

## **The use of international private law as a criterion for the application of Catalan civil law in Catalonia**

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### **Abstract**

*The system of conflict of laws and the principle of unity of jurisdiction are under the influence of the plural composition of the Spanish legal system in civil law matters. The aim of this article is to examine cases in which the rules on conflict of laws should be applicable in order to determine the application of Catalan civil law.*

**Key words:** private international law, interregional law, rules on conflict of laws.

### **1. Brief introduction**

The goal of this article is quite modest: we might even say that it is lacking in ambition. It is modest first because it simply aims to shed light on when it is appropriate to apply the rules on conflict of laws in order to establish that a given de facto affair is governed by Catalan civil law. This is a question which I believe is accepted and known by both practitioners and courts, but it is worth noting that the peculiarities stemming from the unity of jurisdiction in the legislative plurality that comprises the Spanish legal system hinders a highly precise delimitation. Therefore, we should say that this text does not aspire to definitely close such a delicate issue as the legal basis or underpinning for the application of Catalan civil law, which until recently was completely open and, as we shall see, still presents doubts in some doctrinal spheres.

Consequently, the goal is simply to state when it is appropriate to apply the rules on conflict of laws to determine the application of Catalan civil law, and when, therefore, it is not appropriate to apply them.

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## 2. The applicability of Catalan civil law

One might think that wondering about the condition of applicability of Catalan civil law is almost absurd, especially for a merely internal affair. Indeed, in a domestic affair which has no link other than with Catalan civil law, is it necessary to justify the application of this law? Perhaps the question becomes clearer and even stranger if we ask it and project it onto the applicability of French law by a French judge, for example. In this sense, it almost goes without saying that a French judge is not obligated to justify the application of the French Civil Code. To the contrary, this same judge would be obligated to argue why he or she is applying a foreign law, the Spanish Civil Code (CC) or the Catalan Civil Code, in the event that the affair is linked with any of these civil laws coexisting in Spain.

The counterpoint that I just mentioned therefore puts us on alert because – unlike what might happen in unitary systems, such as in France – in Spain the constitutional system protects civil plurilegislation. Thus, the question asked – “Is it necessary to justify the application of Catalan civil law?” – becomes more meaningful in this context. Indeed, the question we should ask is whether a Spanish judge must justify the application of Spanish civil law the way a French judge could. However, as the reader must have already guessed, the question is much more complex here because even though we could posit a Spanish judge – that is, one belonging to a particular jurisdiction, the Spanish jurisdiction – we cannot truly speak about the application of Spanish civil law but should instead speak about the application of one of the civil laws coexisting in Spain.

Therefore, the question is sharper-edged and more ridden with different angles that must be taken into account. In reality, the content of the question is so complicated that it must be adapted in order to mould it to the plurality that shapes the legal system on civil matters in Spain. This is why the question that should be asked is: Should a Spanish judge have to justify the application of any of the civil laws coexisting in Spain, and more particularly Catalan civil law?

The answer is neither facile nor immediate. Thus, we could say that if the question is more complex, as we have seen, so is the answer.

The unity upon which the exercise of jurisdiction is built means we have to talk about just a single jurisdiction, Spain, even though this jurisdiction applies different civil laws depending on the matter at hand. However, precisely this plurilegislation situation is what forces a question which would be completely incongruous in other circumstances and other places.

For this reason, it should come as no surprise that numerous resolutions justify the application of Catalan civil law with article 14.1 of the Statute of Autonomy of Catalonia (SAC), article 111-3.1 of the Civil Code of Catalonia (CCCat) and quite often with rules on conflict of laws as well. This is almost always a clause that would affect any material sphere, including family, successions or inheritances.<sup>1</sup>

The feature that makes these cases common is not that they are heterogeneous affairs in which one must determine which of the civil laws coexisting in Spain is applicable, but instead they are internal affairs, solely

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<sup>1</sup> See the plentiful jurisprudence mentioned in Ginebra Molins (2012).

associated with the Catalan system, and yet the court nonetheless feels obligated to justify the application of this law. Therefore, the question should be framed within the plurilegislative nature that defines the Spanish system. However, it is known that this note of plurality that characterises the Spanish system does not in itself mean a conflict of laws. Despite this, the justification reproduced appears in multiple judicial resolutions without the need for the legal matter to show any degree of heterogeneity, and yet the rules to resolve conflicts of laws are nonetheless invoked. In any event, what stands out is the fact that the courts need to vindicate the application of Catalan civil law.

Despite this, the challenge which should theoretically be posed by any judge from the Spanish jurisdiction is not always dealt with in the same way. Therefore, we could wonder whether the Spanish courts justify the application of one Spanish civil law or another at all times and all over Spain, and more specifically, whether this approach can be insisted upon even with regard to legal matters which could be considered purely domestic, homogeneous or internal.

The question is pertinent again because a sampling of the jurisprudence, no matter how painstaking it is, reveals that this kind of reasoning never occurs when the judicial resolution was handed down by a judge belonging to the Spanish legislation but headquartered in Ávila, Seville or Ciudad Real, that is, in the territory of what is poorly called common civil law. If the affair is purely internal, not only is there no doubt regarding the applicability of the Civil Law, but there is also no need to justify its application. Consequently, we must determine the motives that lead the same jurisdiction, the Spanish jurisdiction, to justify the application of some of the civil laws coexisting in Spain in some cases, while directly applying another of the civil laws coexisting in Spain in others, without anyone questioning the grounds upon which this application rests.

### **3. The reasons leading to the justification of the applicability of Catalan civil law**

The differences in the treatment or, if you will, in the condition of applicability of a given Spanish civil law is based on different considerations which are somewhat intertwined.

Perhaps the factor that plays the most prominent role in this issue is the completeness of the state law, its suppletory nature and the diminishment to which Catalan civil law has been subjected historically. Therefore, plurilegislation has been alien to the shaping of the very structures that make up the state in Spain. The goal was to eradicate this circumstance with the Spanish Constitution (SC), but the inertia, resistance and – in the sphere we are examining – the principle of unity of jurisdiction have made that extraordinarily difficult. This is a peculiar yet crucial piece of information in the Spanish system that does not occur in any other country within our cultural milieu. Usually, plurilegislative regionally-based systems – obviously, I am referring to plurilegislative private law systems – entail a plurality of jurisdictions such that each territorial unit has its own law and its own jurisdiction (such as in the United Kingdom, Canada, the United States and Australia). A plurilegislative system in which there is simultaneously a plurality of jurisdictions does not

require this – shall we say – previous question. Indeed, when faced with a circumstance associated solely with system X, the courts belonging to jurisdiction X would apply their own law without having to consider or justify the application of their own law.

We should not forget that historically, the jurisdictional function in the different territories in the Iberian Peninsula was exercised in a sovereign way. However, the unification of the jurisdiction and the existence of an unequal, imbalanced plurilegisative system has led to the clear supremacy of state civil law. In this sense, the application of state law is assumed to be a natural consequence, while to the contrary, the application of a Spanish civil law that is not state law occurs in a fragmentary, infrequent way and is only reserved for certain clearly determined spheres. In short, it is viewed as an anomaly. However, this conception in a plurilegisative system such as the one currently in force in Spain – which nonetheless continues to have a single jurisdiction – is difficult to sustain. It should be obvious that none of the civil laws coexisting in Spain is inherent to the jurisdiction or, perhaps more accurately, that they are all “inherent” there, since all Spanish laws are inherent to the only competent Spanish jurisdiction and in consequence there is no need to equate it with only one of the civil laws. Equating the Spanish jurisdiction with one law or the other is tantamount to distorting the structural plurilegislation with which the Spanish system was envisioned in the SC. Although it is true that the jurisdiction serves a state function, this does not equate it with state law per se but with the Spanish system, meant as the simultaneous presence of the laws produced by both the central state and the regional lawmakers.<sup>2</sup>

Overcoming the pre-constitutional system, which temporarily remained in place in the immediate post-constitutional period (not because of a lack of justification but simply as the consequence of an obviously temporary process of adapting to the changes made) was manifested in Catalonia with the positivisation of the completeness of Catalan civil law. This completeness itself does not alter the suppletory nature of state law as a principle, but naturally it reveals that in order to resolve legal matters that are purely internal, in the sense that they have no association with any civil law other than Catalan civil law, the jurisdiction should apply this law without having to resort to state civil law, or perhaps by applying it in a suppletory fashion, but not as an effect of the remission from a rule of conflict. The presence of plurilegislation, and in particular of the suppletory nature of state law, forces a justification that could not be understood otherwise.

This complexity must be accepted, yet the inertia of the Spanish jurisdiction in the exclusive application of state civil law cannot be accepted. This explains why, for example, the Ruling by the Provincial Court of Barcelona dated 22 October 2010 (Aranzadi Westlaw, JUR/2010/382952) quite appropriately added the following: “The appealed ruling applies State civil law without justifying it”. This reveals that in appeals even today it is essential to recall the plurilegisative nature of the Spanish system and the necessary application of the corresponding regional civil law, in this case Catalan civil law, given its completeness in the aspects that fall within this legal matter and

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<sup>2</sup> Regarding the difficulty of fitting regulatory plurality into unity of jurisdiction, see Arenas García (2010 and 2011).

inasmuch as the matter is a purely domestic affair without any elements of heterogeneity.

This does not mean that both state civil law and the regional civil law with which the affair is connected should be applied in the same legal matter. In these cases, the simultaneous application of state civil law and a regional civil law is not the result of a conflict of laws but of the simultaneous existence of the unity of the system with regard to a given matter and the plurality of the system regarding other matters, or the failure to exercise the regional competences in this matter. This is the case of rulings in which the application of the recommendation provided for in the first book of the Civil Code of Catalonia is at stake.

The exclusive competence of state lawmakers in some of the aspects of the legal matter, or the failure to exercise the regional competence, thus sometimes generates a scenario in which even though there is no heterogeneity, pieces from different Spanish civil laws must be cobbled together: state civil law on the one hand and one of the regional civil laws on the other.

However, simultaneous application does not mean cumulative application. The cumulative application of state civil law and a regional civil law on a given legal matter is inadmissible when either of the two bodies of law is applicable, regardless of whether the matter is heterogeneous or homogenous. This claim must be maintained even if the content of the rules of both bodies of law is similar or even identical. This explains why even though it has been stated that Catalan civil law should be applied, after the justification reproduced, which we have alluded to several times already, the Ruling by the Provisional Court of Barcelona on 7 October 2010 (Aranzadi Westlaw, JUR/2010/384472) declares the following: “Therefore, the cumulative allegation of precepts of Catalan civil law and state civil law is baseless.”

Thus, when the affair is homogeneous, it prompts no conflict of laws, such that it makes no sense to turn to the rules of conflict. It is probably not quite accurate to say that the jurisdiction applies the law of its territory. In reality, the law of the place where the court is located is applied, or perhaps even more accurately, the law whose sphere of application typically includes the situations which are “inherent” to it is applied, because they are exclusively linked. The criterion of territoriality contained in articles 14.1 SAC and 111.3 CCCat expresses the sphere of application of Catalan civil law in homogeneous affairs while also introducing a factor of proximity or immediacy between the jurisdiction and the affair being judged, even, as we shall see, if it is a heterogeneous affair. Citing these precepts is then appropriate,<sup>3</sup> yet it should not be necessary, at least if we contrast it with the way the Spanish jurisdiction operates in homogenous affairs linked solely to what is inaccurately called common civil law, in which no legitimising precept to apply state civil law is cited. However, it turns out that the underlying presence of state law as the suppletory law and potentially, if I may, the law that is applicable vocationally, explains the invocation of articles 14.1 SAC and 111.3 CCCat.

In any case, what is inadmissible, albeit understandable, given the precedents outlined above, is that the rules on conflict of laws serve the purpose

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<sup>3</sup> See the plentiful jurisprudence on this issue, such as Ginebra Molins (2012), pp. 75-76.

of delimiting the scope of application of Catalan civil law only when the affair is associated with this law (Ginebra Molins, 2012:92). This erroneous solution was noted by the Higher Court of Justice of Catalonia in its rulings dated 26 May 2011 (ROJ: STSJ CAT 6728/2011) and 12 September 2011.<sup>4</sup> In these cases, which are homogeneous and exclusively linked to Catalan civil law, it is applied naturally or immediately (Badosa Coll, 2007:32-33; Ginebra Molins, 2012:82 and forward).

Finally, we should recall that Catalan civil law, in its capacity as common law, can be supplementary to state mercantile law (Font i Segura, 2002; Font i Segura and Oró Martínez, 2013).

#### **4. The application of Catalan civil law as the law designated by the rule of conflict**

Having clarified this point, if we notice an element of heterogeneity – either international or interregional – then the system of conflict of laws is activated, and the rules of this system are the ones that will determine the applicable law. In theory, the territoriality expressed in article 14.1 SAC and in other statutes of autonomy, and in article 111/3.1 CCCat, add nothing and do not entail any determination of the applicable civil law. In heterogeneous affairs, the rule of conflict is what determines the application of Catalan civil law, or the law that has been determined by the rule itself (Álvarez González, 2012).

When dealing with a heterogeneous affair linked to different legal systems, the court is obligated to determine which law is applicable by the imperative application of the rule of conflict provided for in article 12.6 CC. All it must do is cite facts which include elements that are foreign or heterogeneous for the *ex-officio* application of the rule of conflict to be imposed and therefore for it to be unnecessary to cite the application of foreign legislation.<sup>5</sup> In interregional affairs, this is even less true, since all the laws present are Spanish and therefore should be known by the Spanish jurisdiction.

Consequently, *prima facie* the problem is not so much determining the applicability of Catalan civil law in a heterogeneous affair but determining the law applicable to the affair. Even if one of the bodies of law present is Catalan law, in order to establish that it is the applicable law, a pathway must be followed that is not always reflected in Spanish jurisprudence. Often a leap is taken into the void that neither provides clarity or fits the principle of legal security.

In terms of prescription, in interregional affairs it has been claimed – erroneously, in my opinion – that article 1010. CC, on the effect of remission provided for in article 16.1 CC, does not allow a regulation to be applied of the prescription contained in a different law than the one provided by the regulation of the requirements for compliance and the consequences of noncompliance.

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<sup>4</sup> As Alegret Burgués (2012) emphasises. See too the considerations of Lamarca i Marquès (2012).

<sup>5</sup> See the rulings of the Supreme Court dated 1 April 2011 (ROJ: STS 1805/2011), 23 March 2010 (ROJ: STS 3313/2010) and 10 June 2005 (ROJ: STS 3760/2005). The actual accreditation of the designated foreign law is another matter.

Therefore, article 10.10 CC would lead to complete application of the law regulating the obligation (contractual or extra-contractual).

This has been upheld, for example, in the ruling by the Provincial Court of Barcelona dated 10 March 2010 (ROJ: SAP B 2052/2010):

THREE.- The conflict of laws which exists between the two civil bodies of law (state and regional) must be resolved according to the provisions of section 10 of article 10 of the Civil Code, through express remission of article 16 of the same text when it says that “Conflicts of laws that may emerge because of the coexistence of different civil bodies of law in the national territory shall be resolved following the rules contained in chapter IV”, a chapter found within the aforementioned article 10.

The aforementioned article 10.10 CC provides that “the law regulating an obligation extends to the requirements of compliance and to the consequences of noncompliance, as well as to its termination”. As stated by doctrine, this provision is projected onto a wide range of obligations, both contractual and extra-contractual. Despite this, the designation made by articles 10.5 and 10.9 CC (no regulatory instrument of the European Union nor conventional instrument is applicable in interregional affairs) can deem Catalan civil law applicable when the case at hand is, respectively, contractual obligations and extra-contractual obligations (Abril Campoy, 2011). The incomplete nature of Catalan civil law in matters involving obligations and contracts, and the fact that it only calls for a complete, systematic regulation of the prescription, require hetero-integration to be considered without ceasing to apply Catalan regulations in relation to the prescription. The justification of this argumentation is the preferential nature of Catalan civil law provided for in article 111-5 CCCat. However, we should note that the state’s exclusive competence could compromise this scenario inasmuch as there would no longer be an inherent, unique regulation in Catalan civil law and therefore the pluri-legislative nature of the system would disappear. This is what happened in the two rulings handed down by the Supreme Court on 6 September 2013 (ROJ: STS 4494/2013; ROJ: STS 4495/2013), in which it describes the action as direct action against the insurer of the vehicle driven by the person who caused the accident, in this case the Consortium of Insurance Compensation, an action regulated in article 7.1 of Royal Decree 8/2004 dated 29 October 2004 which approves the recast text of the Law on Civil Responsibility and Insurance in the Circulation of Motor Vehicles.<sup>6</sup> The arguments cited by the Supreme Court are grounded upon the “unique and extraordinary” (that is, special) nature of direct action and on the norm from which the possibility of exercising this action arises, which is none other than the aforementioned Royal Decree 8/2004, not Catalan law. On the other hand, the Supreme Court states that the constitutional underpinning –

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<sup>6</sup> Alegret Burgués (2012) noted that this controversy was not resolved and that now there are doubts precisely regarding Royal Decree 8/2004.

article 149.1.6 SC – on which the state is given the exclusive competence on matters of mercantile law hinders the application of Catalan law.<sup>7</sup>

The question would be different in international affairs. In these affairs, Catalan civil law would eventually be designated as a legal system which contains its own regulatory framework on specifically regulated matters. Indeed, the different instruments that would determine the applicable law would lead to the application of Catalan civil law, even though the doubt could arise as to whether this is really so when we consider that the remission to a plurilegislative system takes place whenever each of the territorial units has its own legal rules on the matter (in contractual matters, in accordance with article 22.1 of the Rome I Regulation on the applicable law in contractual obligations; in extra-contractual matters, in accordance with article 25.1 of the Rome II Regulation on the law applicable to extra-contractual matters; in relation to the extra-contractual responsibility on matters involving road accidents in accordance with article 12 of the 1917 Hague Convention on the law applicable to traffic accidents; and on matters of responsibility for products in accordance with article 12 of the 1973 Hague Convention on the law applicable to the responsibility for products). Therefore, one could claim that the direct remission called for in the aforementioned provisions is operative only if Catalan civil law, as a system for a territorial unit that is part of the plurilegislation of the Spanish system, contains its own regulation on the matter. If, however, this is a sphere in which the state lawmakers hold exclusive competences, plurilegislation would not be manifested and the determination shall be for the only law that regulates the matter at hand.

## **5. Application of Catalan civil law as a law substituting the law designated by the rule of conflict**

Finally, I wanted to make one last point without seeking to delve too exhaustively into it. The application of a rule of conflict can obviously refer to a foreign law, and it is impossible for its content and validity not to be accredited. This situation has generated a major doctrinal and jurisprudential controversy which we shall not examine now. Broadly speaking, we shall only say that in Spanish jurisprudence, three positions have been upheld: the application of the *lex fori*, the rejection of the legal matter, and the judge ascertaining the content of the foreign law *ex-officio*. The position that has been upheld in the jurisprudence the most often, regardless of how much it has been criticised, is the application of Spanish law for the purposes of *lex fori*. However, it is not clear what this law is if we bear in mind that jurisdiction is unitary but the material regulation is plural, just as in the Spanish legal system.

If one upholds that the law of the forum is applicable as a substitutive solution – and, I stress, regardless of the goodness of this solution – we must determine which Spanish civil law is applicable as long as there is regulatory plurality in the Spanish legal system to regulate the purpose of the lawsuit. The territoriality and Catalan civil law's nature as common law – art. 111.3 and 111.4 CCCat – contribute to the application of Catalan civil law, since under these circumstances what is sought is not so much a solution that reflects the logic of

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<sup>7</sup> Regarding the difficulties in delimiting between the competence in civil law and the competence in business law, see Font i Segura and Oró Martínez (2013).



the conflict of laws as a determination of the law applicable as the consequence of a trial necessity. Thus, the criterion of territoriality introduces a factor of proximity which explains why the application of the civil law of the place where the court hearing the case is located is upheld.<sup>8</sup>

## Bibliography

ABRIL CAMPOY, J. M. (2011). “La prescripción en el derecho civil de Cataluña: ¿es aplicable la normativa catalana solamente cuando existe regulación propia de la pretensión que prescribe?”, in *InDret*, 2, pp. 24-27.

ALEGRET BURGÚÉS, M. E. (2012). “Els terminis de la prescripció extintiva en el dret d’obligacions a Catalunya: una qüestió polèmica”, paper in the session of the Acadèmia de Jurisprudència i Legislació de Catalunya dated 24 January.

ÁLVAREZ GONZÁLEZ, S. (2002). “¿Derecho interregional civil en dos escalones?”, in *Libro homenaje a Ildelfonso Sánchez Mera, 1st ed., vol. II*. Madrid: Consejo General del Notariado.

— (2011). “Determinación del ámbito personal y territorial del derecho civil catalán (o sobre la competencia compartida en materia de derecho civil catalán)”, in FONT I SEGURA, A. (ed.). *La aplicación del derecho civil catalán en el marco plurilegislativo español y europeo / L’aplicació del dret civil català en el marc plurilegislatiu espanyol i europeu*. Barcelona: Atelier.

— (2012). “La prescripción en el Código civil de Catalunya y los conceptos de *lex fori* y derecho común dentro del pluralismo jurídico español”, in *InDret*, 1, pp. 11 and forward.

ARENAS GARCÍA, R. (2010). “Condicionantes y principios del derecho interterritorial español actual: desarrollo normativo, fraccionamiento de la jurisdicción y perspectiva europea”, in *Anuario Español de Derecho Internacional Privado*, 10, pp. 547-593.

— (2011). “Pluralidad de derechos y unidad de jurisdicción en el ordenamiento jurídico español”, in FONT I SEGURA, A. (ed.). *La aplicación del derecho civil catalán en el marco plurilegislativo español y europeo / L’aplicació del dret civil català en el marc plurilegislatiu espanyol i europeu*. Barcelona: Atelier.

BADOSA COLL, F. (2007). “El caràcter de dret comú del dret civil de Catalunya”, in *Revista Catalana de Dret Privat*, 8, pp. 32-33.

FONT I SEGURA, A. (2002). “Nota a la Sent. AP de Navarra de 16 de noviembre de 2001”, in *Revista Española de Derecho Internacional*, 1, pp. 449-458.

— (2007). *Actualización y desarrollo del derecho interregional*. Santiago de Compostela: Universidade de Santiago de Compostela.

FONT I SEGURA, A.; ORÓ MARTÍNEZ, C. (2013). “Cuestiones de derecho internacional privado y de derecho interregional”, in VALLE ZAYAS, J.; PÉREZ I VARÉS, J. A.; SALELLES, J. R. (coord.). *Estudios sobre derecho de la empresa y el Código civil de Cataluña*. Barcelona: Bosch.

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<sup>8</sup> This solution is not wholly satisfactory, and this means that there is a debate on this issue. See Álvarez González (2002 and 2011), Arenas García (2011), Badosa Coll (2007), Font i Segura (2007), Forner Delaygua (2011).

FORNER DELAYGUA, J. J. (2011). “La aplicación del derecho catalán como derecho español en los supuestos internacionales”, in FONT I SEGURA, A. (ed.). *La aplicación del derecho civil catalán en el marco plurilegislativo español y europeo / L'aplicació del dret civil català en el marc plurilegislatiu espanyol i europeu*. Barcelona: Atelier.

GINEBRA MOLINS, M. E. (2012). “Article 111-3. Territorialitat”, in LA MARCA I MARQUÈS, A.; VAQUER ALOY, A. (eds.). *Comentari al llibre primer del Codi civil de Catalunya. Disposicions preliminars. Prescripció i caducitat*. Barcelona: Atelier and Col·legi de Registradors de Catalunya.

LAMARCA I MARQUÈS, A. (2012). “Article 121-20. Prescripció decenal”, in LA MARCA I MARQUÈS, A.; VAQUER ALOY, A. (eds.). *Comentari al llibre primer del Codi civil de Catalunya. Disposicions preliminars. Prescripció i caducitat*. Barcelona: Atelier and Col·legi de Registradors de Catalunya.