Alberto López-Basaguren
Leire Escajedo San Epifanio *Editors*

The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain

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EUSKO JAURLARITZA
GOBIERNO VASCO

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Editors
Alberto López-Basaguren
Leire Escajedo San Epifanio
Fac. Social Sciences and Communication
University of the Basque Country
Leioa - Bizkaia
Spain

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Contents

Prevalence and Primacy: An Essay on Their Scope

Francisco J. Matia Portilla

The Prevalence of the State

Prevalence and the Spanish Autonomous Regions (Introduction)

One of the many paradoxes of the Spanish Constitution is that while it scarcely defines the Regional framework, it goes into detail regarding the limits of the sources of law. Following the widely known work by Professor Cruz Villalón (1981), it is interesting to note that in December 1978 there were few certainties about what territorial structure the Spanish State would finally adopt, both regarding the scope of the decentralisation and the degree of self-governance. These questions would only be answered 3 years later in the regional agreements.

Against this vagueness, the system of sources provided for in the Spanish Constitution established more sound foundations. Schematically, the Constitution is the supreme law within the Spanish legal system, as proved by its special rigidity and its supra-legal status. It is established by the Constitution and the Central State Law that the Autonomous Regions may assume those competences conferred on them by virtue of their Statutes of Regional Autonomy. It is therefore logical that the relationship between the State Law and territorial standards are ruled by the competence criterion since the first requirement for a standard to be valid is to have been issued under an own title.

Normative conflicts may, however, arise between a State standard and a regional one, both issued under sectoral agreements, if two of them regulate the same matter or legal relationship, regulate the same territory, and contain rule discrepancies (Santamaría 2009, p. 141). In order to solve those normative contradictions, the principle of prevalence establishes that State law takes preference over all others.

F.J. Matia Portilla (✉)
Facultad de Ciencias Sociales, Jurídicas y de la Comunicación, University of Valladolid, Palacio de Mansilla, c/ Trinidad 3, Campus of Segovia 40001 Segovia, Spain
e-mail: javierfacultad@gmail.com; javier@der.uva.es

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This principle ensures, from a purely normative perspective, the supremacy of the State legal system over the regional one (García de Enterría and Fernández 1989, p. 355), linked to the general interest (Parejo 1981, p. 110). Regarding prevalence, it is especially interesting to look at its relationship with the principle of primacy of the Community Law over national law, an interrelation initially marked by the widely known Declaration of the Constitutional Court (DTC) 1/2004, which has been recently brought up again in the very interesting and questionable Constitutional Court Order of 9 June 2011, with the separate opinion of Senior Judge Pérez Tremps.

Some Background on Prevalence with Special Reference to Federal States

The first references to the principle of prevalence, before the rise of the federal States model, dates back to the plurality of personal and territorial systems existing after the collapse of the Roman Empire. Then it adopted the opposite position (i.e., the local law took preference over the laws of the Reich; Otto 1981, p. 60), apart from the then unknown principle of competence (Lasagabaster 1991, p. 109).

It is, however, in the context of the rise of the Federal Republic of the United States of America that the principle of prevalence is developed. It was specifically provided for in Art. 6.2 of the 1787 Constitution and in other federal rules (particularly, in Art. 31 of the German Basic Law—and before, in Art. 2.1 and Art. 13 of the Constitution of the German Empire of 1871 and the Weimar Constitution) and implicitly in the Swiss legal system. This approach has not been included in the Austrian Constitution (Otto 1981, pp. 59–60). It was introduced in the Spanish Constitution of 1931, embracing the idea of the integral State.

Doctrinal Debate

The nature, content, and scope of the prevalence clause has been the subject of a lively debate in the doctrine, where doubts regarding its appropriateness in our model of Autonomous Regions have been raised. It is worth noting, among other things, the contributions made with regard to this matter by Luciano Parejo, Ignacio de Otto, and Iñaki Lasagabaster.

Almost all these doctrinal orientations encapsulate an understanding of the Spanish territorial decentralisation model. While for some authors, it is similar to the federal approach (highlighting the competence transfer of Germany or the limited powers of the federal power in the United States); for others, it reminds them that the regional model is actually characterised by the contrary, i.e., by the introduction of general and full power for the regions. It is fair to note that the

constitutional clause has been widely contested, among others, at federal state level. While some classic authors argue that it belongs (Schwartz or Maunz; Otto 1981, p. 60–); others advocate for its exclusion (Imboden; Von Mangoldt and Klein and, particularly, Schmitt and Kelsen) (*cfr.* Lasagabaster 1991, pp. 96 & ff.). Ignacio de Otto is especially belligerent in this regard and defends in a classic paper the point that the central power is of a general and complete nature while that of the regional administrations is competence-limited in character. He considers that the principle of prevalence "is designed to avoid the effect of combining the principle of specialty [of the regional law] and the principle of concentration of the constitutional jurisdiction" (p. 87). For this reason, "if the competent body considers that Regional legislation is null and void, there will be no obligation to apply it under the aforementioned principles. The State Law, i.e., the general law shall be applied instead, without prejudice that subsequently it may be proved that this conclusion was erroneous and that, therefore, the specialty rule should have been used and that the regional law should have been applied. Far from being forced to make an assumption, the prevalence rule states that if there is a doubt regarding the regional law it shall not be applied and that the general State law should apply instead" (Otto 1981, p. 87). In turn, Luciano Parejo defends the prevalence of the State law pursuant to Art. 149.1 of the Spanish Constitution (pp. 103–104), since he considers that it also works as a "competence rule" (ibidem, p. 110) and Gómez Ferrer (1987) links it with a theoretical *constitutional function* (pp. 33–36). Rubio Llorente (1993, p. 123) also calls for the non-application of the regional law. A totally opposite position is held by those who, according to Kelsen, argue that the principle of prevalence is pointless in a model based on the territorial distribution of powers. These professors highlight that "prevalence proves that the constitutional or contractual transfer of powers is useless, since in order to be meaningful it shall not be available at least against the will of one of the parties"(Arroyo 2007, p. 418).

Without going into the details of all those doctrinal approaches on prevalence, it is worth highlighting that due to the development of the Autonomous Regions, the principle of prevalence has been bypassed by the Spanish Constitutional Court and its eventual application, if any, has been unnoticed.

Regarding the first of the aforementioned questions, it should be noted that among us the feeling has grown that the Spanish Regional Framework sets the central and regional governments at the same level. Although the rationale argued by Ignacio de Otto is reasonable, it does not consider some of the facts that are worth bearing in mind. For instance, the fact that the Legislative Assembly of an Autonomous Region may withdraw a proposal to amend its Statute of Autonomy at any stage of the procedure encourages this pactism idea. The Spanish Constitutional Court has also provided greater support to this approach with some of the decisions adopted over the years. For instance, it has expressed that the national regulator is no longer permitted to regulate competences that have be transferred to all the Autonomous Regions; it has also stated that any conflict between State and Regional rules shall be solved through the exclusive application of the competence principle.

The prevalence clause can be useful where the State and Regional regulations are issued pursuant to their own and different competence agreements (Santamaría 2009, pp. 141–142). At this point, the Constitutional Case Law is particularly interesting regarding the relationship of the State legal foundations and the regional rules developing them. While for some authors these are concurrent jurisdictions and therefore the prevalence principle is applicable (García de Enterría and Tomás Ramón Fernández 1989, p. 356; Borrajo 2009, p. 2497; Alonso Más 2003, p. 345), some others argue that there is a functional delimitation (legal foundations on one hand and developing rules on the other hand), which involves an accountable constitutional division of competences making it unviable to apply the prevalence criterion (Otto 1987, p. 282).

The Spanish Constitutional Court has understood that regional rules contrary to the State foundation are unconstitutional [Constitutional Court Judgments (CCJ) 27/1987 and 151/1992] directly or indirectly in connection with the foundations (CCJ 60/1993, 166/2002 and 109/2003, among many others). Such unconstitutionality may also occur where regional legislation, although valid in its origin, is contrary due to amendments to the state foundation (CCJ 1/2003). Lasagabaster considers that, in that event, common courts could apply the fundamental provision (always provided that it has been defined as such by the national legislator or, in the case of regulations, when the national Law establishes its fundamental character) in detriment to the former regional standard but not if it was passed subsequently. To propose the correspondent unconstitutionality, appeal would be possible in the latter case (pp. 148–156). Santamaría Pastor goes further and considers that the Regional standard affected by new State foundations shall be considered derogated (p. 143).

It is, however, true that this understanding of the matter may be called into question. For instance, Constitutional Court Judgment 1/2003 was accompanied by a separate opinion where three Senior Judges considered that the prevalence clause was applicable (see also, from the doctrinal perspective, Borrajo 2009, p. 2497).

Regarding the second issue, and closely related to the relegation of the prevalence in the Constitutional case law as regards the competence principle (CCJ 69/1982, of 23 November, FJ 2.c), it has been taken into consideration by common courts resulting in a discretionary application that makes its analysis difficult. For this reason, it has been argued that its practical application is invisible (Borrajo 2009, p. 2496).

To this it must be added, obviously, that the powers of legal participants are very limited because, on the one hand, all of them (and, particularly, Courts and Tribunals) are subject to the rule of law and, on the other hand, because the Constitutional Court itself has stated that common courts cannot disregard regional standards with the force of law without proposing the corresponding unconstitutionality appeal before the Constitutional Court (CCJ 163/1195, of 8 November, which was noted before by Lasagabaster pp. 124 or 127, vid. Borrajo 2009, pp. 2498–2499). This places the competence principle again at the heart of the discussions, leaving out the efficiency of the prevalence principle.

Characteristics of Prevalence

a) Regardless of what the word "principle" may suggest, prevalence is a legal rule establishing that State law takes precedence over regional laws. This idea on the Supplitary feature, expressed by Professor Biglino, is equally applicable to prevalence (Biglino 1997, p. 56).
b) In any case, this rule is applicable to a conflict between two valid standards, i.e., one that cannot be solved by applying the competence criterion because if the latter is used, "there is no room for prevalence, since the conflict is solved at a previous stage, that of the competence" (Arroyo 2007, p. 416; vid. Santamaría 2009, pp. 140–141). For this reason, prevalence only begins to be meaningful when it refers to competences, at least to shared competences, and being only as sufficient as this due to the lack of a material regulation in our constitutional model.
c) Prevalence is not hierarchy; instead, it operates among rules that may be at the same hierarchical level of different legal subsystems. Since "the non-existence of a hierarchical rule is explained by the political foundation of the system itself: no source of Law (except the Constitution itself) has the immanent competence vested by Law as the expression of the national will in a state of law" (Balaguer 2003, p. 201).
d) As a consequence of the above, the prevalence does not involve the nullification of any standard, nor does it involve the derogation of one of the standards by the other (Borrajo 2009, pp. 2495–2496). "The standard remains valid and in force, but only regulating instances different from those under the mandate of the prevalent standard" (Borrajo 2009, p. 2496). It is just a non-application of the rule to the specific situation.
e) Finally, prevalence is not exercised by neither the Spanish Constitutional Court (Alonso Más is in favour of establishing a procedure for a better understanding of these matters, esp. pp. 346–347) nor the legislator (be it the State or a Regional legislator—cf. CCJJ 76/1983, on the one hand, and 132/1989 and 331/2005, on the other).

The Primacy of the European Union Law and Its Remoteness from the Constitutional Clause of Prevalence

It is common to refer to the primacy of the European Union Law (to the well-known CJEU Costa-Enel) in the academic studies on prevalence (Lasagabaster 1991, pp. 39–40, uses them as synonyms). In turn, Borrajo considers that both principles are similar, but he introduces two points: (a) the primacy of EU law is not expressly laid down by the Treaties; (b) the Spanish prevalence is limited (since it is not applicable to the exclusive competences of the Regions, as set forth in Art. 149.3 of the Spanish Constitution) (p. 2496).

Without questioning these assumptions, it is worth taking into consideration two additional pieces of data. The first one is that while the European Union (whose law is superior to the national laws of the Member States) is an international body with granted powers (and thus limited to these powers), it is not the same for the Spanish central State vis-à-vis the Regions. In our country, Autonomous Regions are the only territorial organisations with granted legislative competence. Another question is that, once competences have been granted, the central State is not entitled to regulate them anymore. It is nonetheless significant that both UE and the Regions were established with an enumeration of powers and that the power of the State to amend the Constitution is still exclusively linked to the Central Administration of the State.

The second idea to be added to the arguments by Professor Borrajo is that the primacy of the EU law over the national legislations is not absolute. All Constitutional Courts have retained jurisdiction, in more or less accurate but evident terms. Thus, for instance, Declaration of Constitutional Court (DCC 1/2004, of 13 December), goes as far as to state that "in a final instance, the conservation of the sovereignty of the Spanish people and the given supremacy of the Constitution could lead this Court to approach the problems which, in such a case, would arise"(FJ 4). Primacy yes, *ma non troppo*.

It is, however, true that that Declaration states a basis in favour of the primacy principle, admitting also that the constitutional text (namely, Art. 93 of the Spanish Constitution) may set forth "its own displacement or non-application" (FJ4). This statement is not noted here in order to reiterate the discrepancies brought to light in the past in this regard (Matia 2005, esp. pp. 345 & ff.) but because the Constitutional Court Order regarding the appeal for protection of fundamental rights 6922-2008, where three preliminary rulings were requested from the Luxembourg Court, examines this question in greater detail. For the purpose of this essay, this recent decision will be analysed only from the primacy perspective notwithstanding that, in a more general context, other complementary questions may be discussed (for instance, if it is possible to lodge a preliminary ruling on the specific wording of a standard that is not in force at the moment, its application is required).

From this perspective, we aim to analyse the relevant and worrying issue that a question is lodged before the European Union Court of Justice about whether a provision of secondary EU law should be interpreted such that it prevents authorities from submitting a European arrest warrant according to standards that the Spanish Constitutional Court has recognised as essential to guarantee the fundamental right of defence (Art. 24.2 CE). The Luxembourg Court is also requested to explain whether such a provision is compatible with the Charter of Fundamental Rights of the European Union. Finally, the third question refers to whether, if the EU law at issue is compatible with the Charter of Fundamental Rights of the European Union and pursuant to Art. 53 of the Charter, a Member State could limit the scope of a European arrest warrant to make it compatible with respect to the constitutional rights of the individual.

The conflict in question does refer not only to the legality of the secondary Community law (in a broader sense) concerning the primary law (particularly, the

above-mentioned Charter, which has the same force as Treaties), but also to the binding influence that such a provision passed by the Council of the European Union may have on the fundamental rights originating from the constituent powers. From this narrow point of view summarising the Gordian knot of the Constitutional Court Order, the Order may be called into doubt for different reasons.

We shall start with the most obvious issues. Even in the event that it was admitted that the national Constitution could be partially displaced by an international treaty (and even more, admitting that such displacement is made by a secondary community law, although obviously international treaties are subject to the compliance with the Constitution), it is clear that fundamental rights could never be affected by such an effect. It is because the purpose of the Constitution (as the most complete form of constitutionalism) is to guarantee the freedom that it is inadmissible to assume that Community law (primary and secondary) consents to the violation of (or the suspension of the binding force) fundamental rights. This is precisely the message contained in the Judgments with regard to this matter of the main European Constitutional Courts (also of the Spanish Constitutional Court, CCJ 64/1991). Apart from diverging from those who argue the case for the Constitutional Court requesting preliminary rulings before the European Union Court of Justice (Alonso 2003) since—strictly speaking—they are neither judges nor applicants of secondary Community Law, it seems therefore that, in any case, that direction should not be followed when fundamental rights are at stake.

If the supreme Community jurisdiction were to understand, as the higher Community law interprets, that the provision under discussion respects the Nice Charter, it would put the Spanish Constitutional Court in a delicate position. It is unlikely that special regimes based on the equality and on the good faith of the State can be consented to in a system such as the European arrest warrant. That would force the Constitutional Court to either abandon the case law of previous decisions (JCC 91/2000, 134/2000, 162/2000, 156/2002, and 183/2004) where constitutional law is interpreted and instead accept an intergovernmental decision that was adopted within the European Union, which would be a surprising action to undertake, or to rebel against EU jurisdiction (if the Luxembourg Court were to dismiss State requests on fundamental rights). It is worrying to consider any of these possibilities. From the strictly strategic perspective, the preliminary ruling is risky, apart from being dogmatically unfortunate. If it is the Court's will to be coherent with its previous case law, it would be closer to rebellion than to understanding since in the above-mentioned 2004 Declaration it is stated expressly that "it is clear that the Charter is conceived, in whatsoever case, as a guarantee of minimums on which the content of each right and freedom may be developed up to the density of content assured in each case by internal legislation", and if the option chosen was to forget this assumption and to be submitted to community jurisdiction, it would not be impossible that the European Court of Human Rights inform our Constitutional Court, which would not be positive either.

Those who agree with the arguments made so far are also likely to endorse the view that perhaps the Constitutional Court should have explored other approaches. One of them, suggested by Senior Judge Pérez Tremps, is to give serious

consideration if constitutionally relevant defencelessness may occur by virtue of a judgment by default when there is evidence that the defendant was duly summoned and he freely decided not to show and that he also had the opportunity to be represented by an attorney for the protection of his interests (section 6 of the separate opinion attached to the Order). This line of argument (incidentally linked to the Strasbourg Court's case law and not to the European Union Charter) makes it unnecessary, in accordance with the opinion of the dissenting Senior Judge, to resort to the preliminary ruling in this case. Moreover, the Court could have questioned if the publication of a new European catalogue of human rights, undoubtedly relevant for establishing the constitutional content of the fundamental rights, requires (or consents) reading in an innovative way the fundamental rights that have also been enshrined in the Charter.

Back to the aim of the present essay and to conclude, it must be made clear that the primacy of the Community law and the constitutional prevalence clause can hardly be compared. While the subsystems of the Central State and of the Regions are linked to a Constitution that is superior, European Treaties establish international bodies, the masters of which are still the sovereign Member States and, this is what is relevant to this article, the founding of rules that should be adopted in accordance, both procedural and substantive, with the different national Constitutions.

Some Points by Way of Conclusion

It has been highlighted above that there are some major differences between the principle of prevalence of the State law over the regional law and the principle of primacy of the Community Law over national laws of Member States. Due to these differences, it is recommended that a thorough and separate analysis of them is carried out. This first conclusion is not surprising since the best doctrine has repeatedly pointed out that the principle of prevalence has specific connotations in each of the legal systems where it is present (Lasagabaster 1991, p. 100). It has also been highlighted that the Spanish Constitution remains important in our legal order, as a consequence of its constituent powers and as a supra-legal law and guaranteed through the nomophylactic control of the legislation enacted by any constituent power.

It would be unfair to conclude without mentioning that both the European and Regional integration processes share another common feature. Both are open processes and, for this reason, unstable.

At a national level, this instability was recently proved when the Constitutional Court (CCJ 31/2010) did not authorise the amended Statute of Autonomy of Catalonia, provoking political and doctrinal reactions. The European Union has not been immune to tensions due to the lack of definition of the chosen international model (which over the years, it is fair to note, has been allowed to reach a profound level of social integration, as well as political and strategic interdependence).

Some of the decisions from the national Constitutional Courts illustrate this (being the most recent the German declaration on the Lisbon Treaty), which, far from holding a debate with the Luxembourg Court, establish the constitutional limits that condition the development of the European Union.

It is clear that the future of both processes for the territorial integration of powers would depend on the political decisions to be adopted. It is also clear that the option adopted in relation to any of these integration processes will have an impact in the other one. Thus, for example, if the European Member States would follow today the path of the United States of America, forming a European State, the role of the Autonomous Regions in our country or the Länder in Germany would lose importance.

It would be risky to speak about the future of the European Union, but it would not be so risky to talk about the possible development of our present Autonomous Regions since their creation was very different from that of federal states in other countries. It is widely known, for example, that the American federalism has traditionally been considered as a second degree or territorial separation of powers, which overlaps with the horizontal or functional one (Ballbé and Martínez 2003, p. 26). However, as it is commonly understood that, from such horizontal perspective, the political system should be based on the Parliament because it represents the minority (its existence and respect is the essence of democracy, *cfr.* Kelsen 2006, pp. 154–155), it is commonly argued that the central State shall retain some political supremacy over the institutions with territorial decentralisation.

This fact that in no way questions the independency between central and regional institutions, and the fact that they are at the same hierarchical level is also applicable to our constitutional system. Some examples are the principles of indissoluble unity and solidarity (Art. 2 Spanish Constitution), being the latter ontologically weighted and required by the central State, and the subordination of the entire wealth of the country to the general interest (Art. 128.1 Spanish Constitution), to the states of emergency (Art. 116 Spanish Constitution), and particularly, in the context of the present essay, in the eventual substitution of the regional powers by central state authorities (Art. 155 Spanish Constitution).

It could be argued that the supremacy is not recognised in the law, pursuing the idea that the Statutes of Autonomy are pursuant to the agreement between the State and the Regions, a theory that has been given further impetus after the Resolution by the Presidency of the Spanish Parliament (Congreso de los Diputados), 16 March 1993, on the procedure to be followed when reforming the Statutes of Autonomy which allows the proposing Legislative Assembly to withdraw its proposal at any stage of the procedure. Indeed, the consensus between the central State and the Autonomous Region will be necessary. It should be noted, at least from a de facto perspective, that this is an agreement between territories.

Since this is certainly true, it should be pointed out that the constitutional review that can (and must) close the door on the Spanish regional model, whatever the adopted political direction is, does not require the involvement of the Autonomous Regions (Groppi 2002, p. 10). By reviewing the Constitution, any decision in this regard could be adopted (ranging from a centralized State model to a Federal State).

It could be argued, however, that Autonomous Regions would also take part in that process through the Spanish Senate since it is the House of territorial representation (Art. 69.1 Spanish Constitution), but this is nothing but an unrealizable notion at the time of writing this article.

The supremacy of the central State is not only a provision of a theoretical model but a consequence of the way we have achieved the territorial decentralisation moving away from a centralised State. Although there is no doubt that the experiment launched by the Constitution has been very positive, this may be a good time to reconsider the model, in whatever manner, and end the process providing it with a stability that is both appropriate and necessary.

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