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What Are "Los Principios Generales del Derecho" in Article Six of the Spanish Civil Code.

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INTRODUCTION

"Law must be stable and yet it cannot stand still."—*Dean Pound.*

1. *The Problem.*—The law (ley) being the work of a man or group of men of an epoch is necessarily deficient and unable to provide rules and formulas to apply to all conceivable cases and to govern for all time. Life, too rich and everchanging, refuses to be shackled to a Procrustean bed. Law is the laggard behind custom and the latter forms and manifests itself very slowly. Thus it happens that notwithstanding the plenitude of statutes, the thousands of code sections, the current of life produces day by day cases, real "lacunae" in the law which do not permit direct and unquestionable application of statutory provisions. Our civil code being the work of men none the less suffers from this common defect inherent in works not divine. Obviously, however, the judge can not refuse to decide for it would lead to that bellum omnium contra omnes, so destructive to the existence of society. Hence the Spanish legislators, in common with modern codes rendered the obligation to decide mandatory, and punished with suspension the judge who refuses to render a decision upon the pretext of the silence, obscurity or insufficiency of the law.[1] There being the necessity and obligation of rendering judgments even in the "unprovided cases" how shall the judge proceed? The legislator in art. 6, par. 2, Civil Code, answers: "Where there is no statute exactly applicable to the point in controversy, the custom of the place shall be applied, and, in the absence thereof the general principles of law (derecho).

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[1] Art. 6, par. 1, Civ. C.; Art. 353 Penal Code. The necessity of a decision is such that even the Civil Code of Ecuador (art. 19) which authorizes the Supreme Court to address the legislature in case of silence or obscurity in the law, provides that it should be "sin perjuicio de juzgar."

This legislative solution of how to fill the "gaps in the law" is but part of the larger problem with which it is inextricably connected of how the law may at the same time be administered and made to grow and adapt itself to the realities of life. The problem dates from antiquity. It has existed since we outgrew the primitive modes of obtaining redress by reprissals, private wars, and blood feuds until this day when the doctrine of the supremacy of the law is thoroughly established. To trace its history in detail would take us too far. Suffice it to say that the discussion oscillates between the following two topics: First, the possibility that the judge would act arbitrarily. It was felt necessary that there should be laws to regulate or restrain the exercise of his power to give the people that sense of security in the enjoyment of their rights necessary for stability in the social order. Second, the need of change in the law in order to make it reflect life. Dean Pound truly stated the problem when he paradoxically declared: "Laws must be stable and yet it cannot stand still." [2]

2. *Scope of this Work.*—Having thus stated the larger problems of the law that its relation to the subject of this thesis may be seen it is clear that its discussion involving legal history, philosophy, theory of the sources of the law, and legal method would be far beyond the limits of this work, which merely seeks to inquire what are and how we may use the "principios generales del derecho" prescribed by the legislator to fill up the "lacunae" in the law. Incidentally we shall touch upon the applicability of common law doctrines in the Philippine Islands.

3. *Method of Inquiry.*—We deem it convenient to divide the subject as follows: (1) Doctrinal Solutions of the Different Schools. (2) Legislative Solutions. (3) Los principios generales del derecho according to the Spanish and Philippine authorities. (4) Critical Considerations. (5) Applicability of common law principles. At the end we shall make a resume of the conclusions reached.

DOCTRINAL SOLUTIONS OF THE DIFFERENT SCHOOLS

"Everyone, it is true, may frame an hypothesis as he pleases, but yet it ought to be practicable."—*Aristotle.*

1. *The Natural School.*

(a) *Concept of Law.*—This scope of our inquiry does not permit a detailed exposition of the tenets of all the different

[2] Pound, "Interpretation of Legal History." Cambridge, 1923, p. 1.

schools of legal thought. We shall therefore content ourselves with the doctrinal solutions pertinent to our case pointing out their main characteristics and defects.

We shall begin with the doctrines of the Natural School which predominated in the eighteenth century. The doctrine of Natural Law had been appealed to for centuries by theologians, jurists and philosophers. Aristotle distinguished an immutable perfect law, the product of reason, common to all men and a positive law, which is imperfect. In the Middle Ages Saint Thomas Aquinas opposed a Natural law derived from Divine law and manifested to men by reason, to a positive law which is not dictated by Nature, but which is unjust if contrary to it. But it remained for Grotius in his great work De Jure Belli ac Pacis published in 1625 to state the doctrine in its modern form. He divorced law from religion and sought its basis in the nature of men, characterized according to him by the desire to live in society. (socialis natura, appetitus socialis).[1] Briefly, the writer of this school sought to find absolute justice in the "nature of men which education and custom had corrupted but had not destroyed; and as no experience could give them knowledge of its essential elements, they pretended to do without it, seeking the adequate instrument for its understanding in Reason. And by Reason they attempted to substitute the imperfect arbitrary order of History (in law, the positive law) for a perfect order, of eternal and universal value (in law, Natural law) which in the speculative order, Reason became the fountain of all knowledge, and in the juridical order, the source of all law." [2]

(b) *Legal Method.*—As Reason was its juristic God, so Logic was its handmaid. A body of fixed and immutable principles was to be discovered from which a complete system perfect in every detail might be deduced by purely logical operations. The characteristics of its juridical thinking were succintly stated by Bassi and Tabanera as follows: "(1) All law (derecho) is contained in the statue. (2) The basis of interpretation is the will of the legislator. (3) The silence of the law is to be filled by the law itself; 'the texts before all' (Demolumbe)." [3]

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[1] De Buen Lozano, Las Normas Juridicas y la Función Judicial (1917), p. 9.

[2] De Buen Lozano, op. cit., p. 9-10.

[3] A. E. Bassi and R. C. Tabanera: Synopsis del Derecho Civil, Vol. 1, p. 33.

(c) *Criticism.*—We shall dwell more on this point in the succeeding pages.[4] De Diego diagnosed its malady thus: "The disease then suffered by jurisprudence was its lack of historical sense, of criticism of the sources, of observation, of reality, and from there came the reform thru History." [5]

2. *The Historical School.*

(a) *Conception of Law.*—This school was founded by Fiedrich Carl Von Savigny. He conceived of law (Derecho) as the spontaneous product of the spirit of the people (Volksgeist) as religion and language. Law is born in the womb of society first in the form of custom, which continually and organically develops and as juridical relations become more complicated, it manifests itself in other forms: the statute and the science of law.[6]

(b) *Legal Method.*—Savigny's famous theory of interpretation consists of four elements: the literal or grammatical, the logical, the historical and the systematic. The literal gives us the meaning of the language of the laws, the logical the relation which exists between the different clauses of the law, the historical the circumstances which preceded its formation, and the systematic the comprehension of the bonds which unite the institutions and the rules of law.[7]

(c) *The Natural and the Historical School Compared.*—The jurists of both schools agreed "that law was found, not made, differing only with respect to what it was that was found." "The philosophical jurist thought that a principle of justice and right was found and expressed in a rule. The historical jurist conceived that a principle of human action or of social action was found by human experience and was gradually developed into a rule. Hence the historical school denied that law was a product of conscious or determinate human will. They doubted the efficacy of legislation in that it is sought to achieve the impossible and to make what cannot be made." [8]

(d) *Criticism.*—We have reserved until this point an extended criticism of the methods of the preceding schools. The cardinal defect of both is their adherence to supposed unchange-

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[4] Pages 4-5, infra.

[5] Clemente de Diego—"Derecho Civil Español, Comun y Floral" (1927) vol. 1, p. 207.

[6] De Buen Lozano, op. cit., p. 16-23.

[7] Valverde—Tratado de Derecho Civil Español, (1925) vol. 1, p. 94.

[8] Pound—"The Spirit of the Common Law" (1921) p. 155.

able standards which condemned the law to part company with reality.[9] Their legal method is that of the "system builder and the method of administering the law is that of enforcing a statute." [10] Accordingly the supposed intention of the legislator is tracked to its most remote hiding place by the most questionable tricks of interpretation when it would have been simpler to recognize that a statute provides only what it provides and what is not provided simply remains unprovided. There is no use trying to squeeze decisions out of an empty statute. "Logic cannot grind out the law any more than it can the cosmos." [11] The method is neither logical enough for it is "not the part of logic to exalt working hypothesis to the place of absolute principles." [12] Nor is it a sure guide to a just result for it is well known that in a controverted case both sides can be supported with deduction drawn from the rule of faultless logic. When the Supreme Court decides the case by a majority vote, the defeated minority can also bolster up their decision by pandectological arguments just as logically beautiful. And when the Judge by using the safety valve concepts of "equity", "good faith", etc. comes to a correct sociological conclusion it relegates the real reason to some remote corner of the opinion, the decision reading as if it were read out of the statute while in reality it was the reverse. This mode of proceeding happily called by Gmelin the "cryptosociological method" [13] should be abolished. This brings us to the modern doctrines.

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[9] Pound, p. 156: "For the historical school also worked a priori and gave us theories fully as absolute as those of the school of natural law. Each deduced and tested existing doctrine by a fixed arbitrary, unchangeable standard. When the historical jurists overthrew the premises of the philosophical school of the preceding century they preserved the method of their predecessor, merely substituting new premises. They were sure that universal principles of jurisprudence were not to be found by deduction from the nature of the abstract individual. But they did not doubt that there were such principles and they expected to find them by historical investigation. * * * No system of natural law was ever more absolute than this natural law upon historical premises."

[10] Gmelin—"Sociological Method" IX Legal Philosophy Series, p. 101.

[11] John C. Wu, The Juristic Philosophy of Roscoe Pound. Illinois Law Review, vol. 28, p. 294.

[12] Ibid, p. 295. Pound in his article on Mechanical Jurisprudence, Columbia Law Review, Dec. 1908 says: "I have referred to mechanical jurisprudence as scientific because those who administer it believe it to be such. We no longer hold anything scientific merely because it exhibits a rigid scheme of deduction from a priori conceptions."

[13] Gmelin defines it as follows: "It consists in the judge having found correct sociological conclusion, but afterwards fitting a scholastic chain

3. *Modern Doctrines.*

(a) *Concept of Law.*—It would transcend the limits of this work to make an exposition of the doctrines advocated by modern jurists such as Ihering's definition of law "as interests protected by the authority of the state"; Kohler's Jural Postulates of Civilization; Stammler's "natural law with a variable content," and Pound's Theory of Social Interests. It is sufficient for our purpose to observe that they all agree "that legal systems do and must grow, that legal principles are not absolute but are relative to time and place, and that juridical idealism may go no further than the ideals of an epoch." [14] Law is no longer identified with the nature of man, logic or the soul of the people. It is rather the resultant of infinite forces.[15]

(b) *Modern Theories of Legal Method.*—Notwithstanding their agreement that the object of all systems is to adapt the rules of law to the needs of social life it is interesting to note that the jurists do not agree as to how this is to be done. But they concur in giving the judge greater ostensible [16] freedom than was accorded him under the traditional method of interpretation, differing however as to the extent of that freedom. Thus Geny's legal method may be summarized as follows: First, apply the formal sources—the law or custom. If the statute is not applicable or does not exist use the "method of free decision", i. e. resort to the other sources of the law having as guideposts justice and general utility.[17] "Por el Codigo Civil, pero mas alla del codigo civil." Plainly the characteristic cult of the

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of merely formal logic to it as the pretended means of arriving at the result." "Sociological Method" IX Modern Legal Philosophy Series, p. 105.

[14] Pound—"The Spirit of the Common Law", p. 172.

[15] Cf. Wigmore's "Problems of Law" (New York, 1920) Prof. Wigmore interpreting legal evolution from the standpoint of causality insists that law is not caused by a single factor but is the resultant of an infinite number of factors, just as the position of a planet in a planetary system at a given instant is the resultant of all forces working in and outside the system.

[16] We say *ostensible* for really the judge under the old method enjoys greater freedom, for as Ernst Stampe says: "Anybody unfortunate enough to fall into the clutches of a fanatic for logical deductions and legal fictions will find that a lawsuit is purely a lottery. It is possible to 'deduce' all sorts of legal results, which may be wholly inconsistent with each other out of the same state of facts because the selection of a starting point for the process of deduction is not hindered by any regard for realities." Quoted by Gmelen—Sociological Method, IX Legal Philosophy Series, p. 133.

[17] Geny—Freedom of Decision, IX Modern Legal Philosophy Series, p. 2, et seq.

law is still evident. On the other hand, the sociological jurists are not content with merely the supplying of a rule for a case which the formulated law has not covered. Their legal method more radical, deals with the very nature of legal justice and tends to produce a more independent attitude on the part of the judge towards the letter of the law. As one of its expounders said: "It is no longer deemed sufficient merely to control and if necessary to rectify the result gained on the way of logical deduction from legal concepts by considering the needs of the subject matter and the reasonableness of the decision. * * * Instead we are from the beginning to aim consciously at a practically useful and reasonable result." [18] The justice of the decision is the main thing. But as every form of justice is the result of historical development, again the followers of this school differ as to the exact mode of its ascertainment. Some seek to find it in the balancing of interests involved which is to "furnish the solid basis for the subjective sense of justice that is to guide the will." [19] Or as Pound would put it: "Does it secure a maximum of interests with a minimum sacrifice of interests?" Others rejecting such procedure as being utilitarian and as placing "profit and advantage in the place of right and justice," [20] would find justice "not in a law of Nature which is absolute" but in a "Law of Civilization which is relative." [21]

LEGISLATIVE SOLUTIONS

"The code is an instrument of development, not of ossification."—*Saleilles.*

1. *Classification*—The systems adopted by the codes to fill the "gaps in the law" may be reduced to two; which with their subdivisions are as follows:

A. *Positive System:* General rules for the guidance of the judge.

(1) Law, Analogy, Principles of Natural Law.

Austria, art. 7. "Where the case cannot be decided either according to the literal text or the natural meaning of a statute regard shall be had to ana-

[18] Gmelin: Sociological Method, IX Modern Legal Philosophy Series: p. 104.

[19] Ibid. p. 130.

[20] Berolzheimer—"Perils of Emotionalism" IX Modern Legal Philosophy Series, p. 172.

[21] Ibid. p. 178.

logous provisions clearly contained in the statutes and to the principles applying to provisions regarding similar matters. If the case is still doubtful, it shall be decided after carefully collecting and considering all surrounding circumstances according to the principles of natural law."

Portugal, art. 16, also says "principles of natural law"

(2) Law, Analogy: General Principles of Law (Derecho.)

Brazil, art. 7. "In case of omissions (Casos omisos) the provisions concerning analogous cases are applied, and where there are none such, the general principles of law (principios geraes de direito.)

Italy.

Uruguay, art. 16.

Argentina, art. 16.

Guatemala, art. 18.

(3) Law, General Principles of Law (Derecho)

Mexico, art. 20: "Cuando no se pueda decidir una controversia judicial, ni por el texto ni por el sentido natural o espiritu de la ley, debera decidirse según los principios generales del derecho, tomando en consideración todas las circunstancias del caso."

(4) Law, Customs of the Place, General Principles of Law (Derecho)

Spain, art. 6, par. 2, supra p. 1.

(5) Law, Customs, Judge proceeding as if he were a legislator.

Switzerland, art. 1. "The Code applies to all legal questions for which it contains a provision in its terms or its exposition. If no command can be taken from the statute, then the judge shall pronounce in accordance with the customary law and failing that, according to the rule which he as a legislator would adopt. He should be guided therein by approved precept and tradition."

(6) Law, Equity.

Louisiana, art. 21. "En las materias civiles, el juez, a falta de la ley expresa esta obligado a proceder conforme a la equidad; para decidir se-

gún la equidad debe occurrir a la ley natural y a la razon, o a los usos recibidos, si la ley positiva guarda silencio."

Chile, art. 24; Colombia, art. 32; Ecuador, art. 18 rule 6: "En los casos a que no pudieren aplicarse las reglas de interpretación precedentes se interpretaran los pasajes oscuros o contradictorios del modo que mas conforme ó parezca al espiritu general de la legislación y a la equidad natural."

B. *Negative System:* No rules, solution left to legal science.

(1) *Belgium, France, Germany.*

Many authors laud the system adopted by the Swiss Civil Code but the general opinion is that the negative system is the best.

2. *Interpretations.*—

(a) *"Principles of Natural Law"*—The first commentators of the Austrian Civil Code interpreted this phrase philosophically and held it to mean the universal immutable natural law, while later jurists such as Berger following the historical school construed it to refer to the basic principles of Austrian law.[1]

(b) *"Principios Generales del Derecho."*

(1) *Italy.*—In Italy there has been and there still is great discussion anent the real significance and concept of this phrase. Jose Castan Tobeñas summarizes the situation in these words: "Some inspired in the philosophic tendency or in natural law, see in such principles universal juridical truths, dictated by right Reason (Borzari, Bianchi). Others, who now are in the majority following the historical current and the so called organic law (derecho) understand by general principles of law, those which serve as the foundation of the positive law of each country and can be deduced by successive generalizations of the particular provisions of the statute. (Chironi, Ricci, Scialoja, Pacifici, Mazzoni, Fadda and Bensa, Ferrara, Dusi). Del Vecchio maintains an intermediate position, in his interesting work 'Sui Principi Generali del Dirritto' (Modena, 1921) in which he censures as exclusive and narrow the idea that circumscribes the general principles of law to a determinate national law of whose particular names they should be extracted, and says that the legislator imposes only one requirement to the relation that should exist between the general principles of law and the partic-

[1] De Diego—Derecho Civil Español, Comun y Foral (1927) vol. 1, p. 333.

ular norms of the law: that between them there should be no disharmony nor incongruency."[2]

(2) *Brazil.*—Dr. Joao Luiz Alvez in his commentary on the Civil Code of Brazil which was promulgated January, 1916, quoting the Italian jurist Pacchioni, said that the judge should seek that solution which corresponds to the spirit of the laws itself considered as a whole. Thus he interpreted the "princios geraes de direito" historically, but in the next paragraph quoting from Rossel et Mentha a commentator of the more liberal Swiss Civil Code which followed Geny's system, he adds that though the judge should be inspired by the doctrines of jurisprudence which is the "tresor comun" of the science of law, nevertheless he should not follow them servilely.[3]

(3) *Spain.*—The opinions of Spanish jurists oscillate between two extremes: the philosophical and the historical. We shall discuss them in the succeeding chapter.

(c) *Equity.*

(1) *Louisiana.*—In a broad sense this term signifies natural justice,[4] and it is with this meaning that it is used in art. 21 of the Civil Code of Louisiana which provided that in deciding according to equity the judge should recur to natural law and reason and approved customs.

(2) *Chile.*—The commentator Luis F. Borja quoting Portalis agreed with him that the phrase "equidad natural" appearing in the codes of Chile, Colombia and Ecuador meant not "moral equity" but "judicial equity", that is, natural law.[5]

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[2] Jose Castan Tobeñas—Derecho Civil Español, Comun y Foral, p. 11-12.

[3] Código Civil de la República de los Estados Unidos de Brazil, Annotated (1926) p. 12.

[4] Bouvier's Law Dictionary, Rawles Third Ed. vol. 1, p. 1057.

[5] Luis F. Borja—Commentaries on the Civil Code of Chile, vol. 1, p. 376: "En todos los tiempos se ha dicho que la equidad es el suplemento de las leyes. Pues bien, ¿que querian decir los jurisconsultos romanos cuando hablaban de *equitad?* La palabra equidad tiene diversas aceptaciones. A las veces no designa sino la voluntad constante de proceder en justicia, y en tal caso no expresa sino una virtud. En otras ocasiones, la palabra equidad significa cierta aptitud o disposición del alma, que distingue al juez ilustrado del que no lo es, y entonces la equidad no es, en el magistrado, sino el efecto de la razon ejercitada por la observación y dirigida por la experiencia. Pero todo esto se refiere solo a la equidad moral, mas no a la *equidad judicial* de que tratan los jurisconsultos romanos, y que consiste en acudir a la ley natural cuando las leyes positivas sean oscuras o insuficientes.

Esta equidad es el verdadero suplemento de la legislación, y sin ella el ministerio del juez, en la mayor parte de los casos, seria imposible."

From the foregoing it is manifest that the meaning of such phrases as "principios de derecho natural", "principios generales de derecho", depend upon the juristic philosophy of the interpreter.

"LOS PRINCIPIOS GENERALES DEL DERECHO" ACCORDING TO SPANISH AND PHILIPPINE AUTHORITIES

1. *Opinions of Spanish Jurists.*—It is convenient at the outset to bear in mind first, the fact that the term "principios generales del derecho" was new to Spanish juridical tradition,[1] its immediate source being the Italian and Austrian Codes; second, Title XXXIV, Partida VII, which set out the "reglas del derecho"; and third, Rule 13 of the transitory provisions of the Civil Code,which provided that "cases not expressly included in the foregoing provisions shall be decided by applying the principles on which they are based." From these facts and provisions it is interesting to note how Spanish jurists have obtained different conclusions as to the meaning of that vague phrase "principios generales del derecho."

As in other countries most Spanish jurists have aligned themselves with the philosophical or the historical school. With the first are Manresa [2], Valverde [3] and Mucius Scaevola and with the second they being in the majority, Arribas [4], Buron, Castan, De Buen and De Diego.

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[1] Sanchez Roman—Derecho Civil, vol. 2, p. 100, 104.

According to the law prior to the Code the order of sources of law were as follows: (1) the law, (2) general customs in its three varieties "según ley, fuera de ley, y contra ley." (3) Special or local custom but only that "fuera de ley". (4) Natural and scientific law. (5) The jurisprudence of the Supreme Court. According to the Code the sources are: (1) The law, (2) Custom of the place, only in its variety of "fuera de ley" but not those "según la ley" y "contra ley", (3) general principles of law (derecho).

[2] Manresa, Comentarios al Codigo Civil, vol. 1, p.

[3] Valverde, Tratado de Derecho Civil Español (1925) vol. 1, p. 184.

"We think that the legislator proposes to give a greater extension and authority to this phrase. There are principles of justice that are higher than the contingency and variableness of facts; there are higher forms which serve as the foundation for positive law, whatever may be the course of development of the latter; there are rules accepted by jurists which constitute true axioms for him who takes part in juridical life, and which doubtless form a law higher than that laid down by the legislator, and it is to these principles, rules and forms that our legislator undoubtedly refers."

[4] Arribas believes that the phrase "principios generales del derecho" means the "fundamental principles of every law." Cited by Sanchez Roman, Derecho Civil, vol. II, p. 102, note 1.

A third theory is espoused by Sanchez Roman who "considers subsisting and in force Tit. 34 of Partida VII, which contains the most fundamental principles or general rules of law (derecho) inasmuch as said art. 1976 although it abrogates all laws, uses and customs which constituted the common civil law, it did so only in all those matters which are the object of this Code (Civil Code) and in said code there is no precept relative to the concrete determination of what should be understood by "principios generales del derecho." [5] An examination of said title 34 Partida VII reveals that those rules are supposed axioms of universal truth, akin to natural law. Thus rule I says: "And we say, that it is a rule of law (derecho) that all the Judges should help liberty, because it is a friend of nature, who is loved not only by man but also by all the other animals." [6] Rule XIV says: "And as the Wise Men said, he injures no one who uses his right." [7] That these rules are not eternal is at once seen when we take into account the great discussion today as to the so called "abuse of rights."

Mucius Scaevola of the philosophical, and De Diego of the historical school appear to have devoted most attention upon the subject, the first having written a volume on it, and the latter several works. Hence we shall take their opinions as representative.

(a) *Opinion of Mucius Scaevola.*—After observing that the majority of the Codes contain the phrase "principios de derecho natural" or "principios generales del derecho" and after pointing out some incontrovertible maxims as "man is free by nature", "you cannot give more rights than what belongs to you", etc. he concludes: "From these it can be inferred that the general principles of law being an emanation of the rational law, always encloses a fundamental truth, an incontrovertible

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[5] Sanchez Roman, Derecho Civil, vol. 2, p. 105.

Art. 1976 says: "All laws, statutes, usages and customs which constitute the common civil law in all matters which are the subject of this code are hereby repealed, and shall henceforth be without force or effect either as direct obligatory laws or as supplementary law. This provision is not applicable to the laws which have been declared by this code to continue in force."

[6] "E Dezimos, que regla es de derecho, que todos los Juzgadores deuen ayudar a la libertad porque es amiga de la natura, que la ama non tan solamente los omes, mas aún todos los otros animales."

[7] "E aún dixeron los Sabios; que non faze tuerto a otro quien usa de su derecho."

and consequently universal affirmation, that is permanent, invariable, without any relation to an epoch or a people, inasmuch as the truth is one and unchangeable. "If in view of this we shall attempt to define in plain language without any scientific pretension, a general principle of law we would say: universal juridical truth." [8]

(b) *Clemente de Diego.*—

(1) *Meaning of "Los principios generales del derecho".*—De Diego reaches the conclusion that "the principles referred to by the Civil Code are those which formed the foundation of the positive law; those basic ideas around which revolve the provisions of our Civil Code, which is an organism and which can and should be reduced to a system" by using Savigny's method of interpretation, with its element of the literal, the logical, the historical, and the systematic.

Literally, he argued our Code does not say priciples of natural law as the Civil Code of Austria. Ours follow Italy which had in view the Code of Austria, and yet did not follow it, invoking only the general principles of law.

Logically, it must be presumed that the legislator referred to those principles which he used in formulating the positive law.

Systematically, for it would be absurd to have placed limitations on the legislature and to have left the judge free. He says: "If in the law of the Bases there are legatures and limitations for the future legislator as well as in the additional provisions (the legislator who had always been sovereign in this respect) how can it be understood that by general principles the legislator meant the abstract dogmas of morality, and the philosophical school, when it refers to judges who have never been sovereign on this point and who have to judge according to law and not of the laws? Would not this be contradictory?"

Historically, having in mind its sources, the Italian and the Austrian Civil Codes.[9]

(2) *Method of Ascertaining these Principles.*—De Diego states his method as follows: "These principles can be found by two methods which mutually complete themselves: by the generalization of the concrete provisions of a juridical institution or of the positive law in general, * * * or by deduc-

[8] Mucius Scaevola, Codigo Civil, Segundo Tomo, Apendice, p. 5-9, 13, 14.

[9] Clemente de Diego, Derecho Civil Comun y Foral, vol. 1, p. 334-7.

tion from the superior principles of reason and justice to see if their consequences conform or not to the concrete provisions of the law, and consequently whether they served or not as the basis of their formulation." [10]

2. *Decisions of the Courts.*—Both the Philippine and Spanish Supreme Courts have not directly defined the phrase "principios generales del derecho" but have contented themselves by involving the general principle of law applicable to the case before them. Thus the Supreme Court in the case of The Heirs of Jumero v. Lizares [11] where the lower court having doubt as to the character of the contract under which the defendant held the land in litigation had decided in his favor, said thru Justice Arellano: "As to the second assignment of error, it is true that the trial judge while in doubt, and by reason of his doubt which still existed after weighing the contradictory testimony decided the suit in favor of the defendant. In doing so he committed no error whatever, but, on the contrary complied with the second paragraph of article 6 of the Civil Code which provides:

" 'When there is no law exactly applicable to the point in controversy, the customs of the place shall be observed, and, in the absence thereof, the general principles of law.'

"And it is a general principle of law that, in case of doubt, the condition of him who possesses is the better one." [12]

The Supreme Court of Spain decided very early that before an appeal can be founded on a violation of a principle of law there must be a citation of the law or decision recognizing it as legal doctrine as well as an allegation of the inexistence of a law exactly applicable to the point in controversy. This doctrine has been severely criticized by commentators.[13] It is said that the Spanish legislator had by using the phrase "principios generales del derecho" instead of the traditional "doctrina legal" intended to give greater liberty to the judge, freeing him from bondage to the law, and that the decision of the Spanish Supreme Court had reduced it to the same miserable fate of the

[10] Ibid, p. 340.

[11] 17 Phil. 112, 115, 116 (1910).

[12] Vide also Urrutia & Co. v. Pasig Steamer and Lighter Co. (1912) 22 Phil. 330, where Justice Torres held that though compensation was not provided for by any law yet should be given in accordance with the demands of "strict justice."

[13] Autos of June 15, 1893; January 5, February 26, March 14, April 17, July 7, and December 10, 1894; Oct. 15, 1895, January 20, December 31, 1897; Dec. 31, 1898; Feb. 17, 1899; and Sentencia of Dec. 31, 1898.

"doctrina legal" and the opinions of the authors before the Civil Code.[14] Mucius Scaevola, deems the doctrine dangerous, first, because it restrains the free evolution of the law; second, because it reduces to the category of juridical principles only those which have been the object of appeal, leaving outside others sanctioned by universal law which have life by itself before and above the exequatur of an appellate court; third, because it favors abuse and injustice.[15] F. de Velasco humoristically comments on the doctrine as being equivalent to recognizing "Jurisprudencia" as a source of law and not the "principles" which is a juridical absurdity.[16] On the other hand, De Diego says: "The question is not insuperable * * * the question is that it be a principle that unites and has a logical connection with the law, and that it be not a mere abstract principle of morality or a subjective opinion." [17]

The Supreme Court of Spain lately seems to have adopted, though timidly, a less rigorous doctrine by its sentencia of October 31, 1914 which said that "all principles of law (derecho) carries by itself the necessity of strict observance." [18]

CRITICAL CONSIDERATIONS

> "The knowing of what is just and what unjust, men think no great instance of wisdom, because it is not hard to understand those things of which the law speaks. They forget that these are not just acts except accidentally. To be just they must be done and distributed in a certain manner. And this is a more difficult task than knowing what things are wholesome. For in this branch of knowledge it is an easy matter to know honey, wine, hellebore, cautery and the use of the knife; but the knowing how one should administer these with a view to help and to whom and at what time, amounts in fact to being a physician."—*Aristotle.*

1. *The Idea of Derecho:*—The foregoing chapters have shown in a way the intimate connection between juristic philo-

[14] De Buen, Las Normas Juridicas, p. 77.
[15] Mucius Scaevola, Codigo Civil, vol. I, 5th ed., p. 214.
[16] F. de Velasco, Resumen de Derecho Administrativo. vol. I, p. 218.
[17] De Diego, Codigo Civil, vol. I, p. 338.
[18] Vide also Sentencia of April 30, 1923.

sophy and legal practice. In considering the meaning and method of ascertainment of the "principios generales del derecho" it is necessary to have a clear idea of the term "derecho". We shall not discuss the somewhat close definitions given by the authors,[1] nor attempt to define it, believing with Josiah Royce that definitions simple, positive, hard and fast as they are, never tell the whole truth of a conception. We shall merely point out its two main characteristics: its aspiration towards justice and its impulse to create a state of peace. "The idea of Derecho is that which our reason gives us to distinguish the Derecho from the No Derecho, the Just from the Unjust." [2] This Derecho is not the eternal rigidly unchangeable Natural Law, but it is relative, in perpetual evolution, and varies like the ideals of a people, according to place and epoch. But this variability does not preclude the existence of a sole, permanent idea of Derecho, as that which is Just. Derecho is not to be confounded with ethics or moral philosophy which traces its laws in view of what it conceives to be the end of man, while the first treats of the human person in so far as it is a means for the harmonious development of social life. Derecho is a norm or law, and is distinguished from the conventional rules of society in that it is sovereign, in that it imposes obedience upon all persons. It exists for social ends and hence in that respect it may be called socializing.

"Derecho" is not to be identified with statute (ley) which is but the declaration by the legislature of the obligations and rights of their subjects, and which may be at one time just or unjust depending upon whether the legislator succeeded in its formulation in taking into account the necessities of social life. Neither is Derecho the so-called "Derecho objetivo", for the latter is but a "mass of formal rules for deciding cases." As

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[1] Sanchez Roman defines it as follows: "Ciencia de las leyes morales. fundadas en la naturaleza racional del hombre, que rigen su libre actividad para la realización del fin individual y social bajo un aspecto de condicionalidad reciproca exigible." Derecho Civil, vol. 1, pp. 3-4.

De Diego's definition: "El conjunto de deberes u obligaciones y de facultades del hombre y de las reglas que determinan unas y otras para el cumplimiento del bien exigido imperiosamente por las relaciones esenciales a la sociedad."

For other definitions see also: Henri Levy Ulmann—"Contribución para investigar una definición del Derecho." Revista de Leg. y Jurispr. tom. 133, p. 137 and 295.

[2] Las Normas Juridicas, p. 101.

De Buen said: "Derecho as a norm of content does not exist until the judge makes his clear and final decision in a concrete case. Until then it is only an ideal possibility hidden in the conscience of men, and a mass of rules for the ascertainment in each case of the adequate norm."[3]

2. *"Lacunae" in Derecho.*—Having accepted the idea that there can be no Derecho except that which is just, it is apparent that unlike the statute (ley) there can be no "gaps" in Derecho. The judge can always give a just decision, and if his decision is unjust it is because he is incapable of finding the correct solution or that he has used the wrong method for the ascertainment of Derecho.

3. *Method of Finding "Derecho".*[4]—The idea of Derecho gives the key to its ascertainment. Any method however of finding it cannot dispense with logic. Man is a thinking animal and will always use his reason. The criticism against the Natural and the Historical Schools was not because of their use of logic but their abuse of it. As Kocourek said: "The universal necessity of logical method is one thing; attribution of unchanging values to the elements that enter into thought is quite another." [5]

In deciding a case there are two moments: First, the ascertainment of the proper and just juridical norm; second, its application by means of syllogism to the case on hand. Obviously before a just norm can be applied syllogistically it must first be found. De Diego would find it by two methods: first, by the generalization of the provisions of the positive law; and second, by deduction from the superior principles of justice.

The first mode may be called the technical, in accordance with codal provisions; and the second, the theoretical investigation of derecho in accordance with what is considered just.

To our mode of thinking the distinctions aforementioned is erroneous in that it admits that there can be an Unjust Derecho, and in that it limits its principles to those which were the foundation of the positive law. There can be no derecho except that which is just. Law, custom, juridical science, etc. are but factors, data to be used to arrive at a Just Decision. The law should first be consulted because it is prima facie presumed to be just, but nevertheless the judge should not be its slave. As Derecho deals with human acts for social ends and its ideals are

[3] Las Normas Juridicas, p. 83.
[4] Las Normas Juridicas, p. 95-101; 106-114.
[5] The American Law School Review, (1928), vol 6, p. 271.

relative it is obvious that it is necessary for its ascertainment, first, to study human situations or conduct in so far as they are a means for Derecho; second, the mode of determining at a given time the social end, that is the juridical idealism of the period. The result of the first is the so-called "juridical construction." (the juristische Konstruction of the German writers.)

The necessity for juridical construction arises from the complexity of human acts and the need of putting them in order. This is made possible thru "formalism", i. e. the forms which characterizes our acts. In the beginning the forms were very formal and were of the utmost importance. Today, the substance is more essential than the form but it does not mean however that the latter has disappeared. The categories of juridical acts are inexhaustible, in perpetual evolution, the old ones being modified and new ones coming into existence with the lapse of time. Thus in Spain and France there has appeared the new juridical category known as "professional risk".

Juridical construction having given and classified our legal materials, it then becomes necessary to determine the social end, or the juridical idealism of the period. The idea of derecho gives us the means of finding it in actual life, but it does not give us its content, which we must seek in human conduct, and in social phenomena. The idealism of a period is a state of fact, a condition which is deemed preferable to another because it is better. As De Buen said: "The necessity of Derecho is one thing; and the necessity of a determinate juridical condition, another. The last derives its preference, not as a requirement of reason, but because of the belief that one state is better than another."

Juridical idealism being the preference of juridical conditions the next problem is how to ascertain it in a scientific manner, and as to this jurists as was previously said in the preceding pages, differ. We can only say, that the judge should use all the means that legal science can give him. De Buen, Berolzheimer, Kohler and others would find the criterion for the value that men gives to objects in civilization which is to be studied and given objectivity through history, where it has been said men learns to know himself and to correct what he thought he was. In history we learn the ends towards which humanity is traveling, the relatively permanent qualities and values of some things and the ephemeral existence of others. Pound would find it in a weighing of interests, individual interests being capable of being stated in terms of social interests. This

theory has been so ably summarized by John C. Wu that we quote it in full to give the reader a comprehensive workable idea of it.

"Pound's criterion is: Does it secure a maximum of interests with a minimum sacrifice of interests?

His tentative outline of the social interests follows:

I. General Security: Safety; Health; Peace and order; Security of transactions; Security of acquisitions.

II. Security of social institutions: Domestic; Religious; Political.

III. General morals.

IV. Conservation of social resources: Use and conservation of natural resources; Protection and education of dependents and defectives; Reformation of delinquents; Protection of the economically dependent.

V. General progress:

1. Economic progress: (a) Freedom of property from restrictions on sale or use; (b) Free trade; (c) Free industry; (d) Encouragement of invention.
2. Political progress; (a) Free criticism (b) Free opinion.
3. Cultural progress: (a) Free science; (b) Free letters; (c) Encouragement of arts and letters; (d) Encouragement of higher education; (d) Improvement of aesthetic surroundings.

VI. The individual life.

The values of these interests are not fixed once for all, but vary with time and place. In general, it may be said that each item rises and falls in value in direct proportion to the demand of the time and place. In the time of war, for instance, social interest in general security (safety, peace, and order) will be likely to dominate all the others. In a backward nation, social interest in general progress is to be appraised at a comparatively higher value. To a highly cultured but morally decadent nation, an emphasis upon social interest in general morals and in the security of social institutions is probably the best antidote. In a country where industrialism threatens to stifle the human element altogether, and to turn humanity into one imposing but

lifeless and soulless machinery, which seems to me to be the most terrible catastrophe that can befall mankind, it would not be a bad policy to take special account of social interest in individual life and in cultural progress; material civilization and culture being two different things. In a sterile land, social interest in the conservation of social resources should naturally be given paramount consideration." [6]

APPLICABILITY OF COMMON LAW DOCTRINES IN THE PHILIPPINE ISLANDS

"We have long given up the attempt to maintain that the common law is the perfection of reason."
—*Sir Frederick Pollock.*

1. *Decisions of the Supreme Court.*—To develop the topic of this chapter to the full extent of which it is capable would require a volume.[1] We propose only to deal with it in so far as it is related to the question of general principles of law. Article 16 of the Spanish Civil Code provides: "In matters which are governed by special laws, any deficiency of the latter shall be supplied by the provisions of this code."

Chancellor Kent defines Common Law as "those principles, usages, and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the Legislature.[2]

The question is: Are these principles in force in the Philippine Islands?

That the conquest by the United States of these Islands did not have the effect of totally abrogating the Municipal Law

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[6] John C. H. Wu—The Juristic Philosophy of Roscoe Pound, Illinois Law Review, vol. 18, 299-300. (1924)

[1] Those who desire to go further into the subject may look up: Jose C. Abreu, The Blending of the Anglo American Law with the Spanish Civil Law in the Philippines, III Phil. Law Journal, May, 1914, p. 285; Charles C. Lobingier, Blending Legal Systems in the Philippines, XXXII Review of Reviews, Sept. 1905, p. 336; Jorge Bocobo, Civil Law under the American Flag, I Phil. Law Journal, Jan. 1915, p. 284; Laurel, What Lessons May be Derived by the Philippine Islands from the Legal History of Louisiana, II Phil. Law Journal, Sept. 1915, p. 63; In re Shoop, 41 Phil. 213, and cases cited.

[2] Kent, "Comm." 469.

is unanimously decided by the decisions.[3] And by the Instructions of President McKinley.[4] As Justice Moreland said: "The great body of our laws is of Spanish origin and comes to us and is enforced by us upon theory that it has survived." [5] Neither has the Legislator shown any intention to change it. The Philippine Commission in its report for 1901 said: "It is the intention of the Commission as soon as practicable to make a complete statement" of the Spanish law, governing business transactions into a single Civil Code "but without changing the fundamental principles of the civil law which has here prevailed." [6] On the other hand it has been decided that laws coming from and modeled upon Anglo-American law should be construed as understood in the jurisdiction where taken.[7] In the case of U. S. v. Cuna, Justice Carson said: "Neither English nor American Common Law is in force in these Islands, nor are the doctrines derived therefrom binding upon our courts, save only in so far as they are founded on sound principles applicable to local conditions, and are not in conflict with existing law." [8] Yet in the case of In re Shoop the Court through Justice Malcolm held: (1) "In interpreting and applying the bulk of the written laws of this jurisdiction, and in rendering its decisions in cases not covered by the letter of the written law, this court relies upon the theories and precedents of Anglo-American cases, subject to the limited exception of those instances where the remnants of the Spanish written law present

[3] Perez v. Fernandez (1906), 202 U. S. 80, 91, 50 L. Ed. 942. per Justice Day: "Cases which have come to this court from the Philippines and Porto Rico, where we have had occasion to consider the enactments making changes in the laws of those islands, show the disposition of the executive and Congress not to interfere more than is necessary with local institutions, and to engraft upon the old and different system of jurisprudence established by the civil law only such changes as were deemed necessary in the interest of the people, and in order to more effectively conserve and protect their rights." Vide also Pollard's Lesse v. Hagan (1845), 3 How. 212, 225, 11 L. Ed. 565; U. S. v. Balcorta (1913), 25 Phil. 273.

[4] "The main body of laws which regulate the rights and obligations of the people should be maintained with as little interference as possible. Changes made should be mainly in procedure, and in the criminal laws to secure speedy and impartial trials, and, at the same time, effective administration, and respect for individual rights."

[5] Concurring opinion in Forbes v. Chuoco Tiaco (1910), 16 Phil. 534. 592.

[6] Report 1901, vol. 1, p. 91.

[7] U. S. v. De Guzman, 30 Phil. 416, and cases cited.

[8] 12 Phil. 241, (1908).

well-defined civil law theories and of the few cases where such precedents are inconsistent with local customs and institutions. (2) The jurisprudence of this jurisdiction is based upon the English Common Law in its present day form of Anglo-American Common Law to an almost exclusive extent." [9] The logical result of this case is well described by Pound's works: "In the Philippine Islands and in Porto Rico there are many signs that common law administration of a Roman Code will result in a system Anglo-American in substance if Roman Spanish in term." [10]

But in 1928, the Supreme Court through the same Justice Malcolm said: "In the Philippine jurisdiction we have never felt bound to follow blindly the principles of the common law." [11]

It is obvious that the Supreme Court has not as yet definitely established a precise theory as to extent and applicability of the common law in the Philippine Islands.

2. *Los Principios Generales del Derecho and the Common Law.*—From what has been said in the previous chapters on the concept of Derecho and the method of its ascertainment, it is evident that common law doctrines should not be in force in the Philippine Islands as such. They are merely one of the innumerable data to be taken account of by the judge in arriving at a just conclusion. In the places where our positive law is well developed, as in the Civil Code, its use would of course be rare. The reason is at once apparent. Justice as has often been repeated is relative to the ideals of the people. Necessarily the legal materials which have grown with the people, which they understand would to them be more just. Common law doctrines represent the experience, the ideals of a different race and culture and may not correspond to the juridical idealism of another people with different race experience, culture and civilization. To engraft them into the legal system of the Philippine Islands would promote injustice. The very nature of Derecho demands the use mainly but not exclusively as the historical jurists would advocate, of traditional materials as data for a just decision. This is seen at once if we consider our family law which is radically different from Anglo Saxon law.[12] Evidently where

[9] 41 Phil. 213, 254-255 (1920).

[10] Pound—The Spirit of the Common Law, p. 2.

[11] People v. Toledo, 26 O. G. 3013, 3015.

[12] Dean Bocobo, in his lecture entitled La Supervivencia del Derecho Español en Filipinas, before the Real Academia de Jurisprudencia y Legislación gave as one of the reasons: "The adaptation of the Spanish Civil Law to the mode of being of the Filipinos, and above all to the

the traditional materials are insufficient a common law principle may be applied but it is not applied because it is a common law principle but because it is the means for arriving at a just decision. Even in the cases where the statute has been adapted from Anglo American jurisdictions the result is the same. Here the legislature merely adds new premises, new materials, whose defficiencies are to be supplied as before but the same method, i. e. by traditional materials (art. 16) and los principios generales del derecho.

Adopting for the moment the doctrine of the philosophical and historical schools same conclusion is reached. The common-law cannot certainly claim to monopolize all the universal juridical truths. And obviously the common law is not the product of the spirit of the Filipino people.

RESUMÉ

1. Every system of law aspires to do two things: to establish social order and to render Justice. Of the first end arises the need of stability; and of the second, the need of change. Hence the truth of Dean Pound's statement: "Law must be stable and yet it cannot stand still."

2. Law today is no longer the eternal, immutable truth of the Natural School, nor the spirit of the people, but is the product of infinite forces variable with time and place. The legal method of today is no longer that of logical deduction from unchangeable standards but is the finding of a Just Decision to be aimed at consciously from the beginning.

3. There can be no "Derecho" except that which is Just. The law, customs, scientific law, etc, are but materials, data for arriving at a Just Conclusion. The law should first be sought as it has the prima facie presumption of being just, and the Civil Code is right in according it the first place among the sources. But when the statute is unjust or where it is silent, the Judge should decide according to what it Just which is to be found by all the means that legal science can give him.

4. Common Law doctrines should not be in force as law in the Philippine Islands. They may be applied in the appropriate case like other data in the search for the Just Decision.

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tradition of the Filipino family." Jose Maria Fabregas commenting on said lecture said: "Three centuries of dominion cannot but leave a profound effect on civil life. The Filipino family accepts Spanish law because it is its law." Cronica Juridica—A Review of Dean Jorge Bocobo's lecture in Madrid by Jose Maria Fabregas del Pilar. VIII Phil. Law Journal, 132.