REACTION TO JUSTICE VITUG'S PROFESSORIAL CHAIR LECTURE, "COPING WITH THE CHANGING LANDSCAPE IN CIVIL LAW"*

ESSAY

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Justice Vitug has outlined the most telling changes on the 1950 Civil Code: marriage, relations between spouses, adoption, and family relations. He correctly attributes such changes to the application of equity, not to mention the scientific and technological advances we have made since 1950. Incidentally, it seems that our application of the principles of equity is somewhat different from that of Roman law, which is the basis of our civilian system. In our jurisdiction, the orthodox rule is that equity is not applicable where there is a statute in point. In ancient Rome, the principles of equity were used to moderate the strict application of law in order to render justice on a case-to-case basis.

From another perspective, we can view the increasing application of equitable principles in our civil law jurisdiction as an index of the increasing stranglehold of the common law over our civilian system. This, of course, can be traced back to our colonial history when American judges were imported into the Philippines to man our trial courts, not to mention our Supreme Court. Dean Roscoe Pound has observed that "whenever the administration of justice is mediately or immediately placed in the hands of common law judges, their habit of applying to the cause in the hand the judicial experience of the past rather than attempting to fit the cause into its exact logical pigeonhole in an abstract system gradually undermines the competing body of law and makes for a slow but persistent invasion of the common law."[1] After the departure of the American judges, however, political, social, and economic developments have eroded the absolutistic concepts in our Civil Code, especially from the period 1950 to the present. Time, indeed, has upset many of our fundamental beliefs

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[1] POUND, THE SPIRIT OF THE COMMON LAW 3 (1921).

encrusted in the Civil Code, and the Code's rigidity paves the way to its further erosion. In short, the Code has not kept up with a number of socio-economic developments in a Third World country like ours. In fact, it has not kept up with our Constitutions, notwithstanding that we have had two constitutional revisions between 1950 to 1987. This, of course, is no surprise, for while the Civil Code is supposed to embody absolute and universal truths, the Constitution enshrines our values and aspirations as a nation. This accounts for the durability of our civilian system. Law must be stable, yet it cannot stand still, Justice Cardozo tells us. The same advice applies as well even to the Civil Code, otherwise, it will find itself invaded by common law principles through judicial legislation. In some areas of the law, the Code of 1950 may need some amendments.

Let me cite a few examples.

First, we have the concept of "ownership" of property in our Civil Code, which gives the owner of a thing the right of enjoyment, the right to use, the right to dispose, the right to exclude third persons, and the right of receiving from the thing what it produces. This absolute concept of ownership has been modified somewhat in our Constitution insofar as land is concerned. It also deviates from the native Filipinos' concept of ownership of land. Our indigenes' notion of land ownership is communitarian rather than individualistic. Like the Spanish colonizers, our forefathers also drew a distinction between possession and ownership of land, but that of our forebears was physical rather than legal distinction: possession is based on use, while ownership is common, and not individual. Once a family fails to cultivate a parcel of land allotted to it by the datu, it reverts to the commons and it may be assigned to another family for cultivation. In short, as Justice Marvic Leonen pointed out in his Metrobank lecture in 2009, the indigenous people considered themselves only as "secondary owners," or stewards of the land, which was primarily owned by spirits guarding the land. This concept of land ownership has found its way into the 1987 Constitution, which provides that "the Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain,"[2] and it recognizes that "the use of property bears a social function, and all economic agents shall contribute to the common good."[3] In art. XIII, sec. 6, the Constitution mandates that "the State shall apply the principles of agrarian reform or *stewardship*, whenever applicable and in accordance with law, in the disposition of natural resources."[4]

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[2] CONST. art. XII, §5.

[3] CONST. art. XII, §6.

[4] *Id.* (Emphasis supplied.)

The Civil Code has not moved towards this direction. Our absolute concept of land rights had, in the past, proved to be obstacles in the implementation of an effective agrarian and urban land reform program, and in the recognition of ancestral lands, leading, in turn to agrarian unrest in the past, and to Muslim insurgency and Communist rebellion at the present.

Second, the concept of property in our Civil Code has not moved from the concept of a definite object with a definite content. For instance, the list of immovable property under art. 415 begins with "[l]ands, buildings, roads, and constructions of all kinds adhered to the soil." On the other hand, Philippine constitutional law has come to recognize that "property" is a bundle, or even a basket, of rights, so as to emphasize its social function, reveal its economic nature, and lay down parameters of land ownership. Thus, under our Civil Code, while the right to use, to improve, to dispose, and to the fruits may be exercised by the owner, the air rights and the subsurface rights belong to the State, by virtue of article XII, sec. 2 of the Constitution which provides that "all lands of the public domain, waters, minerals, coal, petroleum, and all other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State." And where private property is devoted to meet a public need, as in the case of public utilities and common carriers, the State steps in to regulate the use and operation of such property.

Third, as pointed out by our distinguished lecturer, the Family Code's concept of marriage as a contract between a man and a woman, aside from being obsolete, violates the equal protection clause of the Constitution. As pointed out in American jurisprudence, such provision of our Code is nothing short of invidious discrimination against homosexuals, lesbians, bisexuals and transsexuals. This should hold true, with more reason, in Philippine jurisprudence, which has come to recognize what former Chief Justice Renato Puno calls the "Expanded Equal Protection clause," which strikes down not only unreasonable and arbitrary classification in legislation and rule-making, but also, and more importantly, rank discrimination against marginalized and underprivileged groups. As pointed out in the *Ang Ladlad* decision of the high tribunal, "there are people whose preferences and orientation do not fit neatly into the commonly recognized parameters of social convention and that, at least for them, life is indeed an ordeal."[5] As LGBTs are obviously a powerless and discriminated class, they are entitled to equal protection of the law under the Constitution. Under the reasoning of the Court in the case of *Central Bank*

[5] Ang Ladlad LGBT Party v. Commission on Elections, G.R. No. 190582, 618 SCRA 32, Apr. 8, 2010.

Employees' Association v. Bangko Sentral ng Pilipinas,[6] where the law has an impact on a *distinct class* of persons and that their progressive effect is that a segment of that class is treated differently from the rest, such segment discriminated against is entitled to the equal protection of the law. Thus, to bar the lesbians, gays, bisexuals and transsexuals from exercising their civil rights, especially the right to marry, would violate the guarantee of equal protection. Furthermore, the Family Code's denial of the right to marry to same-sex couples would also intrude into the privacy of the individual. Our Supreme Court has recognized that the right to privacy is a fundamental right under our Constitution.[7] If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person.[8] In this sense, we can say that the Civil Code's provisions on marriage was more progressive than that of the Family Code, for the former had no express provisions specifying that the parties to a marriage contract should be male and female.

Fourth, our Civil Code has repealed the earlier provisions on divorce which we used to have during the Commonwealth under Act No. 2710. Historically, custom law allowed divorce. Presently, Islamic law allows divorce for our Muslim brothers. In 2011, the tiny nation of Malta passed its divorce law, leaving the Philippines as the only country in the world, out of 195 countries, which does not allow divorce. Even strongly Catholic countries, like Chile, Ireland, and Italy allow divorce. It is submitted that the lack of a clear divorce law violates the right of association and the freedom to contract guaranteed by the Constitution, not to mention the right to privacy. The freedom to associate likewise involves the freedom to dissociate, as our Supreme Court has held.[9] Now, as a result of the repeal of our divorce law, battered women abused by their husbands can only have recourse to the provisions of Art. 36 of the Civil Code, where it must be shown that either or both parties are psychologically incapacitated. It is very difficult to obtain court decisions nullifying marriages because engagement of psychologists to testify on psychological incapacity is costly, and engagement of good lawyers even costlier. It is submitted that the common justification against divorce, "what God has put together, let no man put asunder", is not an appropriate analogy to the marriage contract, for there are marriages which were not made in heaven. Perhaps we should consider adoption of the provisions of the Muslim Code of Personal and Family Law, P.D. 1083, so that the Christians among us will not complain that a

[6] G.R. No. 148208, 466 SCRA 299, Dec. 15, 2004.

[7] Ople v. Torres, G.R. 127685, 239 SCRA 143, July 23, 1998.

[8] Eisenstadt v. Baird, 405 U.S. 589 (1972).

[9] Victoriano v. Elizalde Rope Workers' Union, G.R. No. 25246, 59 SCRA 54, Sept. 12, 1974.

religious test has been required for the exercise of civil and political rights, and that they have become the object of discrimination.

Ultimately, time and tide of events will overtake our Civil Code. It will then have to disengage itself from its individualistic moorings and heed the Constitution's mandate "to reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good."[10]

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[10] CONST. art. XII, §1.