vertical element” (the State does not disappear, but is transformed). The “collective *auctoritas*” – incarnated by the Community institutions and impelled by the particularity of each State – would be charged with ensuring the respect, in the ideological plane, of the indispensable acquisitions of Modernity: democracy and human rights, eventually in an original integration of (mercantile) equity and (social) justice that filled with contents the term “solidarity”<sup>60</sup>.

The translation of this to the level of **procedure** requires to envisage the dialectics between the “bottom-up” *impulse (potestas)* and the *integration* of the “top-down” principles (*auctoritas*). The notion of “governance” is clue: it can be seen as the post-modern version of

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<sup>58</sup> VOGLIOTTI 2001:153 (note 26); the author realises an illuminating synthesis of KUHN’S approach.

<sup>59</sup> See, e.g., the account in OST and van de KERCHOVE 2002, ch. 1.

<sup>60</sup> The danger of the lack of legitimacy of a network system, abandoned to itself (“law of the strongest”), is a recurrent theme amongst legal theorists (OST 1998:31 *et seq.*; COMMAILLE 1998; CRAWFORD 2001), who suggest as a corrective the intervention of a State (here: supra-State) *transformed* (RENARD 2000:18) into “modest” o “animator” (MORAND 1999).

the “social contract” as a true “*Vergemeinschaftung*”. The contracting Member States (this label ought to be changed) would not “delegate” any power whatsoever but would exercise *their potestas* inspired in the *common auctoritas*. This is the materialisation of “solidarity”: the (Cartesian) duality of the roles of the State (sovereign *but* member of the Community) would be substituted by a complementarity (sovereign *since* member of the Community). Once perceived the common journey, and understood the differences as being the motor, the mechanisms of consensus formation would evolve from “aggregative” to “deliberative” (Habermas)<sup>61</sup>. And this has a correlative in the dimension of *time*: “imperative-laws” would leave the way open for “experiment-laws” (programs), with the consequent obligation of “*savoir*” (= “*prévoir*” + “*révoir*”; OST 1998:25).

Correlatively, we would have to talk about a plurality of decision levels (that goes beyond the – present – “three levels of legality”; DE SOUSA SANTOS 1988). The complex institutional structure, with its competential intertwinements (of and between the common bodies and the States), already generates an incipient “internormativity” (CARBONNIER) which, however, is perceived as a distortion. It is still far from, but not out of the reach of, the “theory of complex decision” (SIMON) by the “*voluntas legis*” of a multiple “*legislator*”. Indeed, the plurality of actors involucrated in the process is the ultimate implication of pluralism, provided such plurality is not so much quantitative (decisional atomism) but qualitative, thus presupposing an overlapping of roles derived from one subject’s affiliation to heterogeneous communities. The “representation” of society would change, in the double sense of the term (OST).

Thus, “openness” means the transition from “Constitution” (with capital “C”) to “constitution” (without capital “C”). Or, the acknowledgement that “*la constitution est, elle même, en voie de constitution*” (OST). Much like LUHMANN’S “cognitive expectations” (LUHMANN 1988), recursivities would no longer appear as “*ad hoc* hypotheses” but as authentic processes of institutional learning. Now: if contingency, pragmatism and risk are seen as the germ of all evolution (and improvement); if difference is conceived of as a definitory treat of identity; if theory depicts diversity within unity and comparative study searches unity within diversity (WIJFFELS 1998:47)... what follows with respect of a potential **Civil Code** for the whole of Europe?

What most apparently follows is that uniform law must be discarded: pluralism is incompatible with a unique law<sup>62</sup>. But even non-uniform law can still be foundationalist, both as to its form and as to its contents.

Concerning the *form*, it is rather clear for most comparatists and historians interested in the “convergence debate” that the future European “*ius commune*” cannot be forced into the

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<sup>61</sup> This can and should be connected with recent voices claiming a democratic reshaping of the international order, up to now hierarchical and State and sovereignty-based (*cf.* OTTO 1996). The required change of attitude exceeds the procedural level, and could be assimilated to the evolution experienced in recent times by the workers’ “*Mitbestimmung*” (within the realm of the “corporate governance”).

<sup>62</sup> “...un droit commun conçu comme un droit unique me paraît extrêmement dangereux” (DELMAS-MARTY 1996:61).

strict four walls of a code<sup>63</sup>; otherwise, the very form of the instrument would defeat its contents. Still within the realm of the form, one must consider the need for competential distribution between Community and States. A model like the present-day Spanish one would, of course, not sufficiently do: the largely undefined scope of the regions' powers, their *de facto* margin of manoeuvre, are theoretically conceived of, and practically handled, as “anomalies” within the general spirit of uniformity, clarity and systematisation of a code. By contrast, a structure is needed that provides itself the framework for on-going dynamics and co-operation between actors at the rule-giving level. Rather than design competential *distribution* (and re-action), the new system should render possible competential *con-tribution* (and inter-action).

The previous remarks reveal that the emphasis is on the procedure rather than on the contents. This is furthermore coherent with post-modern political theories that, starting from HABERMAS up to Jean-Marc FERRY, recognise “legitimation” in the process of searching “legitimacy”<sup>64</sup>. Still, what (moderate) post-modernity implies, at an epistemological level, is not the absorption of the contents by the form (of the substance by the process), but their intimate interrelation. This way, the question about the **contents** of a future “*ius commune*” ought not to remain unanswered – however, the answer must refer to a process instead of a catalogue of “*personae, res, actiones*”. Probably at this stage it becomes interesting to explore whether or not “European legal systems are converging”. If they *do not* (LEGRAND 1999:76 *et seq.*, LEGRAND 1996), most probably they *will* (if the integration-premise that inspires this paper is accepted). If they *do* (MARKESINIS 1993 and 1994, MACKAY 1992), it remains to be seen *in which way*: i.e., whether similarities are growing or constitutive<sup>65</sup>, whether divergences are both flexible but consistent enough as to handle the centrifugal/centripetal tension without letting the machinery collapse. Only in the light of post-modern opaque proceduralisation can further details about the contents be assessed. Challenging the laws of historiography, post-modernity claims against the use of diachronic analysis and in favour of synchronic adjustment.

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<sup>63</sup> WIJFFELS 2000:116; *contra*, VAN GERVEN 2002, who admits the possibility of a code if its nature is properly redefined.

<sup>64</sup> For the opposition between “legitimacy” and “legitimation”, *cf.* WINTGENS 2002. “Legitimacy” refers to an *a priori* category, reachable “out there” and towards which *per definition* any prescriptive discourse about law (“political philosophy”) strives. Ferry’s “reconstructive ethics” (*éthique reconstructive*; FERRY 1996) proposes to be more modest and, at the same time, more optimistic in conducting this search: for, as he argues, the goal (of legitimacy) is equivalent to the process (of legitimation).

<sup>65</sup> According to G. Samuel (SAMUEL 1997), civil and common law systems are construed using the same building blocks (*in rem, in personam*) but differ in the combination of such elements, i.e., in their structure (common law works with one dimension more than civil law, for the latter includes the notion of “*actio*” within the notion of “*obligatio*”). Another approach that regards similarities as being “*déjà là*” – though for the rest very different than Samuel’s one – is Zweigert & Kötz’s “functionalism” (ZWEIGERT and KÖTZ 1977, ch. 3).

At a moment where the principles of the Ancient city-State are not applicable anymore, they remain nevertheless desirable (CONSTANT 1819) and ought to act as a corrective to achieve common life in a diverse community (GADAMER 1989:115-116). Integration of a plural community is as challenging as it is to make Diversity politically viable. History shows, particularly in the case of Spain, how homogenisation has repeatedly failed when carried out by, and for the sake of, the homogeniser. Shared *auctoritas* and spread *potestas* are the tools for a homogenisation by and for the homogenised. Under the legalist veil of modern State reification (WINTGENS 2002), post-modern epistemology uncovers, and gives voice to, the subjects that *want* and *build* (are) the union.

Much time has passed since SCHUMAN'S "concrete realisations" until the contemporary talk about the "double citizenship". Still, it remains true that only the *product* of particular accomplishments, rather than the *division* of pre-established categories, can possibly lead to a fruitful self-regulation of a community that is too mature – not too green (as SAVIGNY feared) – to give itself a code.

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