THE PHILOSOPHY OF THE CIVIL CODE*

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I. Roman elements of the Civil Code

A. Introduction

Looking for the philosophy of the law is like looking for a black cat in a dark room: at times you hear the cat meow, at times you feel its fine fur, at times you see its gleaming eyes, but most of the time you don't know where to look for it. The concept of philosophy of law is itself ill-defined. It certainly is not jurisprudence, whether this be understood to be sociological, psychological, historical, or any other form advocated by any school. It is also not ethics, although this may be a part of the law itself. Since words like "philosophy" or "law" are themselves susceptible of varied interpretations, it is not surprising that philosophy of law is hardly capable of an accurate definition.

Defining the legal philosophy of the Civil Code can hardly be accomplished with the clean accuracy of a rifle shot; we can only point at the direction of the target and shoot with the errant and unsure explosion of a shotgun shell. In other words, we can only point at the black cat by:

1) tracing the origin of the law to its sources in human nature; or

2) connecting the law with the society that evolved it and the circumstances of the time in which it originated; or

3) relating the importance of the law under the influence of economic , social and other conditions; or

4) pointing out the basic elements of the law; or

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5) tracing the growth of the law, and/or

6) distinguishing law from ethics.

The above tasks, according to Sir John Macdonnell, are the tasks of an investigator of the philosophy of law. It is like shooting in the dark, hoping that a wild shot may, by accident, hit the unseen and elusive target.

B. Roman Law Antecedents

To study the philosophy of the Civil Code is therefore to go back to the history of Spain, for our Civil Code is founded on the laws of Spain. But to go back to the history of Spain is not enough, for we find that the laws of Spain were based largely on Roman law, dating as far back as the Institutes of Justinian. So we go back to the *corpus juris civilis* only to find that this tome of rigid conservatism is merely an accumulation of old Roman law, as modified by the tenets of orthodox Christianity. Going back to the old Roman law does not end our quest for the starting point of the philosophy of our Civil Code, as we find that Roman law was greatly influenced by Greek philosophy. And so we find confirmation of the historical truth that we are but pygmies standing on the shoulders of giants, even in the matter of the philosophy of our Civil Code.

But to start from the ancient Roman state, it has been noted that this was initially composed of hardy tillers of the soil. These were sturdy and hardworking peasants, and they fashioned their laws according to their lifestyle. Their laws did not have any explicit philosophy, except those with religious foundations. Thus, ancient Roman law was but a combination of tribal customs, royal edicts, and priestly commands. This was the time when the law could not be distinguished from the Roman religion, as ancient Rome was under the rule of priests. Thus, early Roman Law

> was both *lex* and *jus*, command and justice; it was a relation not only between man and man but between man and the gods. Crime was a disturbance of that relation, of the *pax deorum* or peace of the gods; law and punishment were in theory designed to maintain or restore that relation and peace.[1]

The same observation holds true for the theory of injury and liability. Ancient Roman thought proscribed injuring one's neighbor as

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[1] 3 DURANT, THE STORY OF CIVILIZATION 331 (1950).

this might affront the gods and prompt them to hit back at the malefactor and imperil the whole community, by indiscriminately unleashing lightning or casting pestilence, which would affect the guilty and innocent alike.[2] Even the theory of contracts invoked the name of the gods. In making a promise, a person was called to witness the promise, and the politically organized society had to give a legal remedy to the promise lest he invoke the aid of the gods and jeopardize the security of the community.[3]

Since priests were the dominant class, they shaped the law to suit their religious ends. They declared what was right and wrong; decided questions of marriage or divorce, celibacy or incest, wills or transfers, or rights of children and parents.[4] The law was surrounded with solemn oaths and sacred sanctions, and the law books were so securely hidden from the plebeians that the priests were suspected of altering the texts on occasion to suit their ecclesiastical objectives.[5]

But there is no point in tarrying at this junction in Roman history, except to note that the philosophy of ancient Roman law was grounded on religion. Where law is based mainly on religious rituals, the philosophy of the law stagnates. The processes of thought are frozen by the countervailing thought of eternal damnation for those who think too much; the substance of the law is eclipsed by oaths and rituals administered by witch doctors or medicine men masquerading as priests. Between salvation and damnation the ancient Roman tribesman did not have much leeway for independent thought, much less for questioning the whys or wherefores of the rules laid down by the priestly class. While law is inextricably interwoven with religion, morals, and custom, it is only when law becomes distinguishable from these that its philosophy, *i.e.*, the ethical basis for its norms, becomes discernible. In the case of the Romans, this distinction became most obvious in the last two hundred years of the Republic, in the first three hundred years of the imperial era, and towards the end of the empire up to the age of Justinian.[6]

And what was the philosophy of private Roman law during those later periods? Schulz puts it thus:

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[2] POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 26 (1954).

[3] *Id.*

[4] DURANT, *supra* note 1, at 33.

[5] *Id.*

[6] SCHULZ, PRINCIPLES OF ROMAN LAW 4 (1936).

> Often the jurists' statements almost give the impression of a mathematical treatise or rather of a treatise on a law of Nature, a law, however, not so generally applicable as was claimed for the Stoical law of Nature, but one within the framework of Roman Legislation and retaining certain traditional principles and axioms . . . in short, a Roman law of Nature.[7]

As Pound observed, among the Romans, law was conceived as a philosophically discovered system of principles which express the nature of things, to which, therefore, man ought conform his conduct.[8]

Almost all commentators agree that philosophy of the law was not a strong point with the Romans; the original ideas in law were borrowed from the Greek philosophers. A German writer notes that the classic and enduring Roman model for the philosophy of law may be represented by the establishment of the *bonus paterfamilias* as the standard relation for development of private law during the first period, and of the *jus aequum*, corresponding to the principle of equity, during the second period.[9] Needless to say, both principles still constitute the pillars of our Civil Code today.

The one distinguishing mark of Roman law during this period, compared with later codes, lies in the absence of an ethical element. Here was law before it was married to ethics. The concept of *paterfamilias*, for example, represented absolutism of the early civil law: the *paterfamilias* was the absolute monarch in the family , over which he had complete control.

The other distinguishing mark of Roman law was its simplicity. In private law, the Romans recognized only two forms of human association - the *societas* and the corporation. There was only one type of *communio*, whether this was a community of heirs, of patrons, or any other communio. There was only one form of property, as no distinction was made between real and personal property. There was only one form of security, whether possessory or not. Contracts for work and labor and contracts for hire and lease were massed together in the same type of contract. In family law, the property law of husband and wife recognized only two kinds: where the wife had no property (*manus* marriage), and separation of property (free marriage).[10]

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[7] *Id.*, at 35.

[8] POUND, *supra* note 2.

[9] BEROLZHEIMER, THE WORLD'S LEGAL PHILOSOPHIES 82-83 (R. Jastrow trans. 1912).

[10] SCHULZ, *supra* note 6, at 69-70.

There are other legal rules borrowed from Roman Law which, while still extant in our Civil Code today, have undergone some changes in terms of their philosophical underpinnings. Take, for instance, the law of contracts and of bailments. While in ancient Roman law contracts and agreements were not initially cognizable by the tribunals, it was soon realized that someone who broke his oath, aside from displeasing the gods, was also a social danger. As observed by Pound, when the law replaced religion as the main regulating agency, the old religiously-sanctioned promise became a formal legal contract which created a legal duty enforced by the government.[11] The legal symbols replaced the symbols of magic, and the contract became the source of the obligation. To borrow from Pound again, new categories of contracts arose which were, however, rationalizations of previous formal transactions, *e.g.*, the consensual contract of sale rationalized transfer by *tradition*, the real contract of *depositum* rationalized *fiducia cum amico*, and *mutuum* rationalized *pecunia credita*.[12] All of these contracts, even if derived from formal transactions, were agreements clothed in legal form, and it was this legal form that formed the *causa* for enforcing the agreement. It was only much later, under the influence of the Germans during the medieval period, that the concept of *causa debendi*, or reason for owing the promised performance, evolved, probably due to pressure from the church which was at that point establishing a jurisdiction over promises. All of these Roman concepts on contracts originally traced the source of obligation in the form itself, for it was earlier thought that "faith in legal forms belongs to the same order of thought as faith in forms of incantation, and that legal forms are frequently symbols to be classed psychologically with the symbols of magic".[13]

If there is any one common thread of Roman private law, it is the philosophy of individualism. In the relationship of husband and wife, for example, marriage and divorce were accomplished without government intervention. No restrictions were placed on divorce - a unilateral declaration sufficed.[14] There was no question of the right of the wife to contract, of the duty of the husband to support his wife, or of the wife to work for the husband. There was no community of property; each remained sole owner of his or her property.[15] The Roman laws of ownership were extremely individualistic; their principle was that ownership is to be as realistic as possible and the greatest possible

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[11] POUND, *supra* note 2, at 138.

[12] *Id.*, at 140-141.

[13] *Id.*, at 139-140.

[14] SCHULZ, *supra* note 6, at 147.

[15] *Id.*

latitude given to individual action and initiative.[16] The same observation holds true for the law of obligations, as well as the law of succession.[17] Testamentary disposition by individual will was the rule, and the statutory rules of succession were of minor importance. There was generous freedom of disposition accorded to the testator; it was only in 40 B.C. that the *lex Falcidia* secured to the heir 1/4 of the estate.[18]

However, two principles of Roman law operated to moderate the excessive individualism and rigidity of the law: *aequitas* and *humanitas*.

It was only later in the development of Roman law that the principle of *aequitas* evolved as a "practical concession as the directive principle of a progressive legal development which finds itself in opposition to the strict civil law".[19] It represented a departure from the austere, rigid and unyielding nature of Roman law.

Aside from *aequitas*, the Romans created the concept of *humanitas*, which contemplated not only moral and intellectual education, but also kindness, goodness, sympathy, and consideration for others. Under this concept evolved the other form of marriage, the free marriage, in which the wife was not subjected to the husband's *manus* . In a *manus* marriage, on the other hand, the wife was really under the power of the husband in the same way as a daughter. But under the influence of *humanitas*, the husband's *usucapio* was abolished, as this rule applied to chattels and not to human beings.[20] Thus, the sale of a wife was considered a delict, community of property between husband and wife was recognized, and the wife could then succeed to the estate of the husband.[21] *Humanitas* likewise softened the relationship between parent and child; under Christianity after Valentinian, the *paterfamilias* was deprived of his right to put his child to death.[22] But Justinian permitted the sale of children in case of poverty, in which case the child became a slave.[23]

If we trace the history of Roman law from the ancient Romans from 451 B.C. up to the Institutes of Justinian in 533 A.D., we find that it

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[16] *Id.*, at 153.
[17] *Id.*, at 155-156.
[18] *Id.*, at 156-157.
[19] BEROLZHEIMER, *supra* note 9, at 85.
[20] SCHULZ, *supra* note 6, at 192.
[21] *Id.*, at 195-196.
[22] *Id.*, at 198.
[23] *Id.*, at 200.

ended in almost the same way that it began: entwined and warped in religion and dogma. For example, we find that the *Corpus juris civilis*, which we know as the Code of Justinian, enacted orthodox Christianity into law, and proclaimed as law the basic tenets of the orthodox church.[24] Thus, after declaring the Trinity of God and ordering all Christians to submit to the religious leadership of the Roman Church, the Code embodies the doctrines of the church even in the area of social relations: the legalization of slavery and serfdom, the oppression and persecution of heretics and dissenters, the preservation of the distinction between classes, capital punishment for sexual irregularities like homosexuality, fornication, adultery, and rape, the prohibition against divorce, inheritance of property through the cognate line in descending order, inalienability of the property of the Church, attachment of freemen and serfs to the feudal estate, and imprisonment for debt.[25] The Code of Justinian, as Durant observes, "differs from earlier codes by its rigid orthodoxy, its deeper conservatism, and its vengeful severity."[26] Justinian, as Durant put it, could not escape his environment and his time, for in his ambition to unify everything, he codified the superstition and barbarity, as well as the justice and charity, of his age.[27]

II. Spanish precedents

A. Introduction

It was in the fifth century that the Visigoths over-ran Spain, and they ruled the country from 456 A.D. until the coming of the Moors. The Visigoth rulers later changed their faith and were converted to orthodox Christianity. The bishops and the priests became the chief power in the state. Thus, it was the clergy that promulgated a system of laws in Spain which was considered the most competent but the least tolerant of the barbarian codes.[28] While the code imposed the rules of evidence and established the principle of equality before the law, applying the law to Romans and Visigoths alike, it rejected freedom of worship for non-Christians, imposed Christianity on all inhabitants, and sanctioned persecution of Jews.[29] From this point, there was an

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[24] 4 DURANT, THE STORY OF CIVILIZATION 112 (1950).
[25] *Id.*, at 113.
[26] *Id.*, at 114.
[27] *Id.*
[28] *Id.*, at 95.
[29] *Id.*

attempt to apply universal Christian ethics to the practical problems of personal relations, society and government.

B. Gothic compilations

Two of the tribal customs brought by the Visigoths to Spain is the system of community property in marriage and of advancement to heirs, which are still features of our Civil Code. Compare this with the concept of self-acquired or individual property in Roman law, forms of which we still retain in our Code.

In early fifth century, the leader of the Goths, Alaric, invaded Italy and the heart of the Western empire, including Spain. This conquest led to the promulgation of the Code of Alaric in 506, which introduced the tribal customs of the barbarians to Roman law.[30] This opened the way in Spain for the introduction of Germanic custom law, so that when the first great code of Spain, *Fuero Juzgo*, was enacted, it contained three categories of law: Roman law, various German customs, and canons of ecclesiastical councils. A commentator considers this one of the most advanced codes of the time and so highly regarded that it was given precedence over later compilations. Our own civil law expert, Prof. Ruben Balane, in his "Spanish Antecedents of the Civil Code," enumerates the features of the *Fuero Juzgo*, as follows:

A. The law of persons and family:

(1) A major change reflecting the social forces at work towards unity was the provision allowing intermarriages between Goths and Hispano-Romans.

(2) Two kinds of persons are recognized - the natural or physical, and the juridical, following the Roman law maxim that not all human beings are persons (for slavery was recognized) and not all persons are human beings.

(3) For a natural person to be considered legally born, he must have lived for at least 10 days and been baptized.

(4) The age of majority was 15 years.

(5) The following were impediments to a valid marriage:

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[30] *Id.*, at 17.

(a) difference in status - *i.e.*, between a freeman and a slave;

(b) if the woman was older than the man;

(c) holy orders, from subdeacon up;

(d) relationship - to the seventh degree, computed in the same way we do today;

(e) prior existing marriage;

(f) crimes against chastity, specifically abduction and rape, the effect of which (and we would find this strange) was to make it legally impossible for the felon to marry the victim;

(g) the temporal impediment; *i.e.* one year following the dissolution of the woman's previous marriage.

(6) There was no minimum age requirement for marriage; anyone could marry who had reached the age of puberty.

(7) The prescribed ceremony for marriage is charmingly described by Sanchez Roman:

> . . . the bride wore a veil, symbol of her virginity. They were then blessed by the priest, and were united by the deacon with a white-and-red-cord, the cord symbolizing the matrimonial tie, and the color signifying purity and fecundity.

(8) The concept of conjugal property is clearly discernible in the *Fuero Juzgo*, which recognizes as common property of the spouses whatever is earned by the effort of both, dividing such property in proportion to the contribution of each one.

(9) *Patria potestas* was acquired solely by reason of marriage, the Roman concept of legitimation and adoption being unknown or unacceptable to the Goths. On the other hand, the extent of the *patria potestas* was not nearly as absolute or as fearsome as in Roman law, the *jus necis* being available only when either parent caught the daughter in the act of carnal indulgence (in *flagrante delicto).* The rights of infants, and even of the unborn, were scrupulously protected: infanticide and abortion were punished either

by death, or, more leniently, by the gouging out of one's eyes; the mother who procured an abortion was reduced to slavery.

(10) The mother exercised substitute parental authority in the event of the father's death but this was lost if she remarried.

(11) A kind of adventitious property (similar to our Article 321) is recognized.

B. The law of property:

(1) The modes of acquiring ownership were: a) occupation; b) accession; c) prescription; and d) succession. Occupation occurred by conquest, hunting and fishing. Accession, by building, planting, and sowing (the same as our accession industrial, except that accession in our law is not a mode of acquiring ownership). Prescription was either ordinary (for 30 years) or extraordinary (for 50), the first governing all cases save the division of lands between Goths and Romans and property of minors.

(2) Co-ownership was recognized and regulated.

(3) Servitudes were classified into personal and real, the latter referring to pasture lands.

C. The law of descent:

(1) Succession was either testamentary or intestate - the former occurred by virtue of an attested or a holographic will (an oral declaration of testamentary intention being allowed only in a very rare situation, which we need not advert to here). Only freemen could be witnesses (again except in one rare instance).

(2) The minimum age for making wills was 14, and 10 for those *in periculo mortis*.

(3) The reserved portion was large: 4/5 of the father's property and 3/4 of the mother's, with a portion allowed as *mejora*, and a preferential order of heirs.

(4) Disinheritance was limited to certain specific grounds.

(5) An order of intestate succession was established.

(6) In Book IV, Title I, law 6, we see the beginnings of the *reserva* which later developed into the *reserva troncal.*

D. The law of obligations and contracts:

(1) Contractual capacity was acquired at the age of 14, inconsistently with the provision making 15 the age of majority.

(2) Minority, insanity, slavery, and force or fear vitiated a contract.

(3) The following contracts were regulated: a) sale; b) lease; c) mutuum; d) commodatum; e) deposit; f) mortgage; and g) pledge[31]

In 711, the Moors invaded and occupied most of Spain, an occupation that lasted twice as long as the Spanish rule over the Philippines. This retarded the development of Spanish law, but it did not wipe out the gains in previous eras. This was because the conquered Spaniards were governed, in their internal affairs, by their own laws and by their own officials. Thus, the Visigothic-Roman law compilations continued to apply to the Spaniards. Various cities were given or assumed their own codes during the *Reconquista.* The *Fuero Juzgo* was given to the city of Cordova in 1241.[32] The situation in this period was that there were separate law codes for each state, and for each class in each state.

After the *Reconquista,* Fernando III began, and Alfonso X completed, a new system of Spanish law, which, because it was divided into seven parts, became known as *Siete Partidas.* This was a compilation of law and a treatise of jurisprudence, based on the law of the Spanish Visigoths but patterned after Justinian's *Institutes.* This code was advanced for that age; it was ignored for 70 years, but in 1338 it became the law of Castille, and by 1492, of all Spain.[33] At this time, Spain felt the need for a common law; the Visigothic concept of law designed only to keep the peace would not do; it needed a code to preserve the social status quo.

This was because Spain had been stimulated by its victory over the Moors, although it could not deny the partial absorption of modern

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[31] Balane, *The Spanish Antecedents of the Philippine Civil Code,* 54 Phil. L.J. 11-14 (1979).

[32] 4 DURANT, *supra* note 24, at 299.

[33] *Id.,* at 699.

culture into Spanish civilization. There was growth of industry and wealth, evolution of manners and tastes, and intellectual ferment with the establishment of universities.[34] Spain also led the medieval world in developing free cities and representative institutions. The *Siete Partidas* served the function of developing a common law for all of the principal cities of Spain. The first *Partida* refers to natural law, usages and customs, and to the Catholic Church and religious laws. The second *Partida* is mainly administrative law, including the rights of the Crown, the reciprocal duties of the King and the people, military captives, and public education. The third *Partida* deals with court organization and procedure, and also with land ownership, possession, and servitudes. The fourth *Partida* deals with family matters and personal relations arising under feudalism. The fifth *Partida*, which is the most important, deals with obligations and contracts, including bailments, mortgages and pledges; concepts copied literally from Roman law. The sixth *Partida* deals with succession, intestacy, heirship, and guardianship. The seventh *Partida* is the penal code.[35]

Prof. Balane lists down the prominent civil law features of the third, fourth, fifth, and sixth *Partidas* as follows:

A. General provisions:

1) The principle of territoriality is preserved - all juridical acts done within the realm, whether by natives or by foreigners, are to be governed by the law of the land.

2) Ignorance of the law is admitted as an excuse for peasants, soldiers, and women.

B. The law of persons and family:

1) The minimum age for marriage is that of puberty.

2) Legitimation occurs in three ways: a) subsequent marriage, b) the will of the king, or c) the performance of some service to the king.

3) Adoption - called *porfijamiento* - is completely Roman in derivation, as to kind, as to requisites, and as to effects.

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[34] *Id.*

[35] Introduction, CIVIL CODE OF MEXICO.

4) The mother is given no share in the *patria potestas*; rather (as in the Roman law) it is granted to the ascendant of the highest degree.

C. *The law of property:*

1) Ownership is acquired by occupation, accession, prescription, tradition, and hereditary succession.

2) The Roman law rules on possession and servitudes - classified into real and personal - are reproduced.

D. *The law of descent:*

1) Many features of the Roman law of succession are borrowed, like the necessity of instituting an heir and the legal impossibility of dying partly testate and partly intestate.

2) Capacity to inherit from ascendants is denied sacrilegious, adulterous, and incestuous children - all of whom are designated *fornecinos*.

3) The legitimary system undergoes drastic changes: from the 4/5 of the *Fuero Juzgo*, the legitimes of descendants were reduced to either 1/2 or 1/3, depending on the number of children.

4) Mejoras are not provided for.

5) On the other hand, legitimes are granted to ascendants.

6) Substitutions are classified into: *vulgar, pupilar, ejemplar,* and *fideicomisaria.*

7) Representation is made to operate *ad infinitum* in the direct descending line, and to the second degree in the collateral.

8) Succession in the collateral line is allowed to the 4th degree; in default of relatives within these degrees, the surviving spouse; and in his or her default, the King.

E. The law of obligations and contracts:

1) In its effort to borrow from the Roman law, the *Partidas* changed the already simplified law on contract, which had generally required only consent; the new Code emphasized form once more, a change which Sanchez Roman characterizes as "completely arbitrary, gross, materialistic, formalistic, artificial, capricious, which subordinates the spiritual element to the observances of puerile rubrics . . ."

2) Contracts are either real or consensual - among the former are: mutuum, commodatum, deposit, and pledge; and among the latter: sale. lease, partnership, and agency.[36]

C. Philosophy of Law (Medieval Period)

To understand the philosophy of medieval law during the early period (up to 800 A.D.), we have to understand the communal nature of medieval society. The community was rigidly organized in a close hierarchy, with medieval society divided into various classes and orders. There were three basic orders divided according to function - the religious, the military, and the workers. Hierarchy implied inequality; in fact, medieval scholars thought that hierarchy and inequality on earth were ordained by heaven for it reflected the angelic hierarchy up above.

The hierarchical system revolved around the relationship between lord and vassal. This was a pattern of trust and responsibility between the lord and his vassals, a pattern that permeated the whole of society. Thus, society was composed of families whose members served their respective functions for the master. The ties that brought them together were personal and emotional bonds of friendship and intimacy, covered by a web of mutual rights and obligations. Vassalage was not a legalistic concept that would approximate a social compact; it was more of an emotional bond between lord and servant.

So even if the religious and moral doctrines which produced a profound change in the concept of law and of state preached clarity, equality and brotherhood of men, these did nothing to change the established social order, for those were directed towards life hereafter and not to the here and now. In fact, the fathers of the Church

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[36] Balane, *supra* note 31, at 25-26.

considered slavery a propitious occasion for the slaves to practice patience and obedience toward their masters, and for the masters to practice kindness toward their slaves.[37] The philosophy of law during this period, according to Berolzheimer, was a philosophy of compromise.

But the rise of Christianity did have an effect on the philosophy of law during this period. First, it drew the law closer to theology in the sense that since a personal God governs the world, law is therefore founded on the will and wisdom of God. Second, there arose a legal relationship between church and state; with the church asserting itself above the state.[38]

These views are presented very clearly in the works of St. Augustine, *De Civitate Dei*. While he extols the church as the communion of the faithful in God, who constitute a divine city, he looks down on the state as the kingdom of the impious - a necessary evil that is needed only to maintain peace and order among men, and which will wither away upon the reestablishment of the kingdom of God. St. Augustine's contribution was the concept of "pax" as a regulating principle, which is not peace, but that which brings peace -- the blissful, sacred order which is harmony among rational beings.[39]

D. Philosophy of Law (Late Medieval Period)

The late medieval period had a slight shift in philosophical thought with the partial return of classic philosophy in scholasticism. Thus, Aristotle was resurrected in a different light: his teachings were studied from the prism of religious dogma. The result is a philosophy that developed religious dogmas with a rational analysis within the framework of the Catholic faith.

The legal philosophy of the Middle Ages culminated in the *Summa Theologiae* of St. Thomas Aquinas. Here he distinguished three orders of laws: *lex aeterna*, or divine reason, which governs the world; *lex naturalis*, or natural law, which men know through reason; and *lex humana*, or positive law, which is man-made application of the natural law to particular situations.

Just as the ancient Romans used the *bonus paterfamilias* as the norm of their system, St. Thomas Aquinas used the average nature of

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[37] DEL VECCHIO, PHILOSOPHY OF LAW 46 (1953).

[38] *Id.*, at 47.

[39] BEROLZHEIMER, *supra* note 9, at 96.

man as the limitation of legal restraint. He thus established a penal principle, and determined its application.[40] The Aquinian definition of "justice" is borrowed from Roman law, which is either *justitia generalis*, comprising all earthly virtues, or *justitia particularis*, likewise divided into *justitia commutativa* or the obligation of restitution to prevent unjust enrichment, or *justitia distributiva* or distributive justice, which is the application of the proceeds of justice in geometrical proportions.[41] The theory of punishment is also discussed in the *Summa*, and usury is denounced.

The priests who revived Roman private law in Italy and carried it to Spain, France and Germany saw in it a kind of law of nature, and were in favor of its practical application.[42]

It was in Spain where the influence of the scholastic philosophy continued long after the medieval period. In fact, among the countries of Western Europe, Spain was one of the few which was uninfluenced by the Renaissance, as the term is understood to mean a general detachment from the religious dogmatism of the Middle Ages. Spain's version of the Renaissance, in fact, was a renaissance of scholasticism.[43] Thus, its legal philosophers, like Francisco de Victoria and Dominico de Soto, who were both Dominicans, elaborated on the Thomistic doctrines, especially on natural law. Others were Jesuits, like Luis de Molina, Juan de Logo, Juan Mariana, and Francisco Suarez, who elaborated and developed the principles of scholasticism. It was only in the 19th century that Spain felt the influence of the various currents of thought in other European countries, but the scholastic, or neo-scholastic tradition, always remained dominant.[44]

It was thus inevitable that the revision of the laws in Spain at the time (14th century) reflected the strong influence of medieval philosophy. In the field of contracts, for example, the *Ordenamiento de Alcala* emphasized the spiritual aspect of contracts, that is, the concurrence of wills, practically ignoring the element of form stressed in the *Partidas*. The concept of *lesion* in sales was introduced, which was defined as inadequacy amounting to more than one-half the price. The taking of interest was also prohibited.[45]

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[40] *Id.*, at 99.
[41] *Id.*, at 100.
[42] SCHULZ, *supra* note 6, at 37.
[43] DEL VECCHIO, *supra* note 37, at 215.
[44] *Id.*, at 215-216.
[45] Balane, *supra* note 31, at 28.

In 1502, the Spanish Cortes promulgated the *Leyes de Toro,* consisting of 83 laws, to supplement existing laws. The salient civil law features of this law are:

A. The law of persons and family:

(1) Juridical capacity is possessed by the *naturalmente nacido* with the following requisites: a) the child must be born alive; b) it must survive at least 24 hours; and c) it must be baptized. If any of these requisites was absent, the child was not *naturalmente nacido* but *abortivo.*

(2) Marriage was recognized as a cause of emancipation from parental authority, and the usufruct of any adventitious property passed to the child from the time of marriage.

(3) An interesting feature of this legislation was the so-called *ley de osculo* - if the marriage did not materialize, the woman had the right to retain one-half of whatever the man had given her, if he had already kissed her.

(4) The wife could not renounce inheritance without the husband's consent.

(5) The wife could neither contract nor go to court without the husband's consent.

(6) The conjugal regime was more minutely regulated, various provisions being devoted thereto.

(7) Natural children were defined as those born of parents who, at the time of the child's conception or birth, could have married lawfully and without dispensation.

B. The law of property:

A provision governs interruption of prescriptive periods.

C. The law of descent:

(1) Persons subject to the penalty of death were, unlike the rule in the Partidas, allowed to make wills.

(2) The minimum age for will-making was fixed at 14 for males and 12 for females.

(3) Legitimate ascendants were made compulsory heirs in default of children or descendants; as heirs, these ascendants excluded collateral relatives of the decedent.

(4) In default of descendants and ascendants, brothers and sisters inherited by intestacy; and in the representation of predeceased brothers or sisters, nephews and nieces inherited per stirpes, not per capita.

(5) All kinds of illegitimate children were excluded by legitimate descendants from the succession of the mother, but in the absence of legitimate descendants, these illegitimates - whether natural or spurious - succeeded to the mother's estate to the exclusion of legitimate ascendants; on the other hand, the father and the mother could each give illegitimate children of all kinds legacies for support not exceeding one-fifth of their respective estates, but a man without legitimate children could give a natural child any amount he wished.

(6) *Mejoras* could be given either by will or by contract. In addition to this, several other rules governing mejoras were laid down.

(7) Mayorazgos - already an established practice throughout the land but theretofore unregulated in the Codes - were there regulated.

D. The law of obligations and contracts:

Donations of the universality of the donor's patrimony were prohibited, even if only present property was included therein. [46]

Later, in 1567, a compilation of all laws published since the *Fuero Real* and the *Partidas* was published by order of Philip II under the name of *Nueva Recopilacion*. In 1805, another compilation entitled *Novisima Recopilacion* was published, which was also a supplementary code which failed to abrogate earlier laws.

In 1799, Napoleon Bonaparte came to power in France, and promulgated the Code Napoleon in 1805. The Civil Code became the model in a number of European countries, including Spain. In 1899, the

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[46] *Id.*, at 31-33.

Civil Code of Spain was promulgated, consisting of four books like our Civil Code: Book I is Persons; Book II is Property, Ownership, and its Modifications; Book III is Different Modes of Acquiring Ownership; and Book IV is Obligations and Contracts. In the same year, the Civil Code was extended to the Philippines by royal decree.[47]

III. Philosophy of Innovations in the Present Civil Code

Cast in the mold of the Code Napoleon, 53% of our present Civil Code provisions were textually lifted from the Spanish Civil Code of 1889, the philosophical elements and antecedents of which had been discussed above. The main philosophical strand of our civil law is the Romano-Germanic element, to which were added the concepts and principles of equity in England and of torts in America.

But even the innovations of the Code Commission reflect the strains of the *jus civile* and of the scholastic philosophy. Like the *Corpus juris civilis*, our Civil Code enacted the morals of the Catholic religion into law, and perpetuated the institutions of Catholicism. Thus, the over-riding philosophy of our Code is that of natural law.

The framers of our Code looked at law as a collection of rules derived into a system, and classified it according to subject matter so as to be easily remembered and readily applied. This can be seen from the Report of the Code Commission, explaining the rationale for new provisions on morality, which declared for natural law:

> ... in the last analysis, every good law draws its breath of life from morals, from those principles which are written with words of fire in the conscience of man. If this premise is admitted, then the proposed rule is a prudent earnest of justice in the face of the impossibility of enumerating, one by one, all the wrongs which cause damage. When it is reflected that while codes of law and statutes have changed from age to age, the conscience of man has remained fixed to its ancient moorings, one cannot but feel that it is safe and salutary to transmute, as far as may be, moral norms into legal rules, thus imparting to every legal system that enduring quality which ought to be one of its superlative attributes.[48]

This is a restatement of the *Aquinian* concept of natural law, from which men derive the knowledge of good and evil. This natural law is the participation of mankind in *lex eterna* derived from the divine reason, and much higher than positive law. Positive law,

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[47] RIVERA, THE FATHER OF THE FIRST BROWN RACE CIVIL CODE 6-7 (1978).

[48] REPORT OF THE CODE COMMISSION 40.

according to St. Thomas, must follow the dictates of natural law; it should be founded upon justice, should be in harmony with morality; concordant with the natural order; adapted to what is feasible; and considerate of local customs and traditions.[49]

This explains the moral orientation of our Civil Code, illustrated by Art. 21 on violation of morals, Art. 22 on unjust enrichment, Arts. 1423, 1424, 1428, and 1429 on natural obligations. Our articles on natural obligations remind us of the jurists of the 17th and 18th centuries who made no distinction between natural and civil obligations, since according to them, all natural obligations must be also legal for the very reason that they are natural. On the other hand, Art. 19 on right conduct, *i.e.*, every person must, in the exercise of his rights and in the performance of his duties, give everyone his due, and observe honesty and good faith, is a reflection of one of the moral precepts of the Institutes of Justinian: "The precepts of the law are: To live honestly, to hurt no one, to give everyone his due." These are our legal rules that embody eternal truths.

The philosophy of individualism that characterizes the innovations in our Civil Code is not that of the old Roman law; it is the individualism of American common law, from which some of the new provisions were borrowed. These are the provisions on (1) independent civil actions, similar to the American law on torts, and (2) actions for damages for violation of the rights enumerated in the Bill of Rights, or for violation of privacy. Thus, we have Art. 32 on damages for violation of constitutional rights, Art. 33 on damages arising from defamation, fraud, and physical injuries, Art. 26 for violation of privacy, Art. 29 on civil actions independent of criminal actions, Art. 27 on refusal to perform official duty, and Art. 35 on refusal or failure to institute criminal proceedings. Explaining the philosophy behind these innovations, the then Chairman of the Code Commission, Dean Jorge Bocobo, underscored the need for individualism in the Filipino character:

> The thought of the Code Commission is that democracy draws its breath of life from the spirit of rugged individualism, and should not derive its effectiveness from the action of public officials. The philosophy of the Anglo-American torts is that private wrongs should be redressed in a private civil action. When this principle shall have seeped into the general consciousness of our people, there will arise and develop a spirit of individual independence on which, when all is said and done, popular government rests.[50]

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[49] BEROLZHEIMER, *supra* note 9, at 98-99.

[50] Bocobo, in RIVERA, *supra* note 47, at 191.

Even the new Family Code in some parts is a throwback to the Middle Ages. It adopted the medieval attitude on marriage as a contract between families, instead of one between individuals. Thus, under the Family Code, parental consent is required for couples between the ages of 18 and below 21, and parental advice for those who are between 21 and 25. The new Code likewise requires, as a prerequisite for the issuance of a marriage license, a certificate from a priest, minister, or an accredited marriage counsellor that a party who is at least 18 but below 25 has undergone marriage counselling. These provisions are reminiscent of the Christian theory of marriage under Justinian in the 6th century which required a formal negotiated property settlement between the two families as the minimum requisite for marriage. Marriage was considered a family affair, and it still is.

The role of individual consent in marriage is still virtually subordinated to social values. While the Family Code now defines marriage as a "special contract", it retains the provision of the Civil Code that it is "an inviolable social institution whose nature, consequences, and incidents are governed by law and not subject to stipulation". Again, this is a vestige of the medieval outlook on marriage, which was primarily to assure the wealth and continuity of families. It was a matter of concern for the whole community and the families involved, hence the Church later prohibited divorce. In the medieval period, marriage was looked upon, not as the fruit of love and courtship between two individuals, but as a strategy for a family to obtain military, financial or property alliance with another family. Thus, the prospective wife's family would bargain for fealty and financial support from the husband's family in exchange for higher social standing offered by the socially superior daughter. It was in this sense that marriage was anti-individualistic in philosophy, and it became a social institution at the level of the extended family system and the feudal bond. Negotiations for marriage were conducted not only among the family generally but also with the family's lords, retainers, and counselors.[51] Our Civil Code provision that the wife shall manage the household is actually a vestige of the medieval custom making the wife or lady of the manor in charge of all feminine matters in the household.[52]

The participation of priests in our marriage rituals dates back to the eleventh century, when the Gregorian Reformists realized that

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[51] Schroeder, *Feminism Historicized*, 75 IOWA L. REV. 1135 (1990), at 1171-1172.

[52] *Id.*, at 1172.

clerical supervision of marriage was an opportunity for the Church to increase its power over the feudal lords. After this, the Church gained exclusive jurisdiction over all issues pertaining to marriage and divorce. By the end of the 12th century, the Church developed a comprehensive canon law of marriage, which became our secular theory of marriage as well.[53] One of the provisions of canon law, on annulment of marriage based on psychological incapacity of one of the parties, became Art. 36 of our Family Code. The requirements for validity of marriage are imported from Spain which, in turn, copied these from canon law. Prohibition of absolute divorce is dictated by Church edicts, not to mention the invalidity of agreements for personal separation of husband and wife, or for dissolution of the conjugal partnership of gains or absolute community of property, or for annulment of marriage. Fortunately, in other areas like marital relations, emancipation of married women, and property relations between husband and wife, the Family Code made some advances over the present Civil Code.

In property law and succession, the present Code is cast in economic individualism. The sovereignty of the property owner and the property rights of the family are still the basic tenets of our law on property. Succession is centered on conservation of property in the family, and the share of the forced heirs have been amply protected by the Code. Indeed, the provisions of the present Code on property ownership go against the grain of the stewardship of property principle in the Constitution. It hardly mentions the social functions of property, except for provisions on easements and servitudes. Its provisions on ownership all point to possessive individualism. The rights to possess, use, manage, and receive income; the powers to transfer, convey, exclude, and waive; the privilege to consume, alienate, or destroy; and the liability for execution of a court judgment - these are all the traditional incidents of property ownership protected and preserved by the present Code. All of these are founded on natural law theories derived from the old Roman law and handed down to us by the scholastics.

The transferability of property and property rights is also well-recognized in the Civil Code. Gratuitous transfers through gifts, bequests, and succession, as well as transfers for value are protected for the owner and his family. The power of bequest has been limited by the Code in favor of consolidation of property in the family, while intestate succession achieves the same purpose. The principles of transfers for value have been imported from American law, but the principles hew to the basic philosophy of absolute liberty of the contracting parties, and their corresponding responsibility in case of breach of contract.

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[53] *Id.*, at 1173.

The Civil Code provisions on contracts and obligations are also grounded on the natural law philosophy. According to Dean Pound, "the idea of deduction from the nature of man as a moral creature and of legal rules and legal institutions was put to work upon existing materials and the result was a reciprocal influence of the conception of enforcing promises as such because morally binding".[54] It was only later in the 19th century, with the creation of more wealth and property, that man became more interested in freedom to contract than about enforcement of promises. " The important institution was a right of free exchange and free contract, deduced from the law of equal freedom as a sort of freedom of economic motion and locomotion," continues Pound, so that jurists "saw freedom as a civil or political idea realizing itself in a progress from status to contract in which men's duties and liabilities came more and more to flow from willed action instead of from the accident of social position recognized by law".[55] It was at this point that the drafters of our Civil Code borrowed from the Spanish Civil Code of 1889 the Roman and the scholastic philosophy of the law of contracts, bonded it with Anglo-American elements of individualism, and produced a hybrid which is recognizable in natural law.

Our Romanized will theory of contract gave birth to our theory of obligations. It is based on the premise that agreements legally formed take the place of the law, and, according to Planiol, the obligatory force of a contract rested on "a moral idea, the respect for the given word, and economic interest, the necessity of credit." While equity principles have crept into our law on obligations and contracts, its basic core still harks back to the metaphysical theory of the 19th century that individual will is the high point in the philosophy of law.

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[54] POUND, *supra* note 2, at 143.

[55] *Id.*, at 149-150.