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SOME SUGGESTIONS FOR THE REVISION OF THE CIVIL CODE

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CHAPTER I INTRODUCTION

The Need of Revising the Civil Code

The idea of revising the Civil Code of Spain which is the Civil Law in force in the Philippines is not new. Way back in the beginning of the American regime, an attempt had been made to supplant the Civil Code along with the other codal laws then existing with revised ones which will embody reforms deemed necessary as a result of the change of sovereignty. On May, 1909, the idea materialized when Act 1941 was passed actually creating a code committee composed of a President and four members for the purpose of revising, among others, the Civil Code and to propose new ones "in accordance with modern principles of the science of the laws and with the customs of the country". For some unexplained cause however no tangible result was attained in so far as the projected revision of the Civil Code was concerned although the famous Correctional Code of Del Pan actually came into being only to meet an ignominious fate in the hands of legislators who for some reason or another left the proposed Code unenacted.

But the idea of reforming the Civil Code had never been entirely given up although its realization had met with a great many obstacles. In 1927, a liberal minded jurist in the person of now Associate Justice Jose Abad Santos, then Secretary of Justice, to realize a consuming desire to promote and enhance the administration of justice in this country appointed different committees to revise all existing codal laws in the Islands. One

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of such committees was that assigned to study the revision of the Civil Code and to propose the draft of a new one. This Civil Code Revision Committee is still at work at present.

Reasons for the Revision of the Code

Every one admits the necessity of revising the Civil Code for various reasons. The Civil Code for one thing is not perfect. This fact had been confessed by the very legislators who were responsible for its enactment. The criticisms of authoritative commentators have also been unsparing.

From the point of view of the Philippines moreover the need of revising the Civil Code is accentuated by two important factors namely, (1) that the Civil Code of Spain is primarily a foreign Civil law imposed upon the Filipino people, and, (2) that from the time of the assumption of authority by the United States in the Philippines, the Civil Code has suffered so many modifications to suit American principles of law that its exact status today can only be determined by painstaking study of and discriminating comparisons with hundreds of amendatory acts passed and approved since that time.

In the first place, law is in the main nothing more than customs and practices codified. As such, it must have its background in the consent of the people. Otherwise law will be a burden rather than a help to the community in which it is proposed to be observed. It is true that laws are sometimes imposed upon the people without their consent, and that at times, these laws later become part of the people's laws themselves. This is a historical truth that finds its incontrovertible proof in the history of peoples who have come at one time or another under the control of some more powerful neighbors.

But this is true only in so far as these foreign laws are by their nature assimilable and to the extent that they serve the people in their social and economic needs. Thus in the Philippines, for example, although the Civil Code has been imposed upon the people by the Spanish authorities, yet the liberal philosophy with which it is informed, the spirit of justice with which it is permeated, and the pliability and adaptability of its provisions to the social and economic practices of the people have so appealed to the Filipinos themselves that for almost four centuries, it has remained the bulk of the law governing the civil relationship of the people in this country.

But while this is true with respect to the Civil Code taken as a whole, yet it is undeniable that there are many of its provi-

sions that have proved not only unassimilable but also in conflict with the customs and practices of the Filipinos. In the succeeding pages the writer will endeavor to point out what some of these unwanted institutions of the Spanish Civil Code are and why therefore they should be eliminated, and also indicate what are some of the provisions that are deemed defective or deficient and in what manner as a consequence they should be reformed.

In the second place, as had been adverted to already above, the advent of American sovereignty in the Philippines has rendered the revision of the Civil Code doubly necessary. For more than three decades since American rule, the Civil Code has suffered many changes. Let us cite a few examples. Right after the establishment of the American government in the Philippines, the Military Governor, exercising the legislative authority then vested in him under the war power, promulgated a Marriage Law, designated as General Orders No. 68, because the Civil Law as it then existed in the Philippines recognized only the canonical marriage as valid,¹ which is in direct conflict with the American doctrine based upon religious liberty recognizing civil as well as canonical marriages as valid. General Orders No. 68 was in turn modified by General Orders No. 70, and again only lately by Act No. 3613, which constitutes the present Marriage Law of the Philippines.

Again, shortly after legislative authority was transferred from the Governor-General to the Philippine Commission, that body enacted a Code of Civil Procedure (Act No. 190) which while purporting and professing to be merely procedural, has been time and again held by our Supreme Court to have repealed by implication an appreciable part of the Civil Code especially those respecting wills, the rights and liabilities of heirs and devisees, guardianship and the rights of parents with respect to the properties of their children. So important have these changes been that way back in 1904, Mr. Justice Willard undertook the difficult task of pointing out in a little book, the principal changes in the Civil Code by the then newly enacted Code of Civil Procedure. To the lasting memory of that great jurist, the opinions expressed in his "notes" have been to a great extent confirmed by the Supreme Court.

Other statutes enacted by the Philippine legislature have affected the Civil Code more or less profoundly. The Divorce

¹ *Benedicto vs. de la Rama*, 3 Phil. 34.

Law (Act No. 2710), the Insolvency Law (Act No. 1927), the Usury Law (Act No. 2073), the Negotiable Instruments Law (Act No. 2031), the Chattel Mortgage Law (Act No. 1508), and the Land Registration Act (Act No. 496), are among the most important of these. Aside from these laws, there are various scattered amendatory acts which have been enacted from time to time expressly or impliedly modifying numerous parts or provisions of the Civil Code which because they have so hopelessly involved the Civil Code with changes and modifications have rendered its revision of imperative necessity.²

CHAPTER II

THE GENERAL BASES OF REVISION

Now, What should be the controlling ideas which should govern the projected revision of the Civil Code? It is doubtless beneficial to have some guiding principles in the redaction of the proposed revised Civil Code. The codifiers of the Civil Code of Spain had the Law of Bases of May 11, 1888 as a guide in their arduous task of codification; a Civil Code revision committee in the Philippines should also have a similar exposition of guiding principles to steer them. In such a plan, the writer suggests that the following ideas, among others, should be made as controlling:

- (1) That the Spanish Civil Code should in the main be preserved;
- (2) That in the revision, the criticisms of Spanish jurists and commentators should be taken advantage of in order to redact a less faulty Civil Code;
- (3) That the deficiencies of the Civil Code should be filled up;
- (4) That particular provisions of the Civil Code which have been found to be in conflict with Filipino customs and traditions should be accordingly reformed; and,
- (5) That provisions which have been found as obsolete should be abolished.

These controlling ideas should be framed however, in such a way that they could not serve to hamper the revisers in their efforts to redact a complete and progressive Civil Code. Much could be learned in this respect from the experience of the codifiers of the Spanish Civil law. A brief review of the history

² Fisher, Preface to the First ed., The Civil Code of Spain.

of the codification of the Spanish Civil law will reveal that one of the causes for the defective character of the Civil Code was the almost literal compliance of the Code Committee charged with its redaction to the requirements of the Law of Bases of May 11, 1888 in so far as it required that the Civil Code to be drafted shall have for its principal basis the Project (of the Spanish Civil Code) of 1851 "en cuanto se halla contenido en este el sentido y capital pensamiento de las legislaciones civiles del Derecho historico patrio, debiendo formularse sin otro alcance y proposito que el de regularizar, aclarar y armonizar los preceptos de nuestros leyes, recoger las enseñanzas de la doctrina en la solucion de las dudas suscitadas por la practica y atender a algunos nesicidades nuevos".³

In fact, the Legislative Commission of the Spanish Cortes charged with the duty of inquiring into the advisability of enacting the draft of the Civil Code as framed by the codification Commission of 1888, in its report to the Cortes, expressly admitted that the principal reason for this recommendation for enactment of the proposed Code was that its provisions faithfully and strictly adhered to the requirements of the Law of Bases although they expressly admitted that the draft suffered from grave defects.⁴

These suggestions will be developed in some detail in the succeeding pages of this paper.

The next question that logically comes to mind in connection with the revision of the Civil Code is, What is the proper medium by which this reform could be best accomplished? According to Sanchez Roman, the ideal of all legislative reform is codification. But this is true particularly where the law has never been codified. Once the law has already been reduced into a Code, however, its revision could best be accomplished with greater speed and convenience by means of proper consolidation.

Ibert defines Consolidation as "the combination in a simple measure of enactments relating to the same subject-matter, but scattered over different acts. The work of Consolidation requires intimate acquaintance with past as well as with existing laws and institutions, involves the re-writing and not merely the placing together of laws, the substitution of modern for antiquated language and machinery, the harmonizing of incon-

³ Base No. 1. Ley de Bases de 11 de Mayo de 1888.

⁴ 1 Sanchez Roman, Estudios de Derecho Civil, 570-71.

sistent enactments, and yet the performance of this work in such a way as to effect the minimum of change in expressions which have been made the subject of judicial decision and on which a long course of practice has been based".⁵ In fact, Consolidation had just been successfully employed in the revision of the Penal Code;⁶ there could be no reason why it could not again be properly used in bringing up-to-date the Civil Code.

CHAPTER III

THE PRESERVATION OF THE CIVIL LAW

It is a general principle of public law that while the change of sovereignty in a territory makes the political laws therein ipso facto superseded by the political laws of the new sovereign, it is no less settled that the great body of municipal or private laws or those defining private rights and the relations between individuals and those designed to preserve public order and peace in the community, continued in force in so far as they are not inconsistent with the laws and political institutions of the new sovereign until they are altered or repealed by direct action of the new government.⁷ With respect to the private laws of Spain in the Philippines upon the change of sovereignty by the United States, our Supreme Court held that they were considered as severed from Spanish jurisprudence and retained in force in the Philippines to the same effect as if Congress enacted entirely new laws based upon the same Spanish laws.⁸ Probably because of these well known principles of Constitutional Law, President McKinley in his Instructions to the Taft Commission was careful to enjoin that "the main body of laws which regulate the rights and obligations of the people should be maintained with as little interference as possible", while at the same time urging that changes be made in the procedural and criminal laws of the country.

In line with this commendable conservatism of the early American authorities as regards changes in our private laws, the writer advocates that in the proposed revision of the Civil Code, one of the guiding principles should be that the Spanish

⁵ Ibert, *Mechanics of Law Making*, pp. 30-43.

⁶ Sinco, *A Review of the Rev. Penal Code*, X *Phil. Law Journal*, 165.

⁷ *Vilas vs. City of Manila*, 220 U. S. 345; 55 L. ed. 491; 42 *Phil.* 953; *Roa vs. Collector of Customs*, 23 *Phil.* 315.

⁸ *In re Shoop*, 41 *Phil.* 213; *U. S. vs. Smith*, 39 *Phil.* 533; Sinco, *Philippine Gov't. and Political Law*, p. 54.

Civil law should in the main be preserved in the Philippines. There are many considerations why it is advisable to adopt this wise course of action. The Philippines is primarily a Civil law country. For about four hundred years the Filipino people have been accustomed with the Civil law. They have been bred and cultured in it. Legally and socially, the Civil law system has become the pith and core of their lives and properties. As J. Ma. Fabregas del Pilar has written in commenting on President Bocobo's lecture on "La supervivencia del Derecho español en Filipinas", "tres siglos de dominacion no pasan sin dejar profunda huella en la vida civil".⁹

Doctor Jose P. Laurel once said that "it will not perhaps be an exaggeration to state that so far as private law in civil matters is concerned there is no system on the face of the earth better adapted to the customs, traditions, and institutions of the people of these Islands than the Civil Law".¹⁰ And President Bocobo in the lecture referred to above which he delivered before the Real Academia de Jurisprudencia y Legislacion in Madrid, Spain, in 1928, explained the survival of the Spanish Civil law in the Philippines in spite of the gradual and persistent invasion of the Anglo-American law in every domain of our public and private laws as follows:

(1) La adaptacion del Derecho Civil español a la manera de ser de los filipinos y sobre todo a la tradicion de la familia filipina.

(2) La superioridad del Derecho romano que se inspira el Derecho español sobre el Derecho Norte-Americano.

Moreover, the Civil law, unlike other branches of the law, is the one most stable and the least susceptible to change. The reason for this characteristic of the Civil law can easily be explained. "The Civil law affects the relation between husband and wife, and between parent and child; it has to do with the holding and enjoyment of property; it deals with the ways of dividing inheritance and it regulates the general transactions of the inhabitants. It is the law that becomes part and parcel of the life of the community and is interwoven into the social fabric more than any other law. It is the law that is wielded into the people's affections and prejudices. Hence, the citizens may look even with indifference at the transformation of the law in other matters, but they will not endure any substantial

⁹ 7 Phil. Law Journal, 127.

¹⁰ 2 Phil. Law Journal, 93.

change in their Civil law. The New Government cannot impose a new system of family, property and successional and contractual law because it cannot by legislation prescribe new customs and new habits of thought. It might as well enact a law compelling every citizen to speak the language of the new sovereign."¹¹

To engraft into the great body of Philippine Civil law indiscriminate legal principles and institutions of the Common Law would be to create further chaos and confusion in the law of civil relationships in this country. Even as it is, the present state of legislation in civil matters is deplorable, necessitating this advocated revision as a result. The complications that may be created by undue incorporation of Common Law innovations can only be imagined.

This suggestion is not without justification in the legal history of other peoples. The experiences of Quebec as well as of Louisiana in the development of their Civil laws under the dominating influence of different conquerors could be taken as a guide by the Philippines in this respect. Both countries have come under the legal influences of different systems of laws, first of the Civil law and then of the Common Law, and yet when confronted by a choice as to which of these laws to select with which to permanently govern their civil matters, have both chosen the more deeply rooted and historically older Civil law in preference for the more novel and attractive Common Law.¹²

But there is another aspect which makes the preservation of the Civil law a prudent measure, and that is, that the Philippines is about to step into the threshold of independent existence. A couple of years from now, the Commonwealth Government under the Constitution being drafted by the representatives of the Filipino people in the Constitutional Convention will inaugurate a regime of complete autonomous existence for the Philippines; and a decade hence, barring unforeseen contingencies, we will be completely free. The seeming necessity for Anglo-American jurisprudence implied from continued American sovereignty would soon pass; it is needless to involve Philippine Civil Law with foreign matters that upon the withdrawal of the mother country, she would subsequently discard. Hence, although the

¹¹ Bocobo, *The Civil Law under the American Flag*, 1 *Phil. Law Journal*, 284.

¹² Laurel, *Lessons to be derived by the Philippines from the Legal History of Louisiana*, 2 *Phil. Law Journal*, pp. 91-95.

writer is a firm believer and advocate of the complete revision of the Civil Code, he does not subscribe to the idea of its re-vamping in such a way as to substitute Anglo-American law for the Civil law.

However, there are at present already incorporated into the Civil law of the Philippines various special acts which were felt essential to the changed conditions of the times and which in great measure have proved beneficial and workable in the Philippines. As to these laws certainly there can be no longer ground for objection into their incorporation into our proposed revised Civil Code. As a matter of fact, as will be shown later, they are a necessary adjunct to the reform of the Civil Code, either as substitutes for defective provisions of the old Civil Code of Spain or as ready materials with which to fill up gaps in said code.

CHAPTER IV

GENERAL CRITICISM AGAINST THE CIVIL CODE

The second suggestion advanced by the writer is that in the revision of the Civil Code, the criticisms of authoritative Spanish writers and commentators against it should be taken into consideration in order to remedy its conceded defects. Two distinct lines of inquiry will be followed in the investigation of these criticisms, namely, (1) general criticisms against the Civil Code as a whole, and, (2) criticisms against particular provisions.

The Civil Code has been criticized generally upon three important aspects, namely, the system of classification adopted, its contents and the spirit or tendency with which it is permeated.

On the System of Classification Adopted

The very nature of a code requires scientific arrangement. One great purpose of a Code is to shorten and simplify its manifold provisions. It must therefore be free from verbiage, cross-divisions, and cloudy classifications. It must have symmetry, consistency of language, and perfection in logical distribution. This is particularly required by a Civil Code because of the diversity and compendiousness of the subject-matter over which the Civil law treats. As one forceful civilist succinctly reasoned out, "Por algunos se dice que esta cuestion de plan en el codigo es de un interes puramente academico, pero

que carece de importancia para el legislador, para los tribunales y sus auxiliares en la aplicacion de Derecho y aun para el cuerpo social, debiendo reputarse asunto balidi que los libros sean cuatro u otro numero cualquiera y que sea esta o aquel el orden de su desarrollo. Nada mas falso. No puede ser diferente en ningun obra legislativa, y mucho menos en una tan compleja como un Codigo civil, formular la organizacion del Derecho de familia; de el de propiedad, etc. de cualquier modo y tratar, por ejemplo, de los testamentos al lado de los contratos o de la tutela inmediate despues de los Derechos reales".

While there is universal agreement among writers that some system of classification must be followed in the distribution of the materials of a Civil Code, there is nevertheless a manifest divergence of systems adopted by Civil law countries in the arrangements of the provisions of their Civil Codes. The most cursory examination of the principal book divisions followed by the Civil Codes of different countries will readily demonstrate this fact. The Civil Code of Portugal for example does not follow the example of either the French or the Italian Civil Codes which have been both patterned after the Roman law of tripartate book divisions. Instead, it divided its materials into four books much like the Spanish. The Civil Code of Guatemala and others, on the other have followed the French system of division. But those of Mexico, Chile and Uruguay contain four books dedicating one of them to wills and successions, so that this method of acquiring ownership might not be confounded with occupation, accession and possession. The Code of Baden is quite unique for all its provisions are divided into two books only. But it remains for the German Civil Code to revolutionize the system of codal arrangement. The division of the new German Civil Code differs profoundly from all other systems heretofore employed. It is divided neither into three nor yet into four but into five books. The fifth book deals exclusively with wills and successions in the same manner as did the Codes of Mexico and Chile on this matter.¹³ It is interesting to note also that the new Civil Code of the Republic of China which was promulgated four years ago (1930) followed the lines of the German Civil Code also distributing its materials into five books, although it has been expressly announced that the Civil Code of the Republic of China as published and promulgated in 1930 was not yet complete.

¹³ 1 Sanchez Roman, 575.

Be the divergence of divisions adopted by the codes of different countries might, there can be no doubt that the classification adopted by the Civil Code of Spain leaves much to be desired. Senator Beech of the Spanish Cortes found it textbook like.¹⁴ Sanchez Roman was more exhaustive in his criticisms of this point against the Civil Code. He wrote:

“Resulta, pues, contra el codigo, un cargo capital y triple, a saber:

“(1) Por haber adoptado, y aun empeorado el sistema de mas descredito cientifico y de menos justificacion y armonia con el sentido moderno, como es el modelo romano-frances.

“(2) Por no haber aprovechado las enseñanzas en este punto del plan de otras codificaciones civiles importantes y de los direcciones cientificas de mas autoridad.

“(3) Y por los defectos, arbitrariedades y completa falta de sentido organico, aun dentro del censurado plan adoptado, se ha verificado su desarrollo en la distribucion y articulado del codigo.”¹⁵

Let us explain in some detail in what way he considers the plan adopted by the Civil Code as suffering from “defectos, arbitrariedades y completa falta de sentido organico”. In the first place, a comprehensive general examination of the classification adopted by the Code, according to him, will reveal that it contains all sorts of defects, improprieties and misplacements. For example, the doctrines of “parentesco” is expounded in general terms as an incident of succession, but it is not even alluded to in Book One which treats of Persons, Filiation, the varieties and guaranties of filiation and of the rights produced by it, and where naturally the idea of “parentesco” should belong, it being as a matter of fact the origin of these and of other civil institutions such as guardianship, support, legitimacy, and patria potestas.

Again, prescription, which is combined in its acquisitive and extinctive aspects, is placed in Book Four which treats of Obligations and Contracts, instead of in Book Three which deals with the modes of acquiring property, obscuring thus its immense importance in the constitution of real rights, as means of acquisition, and disregarding for instance, the important modifications which inscriptions in the registry has wrought upon the doctrine of possession.

¹⁴ De Cardenas, Int., Manresa's Commentaries on the C.C.

¹⁵ 1 Sanchez Roman, pp. 577-578.

Donation, which, even in the place where it is located, reveals very clearly its predominant contractual aspect figures among the modes of acquiring ownership, for which reason, following the same principle of classification, should also have been included purchase and sale, and all contracts translative of dominion: pledge, mortgage, censo, which as constituted relations evidently possess the character of real rights but in their secondary aspect of constitution, not unique but much more frequent, which is that of contract, while, by an inexplicable inconsequence and by an arbitrariness more or less capricious, easements, and those which are called rights of usufruct, use and habitation, appear uniquely as real right in Book Two which treats of Property, thus suppressing their contractual character in Book Four of Obligations and Contracts.¹⁶

Of course, there are authors and commentators no less noted than the critics quoted above, who defend the classification adopted by the Civil Code. One of them is Francisco de Cardenas who, in his Introduction to Manresa's Commentaries on the Civil Code of Spain, considers the system of classification "la mas cientifica sin ser por eso perfecta". And accounting for the nonperfection of the classification adopted, he pointed out that it is not possible to make so rigorously logical classification of the materials of a Code in such a way that it would leave nothing to be desired. "All legislators posterior to Napoleon have attempted it but invain", he said. He agreed that the legislators should aim at as complete and perfect distribution of the provisions of the Civil Code as possible; but that if the acme of perfection is not thereby attained, the people should not despair because while it is the common fault of all written law that it could not be perfect, yet the remedy lies in its very nature as law which can be changed at any time. Manresa's defense of the inclusion of donation in the modes of acquiring property will be dealt with in subsequent topics.

The writer agrees with Sanchez Roman that the classification adopted by the Civil Code should be improved, in accordance with the modern science of Civil law codification brought about in recent years. Much could be learned in this respect from the classification of the modern Civil Codes such as:

- (1) The Japanese Civil Code promulgated April 27, 1896.
- (2) The German Civil Code promulgated August 18, 1896.
- (3) The Swiss Civil Code promulgated in 1907.

¹⁶ 1 Sanchez Roman, pp. 578-581.

- (4) The Brazilian Civil Code of 1916.
- (5) The Civil Code of the Republic of China partly completed and promulgated in 1930.
- (6) Bentham's Theory of Legislation.

On Its Contents

The second phase of the Civil Code usually pointed out by Spanish writers as generally defective refers to its contents. Viewed as a whole, the Civil Code has been judged to incur the paradoxical defect that while it is deficient in some vital respects, it is also at the same time excessive in others. It is said to be deficient because apart from some indubitable reforms in certain institutions, providing rules designed to meet new situations, and others introducing innovations copied from foreign lands, such for example as the institution known as the Family Council, the doctrine of absence, juridical persons, usufruct of the surviving spouse, etc., many of which are of doubtful utility however, the Civil Code is sadly lacking in provisions regulating certain modern relations and institutions which even at the time of the Civil Code were already in existence right in Spain, and could and should therefore have been provided for.

Among them Sanchez Roman cited the following:

(1) Provisions respecting the greater development of collective persons or the principle of association and of the distinction between individual and corporate property under different forms.

(2) Provision concerning the mobilization of property.

(3) Provisions about certain usual and modern contracts such as "el de edición", lease for a long period, special conventions between employers and employees, institutions of credit and insurance and chattel mortgage.

(4) Provisions concerning the more modern concept of pledge by virtue of which, for the purpose of promoting and encouraging agricultural credit, does not require the retention of the thing pledged by the pledgee.

(5) Provision referring to the work of children, concerning the life and existence of laborers, and of industry in general.¹⁷

(6) The dispositions governing leases—of urban lands, only three articles, and above all, of rural lands, only five articles—are not only deficient but also irritating, as for example,

¹⁷ 1 Sanchez Roman, pp. 588-589.

that which refers to the payment of expenses of the written agreement, which is catalogued as one of the obligations of the lessee.

(7) The prescription of perpetual leases.

(8) The unjust doctrine which deprives the lessee at the termination of the lease of the right to the improvements made upon the leased premises.

(9) The scant influence which local customs are made to have in leases, a very necessary element (in Spain) in this class of contracts, which offer multiple varieties according to the usages of every region.

(10) The introduction of "retracto de asurcanos" which, even if its application was restricted in the reformed edition of the Civil Code, is a novelty only favorable to big land owners but prejudicial to small ones.

(11) The lack, in short, of all precept which tend to protect the small from the big landholders and the laborers from capitalists and employees from industrial establishments.¹⁸

There are two principal reasons upon which this deficient character of the Code are attributable. One is the natural hardship that is encountered in every reform of the Civil Law. The other is that already pointed out as the reluctance of the Codifiers of the Spanish Civil Code to broaden the compass of the Project of the Spanish Civil Code of 1851 which was expressly made the pattern of the Spanish Civil Code of 1889 by the ley de Bases of May 11, 1888. Sanchez Roman recognized this fact when he wrote in extenuation of his acrid criticisms against the Civil Code on this point, "No seria justo el censurar al codigo si pretendieramos que toda esta transformaci3n, y principalmente todo lo que obedece a la influencia de los desenvolvimientos economicos, se hubiera realizado con motivo de su formaci3n, porque ningun Derecho, como el privado llamado civil, pide mayor respeto al elemento historico, ni hace mas peligroso un sentido irreflexivamente radical y transformador, aparte de lo que no lo autorizaba, sino todo lo contrario, la ley de Bases de 11 de Mayo de 1888."¹⁹

He insists however, that even with the requirements of the ley de Bases, had the codification commission been more of progressive codifiers than historic compilers, a much improved and better Civil Code could have been promulgated. As he express-

¹⁸ 1 Sanchez Roman, pp. 592-593.

¹⁹ 1 Sanchez Roman, 589.

ed it, "Respecto de esta nota de deficiencia del contenido del código y a los propositos de estas indicaciones generales de critica, no corresponde discutir el mas y el menos de aquella, ni hacer un inventario de las instituciones que, conservando ese sentido historico, y ese proceder pausado, limitado a mejorar, aclarar y enriquecer en reducida medida el Derecho civil patrio, pudieran, sin embargo, haberse traído a el, y con ellas algo de la evolución y transformación científicas que el moderno contenido del Derecho civil va ofreciendo. Basta con dejar consignado como cierta la afirmación de que el contenido del código ofrece la nota de deficiente, aun en la consideración relativa, circunstancial y limitada, de los propositos del alcance de su formación. Es, bajo este punto de vista un código bastante atrasado para los tiempos en que nace, con una diferencia proxima de medio siglo por lo menos".²⁰

Now, viewing the contents of the Civil Code from another angle, it could be seen that whereas it is sorely deficient in the matters already adverted to, yet it has also overdone itself when it numbered among its provisions codal precepts which properly belong to adjective rather than to substantive law as the Civil law is. The most notorious example of this excess is that which refers to the chapter on "Proof of Obligations", which is undoubtedly evidentiary, and therefore should have been in a Code of Civil Procedure. Another excess of a similar nature is that irritating procedural privilege respecting the proof of salaries of servants provided by Article 1584 of the Civil Code which was rigorously censured in both houses of the Cortes and by opposing parties, establishing that the master shall be believed, except upon proof to the contrary, about the amount of the salary of the domestic servant and of the salary earned during the year, legislative excess which does not serve to compensate the obligation imposed upon the master of indemnifying and paying the servant whom he discharges without just cause the salary earned and of fifteen days in addition, which is also provided. Happily for the Philippines, Article 1584 had been amended by the Philippine Legislature in order to require the fact of the employment and the salary of servants as provided in said article be established and proved by the ordinary means required by law.

²⁰ 1 Sanchez Roman, pp. 589-590.

On the Spirit or Tendency of the Code

The third capital charge often made by critics of the Civil Code is that it is backward and unprogressive. Perhaps the most representative of these criticisms was that launched by Azcarate on the floor of the Spanish Cortes to the effect that the Civil Code "No satisfacía las exigencias que racionalmente pueden formularse respecto de un código civil, en los actuales momentos, (1) ya en orden al respeto y perfección del sentido individualista de los tiempos, (2) ya en orden a las rectificaciones necesarias de este principio abstracto en lo que pudiera oponerse a la reorganización social y sentido corporativo".

As justification of the first charge, the following instances are cited by a writer who shares the same views:

(1) The new limitation which is imposed upon the law of property by the introduction of "retracto de asurcanos" even after its application was restricted by the new redaction of Article 1573 in the second official edition of the Civil Code.

(2) The limitation imposed upon the power to donate.

(3) The interpolation, which is claimed unnecessary and prejudicial because of the vices of Spanish bureaucracy, of State entities, such as charitable institutions and schools, to succeed intestate in default of relatives within the sixth degree.

(4) The lack of express regulation of contracts required by modern civilization, specially with respect to the so-called liberal professions, such for instance as of "el de edición", and the non-recognition of contracts of services or personal hiring, aside from those provided concerning labor of servants and wage-earners and construction works for a fixed price.

(5) And, on the other hand, the individualist philosophy which dominates the Code was not perfected even because of the non-rectification of the arbitrary power which the Code bestows to an individual by virtue of ownership over a thing, which, in a perfected individualist doctrine, should be deemed as carrying with it implicitly that prudent limitation implied from rational use which in turn is determined by the very nature of the property itself.

As proof of the second charge, that is of the little that is social and corporate in the Code, may be cited the following:

(1) The timidity and insufficiency with which it recognizes the notion of collective persons, which it denominates juridical, "considerando entre ellas, en primer termino, como tal, la familia, que pasa desapercibida".

(2) The disregard of corporate property and of its rules inseparable corollary of the recognition of this collective personality.

(3) That of not bestowing upon patria potestas its modern character of a function rather than as a right or power.

(4) The unequal condition of authority, with regard to the obedience of children, principally in giving to the mother with respect to the father while the latter lives, authority which should be equal.

(5) That which perturbs and disauthorizes the concept of patria potestas, the lamentable doctrine of the necessary and limited compulsory dowry.

(6) And "tantas otras rasonancias como en el Codigo ofrece de esa falta de sentido organico y social, sobre todo en lo familiar, dentro de los limites del codigo civil, a cambio de lo que parece preocupacion sistematico y rutinaria de los derechos del individuo, aun con quebranto de aquella verdadera unidad social que la familia representa".²¹

Valverde's criticism of the Civil Code upon this point was that it is too individualistic because it ignored the social movement which even in those times had already been agitating mankind. His concept of the Civil law has been summarized as follows:

(1) The Civil law should not be socialistic but socialized.

(2) Private property should not be suppressed but purified.

(3) Cooperative practice should be encouraged.

(4) The Civil law should not be made an instrument of revolution but only of reformation.

Miscellaneous Criticisms

There are a variety of phases, interesting also as criticisms against the Civil Code which are presented here as a prelude to a more detailed discussion of the particular criticisms against it. Among them are the following:

(1) The profound and disturbing novelty introduced with respect to the sources of the law, suppressing the general customs and admitting only that of the locality.

(2) Some of the applications, of a nature perhaps over extensive, to which the new concept of natural children has

²¹ 1 Sanchez Roman, 592.

given way, comprehending at times, other classes of illegitimates.

(3) The conservation of "esponsales" in the form and with the economic sanction with which it is established.

(4) The same case with the antiquated and in disused doctrine of adoption which could advantageously have been substituted by the modern doctrine of "patronato". This provision has already been changed by the Philippine Code of Civil Procedure, Act No. 190.

(5) In providing, as a general rule that the declaration of incapacity be made summarily, and the dangerous doctrine that the defender of the incapacitated necessitates the authorization of the Family Council, which has already also been repealed in so far as the Philippines is concerned by Act No. 190.

(6) The scanty formula of Civil marriage, already remedied by the Philippine Marriage Law, Act No. 3613.

(7) The specie of fiction of death and anticipated succession of parents developed by the obligation of giving moiety of the legitime to female children who marry.

(8) Various provisions relative to guardianship, since then repealed by Act No. 190.

(9) Not a little inconvenience which was occasioned by the introduction of the institution known as the Family Council, already repealed here by the law cited above, Act No. 190.

(10) The development of the concept of patria potestas which leaves much to be desired.

(11) The absence, already indicated, of the doctrine of corporate property.

(12) Various articles relative to possession.

(13) Some of those which treat of easements and the neutral consideration as a mere right which it gives to usufruct, use and habitation.

(14) The lack of mention among real property as modification of property, of censo, mortgage, and pledge which is placed solely among contracts.

(15) The anticipation of the age of majority.

(16) The reduction of the legitime.

(17) The usufruct of the surviving spouse which is perhaps an inconvenience as a compulsory and irrevocable legitime, because some cause might arise subsequently which should justify its revocation as concubinage on the part of the husband and licentious life on the part of the wife.

(18) The liberty to execute marriage settlements, fixing the economic management of the family under the principle established by Article 1315, if its effect is a little made less effective and contradicted by Article 1320.

(19) The regulation of the doctrine of absence which is now of imperative necessity. This has since been also provided here by the Code of Civil Procedure.

(20) The suppression of the recourse of lesion.²²

CHAPTER V

DEFECTIVE PROVISIONS OF THE CODE

These succeeding chapters constitute a rough survey of the reformable provisions of the Civil Code arranged in accordance with the other three suggestions of the writer, namely, (1) that deficiencies in the Civil Code be filled up, (2) that the provisions in conflict with Filipino customs be reformed, and (3) that obsolete provisions therein be abolished. This chapter on defective provisions of the Civil Code is but a continuation of the criticisms against it but in the particular and not the general aspect.

A word of explanation is perhaps necessary for the nature of the treatment made of the succeeding topics. In them the writer simply indicated briefly but comprehensively the provisions or institutions of the Code which the writer believes should be reformed. As had been announced in the foreword of this paper, the writer originally planned to put in detail all the defects of the Civil Code which the writer has discovered from the sources accessible to him; but because of the immensity of the task and the limited time at his disposal, he had to desist from the original plan. So that in the following discussion not only does the writer not pretend that all defects of the Civil Code have been dealt with, but also even those specific provisions he had cited have been but only dealt with broadly but comprehensively. The writer had been convinced that to inquire into and deal extensively with each and every defect that he has found from authoritative sources should not be within the purview of his paper.

Of the Marriage Law

The present Marriage Law is Act No. 3613 which like its immediate predecessors is of American origin. It governs the

²² 1 Sanchez Roman, 594-596.

formal aspects of marriage. The essential nature of the institution, however, as well as the consequences arising therefrom, are still under the sway of Spanish laws.²³

What is treated here in the Marriage Law itself. Among its provisions which badly need reform because defective are the following:

(1) Section 9. There is nothing in section 9 of the Act or in any other section which would remove the ambiguity of General Orders No. 68, with regard to the age of the contracting parties. It only confirmed the doctrine laid down in the case of *Aguilar vs. Lazaro*, 4 Phil. 735 to the effect that marriages between parties above 16 and 14 male and female respectively without the parents' consent are valid (the parties are made punishable only under the present law); that marriages between parties above 7 but below 16 and 14 male and female, are valid if consented to by the parents and voidable if there had been no such consent; and that marriages of parties under 7 are the only ones absolutely void without parental consent. This state of the law makes marriages between children of 7 years old valid if consented to by the parents, which is absurd to say the least. The New Marriage Law confirms the doctrine of the *Aguilar* case because section 30 did not refer to the section requiring parental consent found in section 9, but to section 2 referring to legal capacity.²⁴

(2) Section 10. The posting of the 10 day notice is dispensed with if either of the applicants and a priest or minister of the religion professed by such applicant state in writing and under oath that the rules and practices of the Church, etc., under which the applicant desires to contract marriage requires bans or publications prior to the solemnization of the marriage. The defect here is that it leaves the church officers to say that bans are required whether or not such is the fact.

(3) Section 27. This provision leaves it to the parties to practically dispense with the formal requisites of the law, thus defeating its ends, because it says that failure to comply with the formal requirements will not invalidate the marriage provided that when it was performed, the spouses or one of them believed in good faith that the person who solemnized the marriage was actually empowered to do so and that they believed also in good faith that the marriage performed was per-

²³ Bocobo, *Law of Person and Family Relations*, pp. 17-18.

²⁴ Dean Bocobo, 9 Phil. Law Journal, 121 et seq.

fectly legal, even though the person performing the marriage was not in fact and in truth authorized to do so, and that the marriage performed was in truth and in fact absolutely void.

(4) Sections 34 and 35. The power given to the director of the Philippine library to grant, refuse or cancel authority to solemnize marriage to priests or ministers of the gospel of any church, sect or religion of any denomination is unconstitutional because it is a delegation of the legislative power; because the law is incomplete and leaves an officer to complete it; because it gives to the Director an arbitrary power to discriminate between one religious class and another; and because it is a violation of the constitutional guaranty of freedom of religion.²⁵

Of the Divorce Law

The present divorce law of the Philippines is Act No. 2710. It is purely Filipino, including all its idiosyncracies. Prior to Act No. 2710, the laws on divorce in force here were those contained in Titles 2, 9 and 10 of the Fourth Partidas.²⁶ Since the enactment of Act No. 2710, much literature have been written of its defects, legal or otherwise, and series of attempts had been made time and again to liberalize or reform it but to no avail. May be it is a faithful reflection of the Filipino nation's attitude against divorce in general. Its critics however would want to ascribe the failure to reform it to the moral cowardice of Philippine legislators of the past. Be that as it may, however, there can be no doubt that there are conceded defects in it which it is advisable to reform whether or not one is in favor of the liberalization of its provisions by the addition of more grounds than those recognized in the law.

(1) Section 1. This section should be reformed in the sense that even if the only two grounds for divorce, viz, adultery on the part of the wife and concubinage on the part of the husband, which are recognized by it were to be preserved, they should be made clearly to include the adultery committed by the husband with the wife of another man, and the concubinage of the wife with the husband of another woman. For as our present law is interpreted (*Francisco vs. Tayao*, 50 Phil. 43) the situations above presented are not sufficient grounds for divorce, unless perhaps, subsequent actions were instituted against

²⁵ Tena, 12 Phil. Law Journal, pp. 425-449; Bocobo, 9 Phil. Law Journal, 121.

²⁶ 10 Phil. Law Journal, 293.

the husband for concubinage and against the wife for adultery, which actions, having been based upon crimes on which criminal prosecutions had already been had, could easily be barred by the constitutional inhibition against double jeopardy. As one keen observer has written graphically, "As far as morality and the feelings of the husband and wife are concerned "concubinage" and "adultery" are two different collars to exactly the same dog. But the legislators have given that dog a collapsible set of teeth. Just as long as that dog wears one or the other collar, it can bite and bite hard; but when and if, by a stroke of fate, it has two collars on, it loses and drops out its teeth at the very moment it needs them most".²⁷

(2) Section 7 should be amended so as to provide expressly that the spouse against whom an action for divorce has been brought shall be entitled to alimony pendente lite. This alimony grant is uncertain at present in view of the fact that Article 68 of the Civil Code had been suspended in the Philippines, although Justice Cooper of the Supreme Court (*Yangco vs. Rhode*, 1 Phil. 404) sustained that alimony pendente lite is an incident of a divorce proceeding, which view has also been confirmed by the case of *Sweeny vs. Santos*, 4 Phil. 79.²⁸

(3) Section 8. The prerequisite of prior conviction of either spouse should be modified because it is cruel and inhuman to force people to send their unfaithful spouses to jail whether they are inclined to do so or not, so as to free themselves from an unhappy marriage. Considerations of the children alone should plead for this reform. Moreover, which ever way the spouses would turn, under the law, they face a life of unpleasantness. If they prefer not to go through criminal proceedings, they remain unhappily wedded. If they agree to live freely, they are forced to practice common law relationships. If they follow the path of the law, they must perforce have to send their partners to jail even if such procedure were revolting to them.

On another point, as it is, section 8 has loopholes in it. For example, the case of *Juarez vs. Turon*, 51 Phil. 736 decided that the record of conviction of adultery cannot be admitted as evidence in the civil case so as to prove the commission of the

²⁷ Laput, *Our Vicious Divorce Law*, 10 Phil. Law Journal, 123.

²⁸ Angeles, *An Act to establish Divorce*, 5 Phil. Law Journal, pp. 265-269.

crime. This is anomalous because the sole purpose of conviction is precisely to furnish an incontestable case for the civil demand for divorce.²⁹

(4) Section 9. This provision has been the object of the most acrid strictures from all sectors of the populace, male as well as female, lawyers as well as layman. And justly so because it is undoubtedly defective. From the legal point of view, it suffers a triple defect. First, it is confiscatory of the property of the spouses. Paragraph 2 of this section requires that in order that the bonds of matrimony between the spouses may be considered as dissolved, it is essential that the spouses shall deliver to each of their children within a period of one year the equivalent of their legal portion. The law does not spare even the innocent spouse, for he is also burdened with the duty of giving up his property to his children and is forced to live in abject poverty the rest of his life just because he has made the terrible mistake of suing out for divorce from his unfaithful spouse.

Second, if the above requisite is not fulfilled by the same section 9 paragraph 2, the bond of marriage will not be considered as dissolved. Consider the anomaly and injustice of this provision. Suppose the guilty spouse has performed the above requirement but the innocent spouse had not being naturally reluctant to deprive himself of his property, being in truth the innocent one. Here will be a situation where the marriage would, on the guilty spouse's side be dissolved, and on the innocent's side still unbroken. So that, if the guilty spouse married again, his second marriage would be perfectly valid, the other one having been already dissolved with regards to him. Yet if the innocent spouse married again, he would be liable to conviction for bigamy, because under the eyes of the law, the former marriage is not dissolved, the requirement for its dissolution as prescribed by paragraph 2 of section 9 not having been previously complied with. Under a situation like this, the innocent spouse for whose interest the Divorce Law had decidedly been enacted, suffers more punishment than the guilty spouse who goes scott free.

Third, the law is vague and uncertain. Section 9 paragraph 2 says, the equivalent of what would have been due them as their legal portion if said spouse had died intestate immediately after the dissolution of the community property would be given to

²⁹ Marquez, 10 Phil. Law Journal, pp. 279-297.

the children. Now, under the provisions of the Divorce Act, and the Civil Code, what are the children to receive, and a converse, what are the parents to deliver? The entirety of his estate or two thirds of it? The first is indicated by "as if he had died intestate"; the second finds support in the words, "legal portion by way of legitime". The concepts involved in the two phrases simultaneously used in the law are so fundamentally contradictory that neither may be adopted without discarding the other. If it is held that the law means two thirds of the estate, then the words "as if he had died intestate" must be discarded as worthless; and if the law is held to mean the entirety of the estate, then the children get more than their legitime. Decidedly, section 9 paragraph 2 is very ambiguous.³⁰

Of course, it is but proper to say here that the purpose of the legislator may have been the welfare of the children. But this purpose could be attained and preserved by a corresponding provision in the revised edition of the law.

Of the Husband's Power over the Conjugal Property

Under the Civil Code the parties are free to stipulate with certain limitations the conditions under which their present and future property shall be subject. In default of such agreement, the regime of the legal conjugal partnership governs.³¹ The provisions of law with respect to the excessive powers which the husband wields over the conjugal partnership under the latter case are the ones subject of this criticisms.

There are two outstanding defects of the legal conjugal partnership as it exists: (1) the excessive powers bestowed upon the husband over the conjugal property, and (2) the deficient remedies granted to the wife as means with which to check these vast powers. Examining pertinent provisions of the Civil Code, we find these salient facts: That the husband is the administrator of the conjugal partnership (Art. 1412); in addition to his powers as manager, the husband, for a valuable consideration may alienate and encumber the property of the conjugal partnership without the consent of the wife (Art. 1413 paragraph 1) in derogation of the accepted rules governing the powers of a general administrator; and certain other powers (Arts. 1414, 1415) not necessary to the discussion; Article 1413

³⁰ Paredes, 13 Phil. Law Journal, pp. 41-71; Angeles, 5 Phil. Law Journal, pp. 271-277.

³¹ 31 Arts. 1415, 1416, C.C.

paragraph 2, makes certain limitations to these powers which will be explained later. Turning upon the direction of the wife, we find that (1) the power of administration is absolutely denied her, because as a general rule she cannot bind the partnership without the consent of her husband except in expenses incurred for the daily maintenance of the family (Art. 1416) and when the management of the partnership is transferred to her due to certain conditions (Arts. 1441, 1442 & 1436); (2) she may with her husband's consent make gifts to their children (Art. 1409).

Now, examining the limitation imposed upon the husband in the alienations of the partnership property (Art. 1413 par. 2) it could be seen that the first consists of a vague general principle of law of doubtful utility, and the second, a futile means with which to prevent the husband from improvident acts and useless as a source of protection to the wife's interest in the partnership property. Nor is there anywhere in the Code some specific provision which gives to the wife while the marriage subsists a right of action against husband or the person with whom he contracts. All that the law gives is a right to be indemnified for damages sustained, which action however may only be brought after the dissolution of the conjugal partnership (Art. 1413 par. 2). But even this remedy is illusory because it based on fraudulent intent on the part of the husband—a thing which is hard to decipher and still harder to prove. It is true that according to Manresa, by virtue of Article 1428, Article 1363 No. 2 is made applicable to cases of indemnization by the husband for the injuries to the interests of the wife in the conjugal partnership due to the bad administration and fraudulent transfers of conjugal properties and that she also has a right of action against third persons who have contracted with the husband when the latter has no private property sufficient to indemnify the wife or her heirs. But all these could be had only after the termination of the conjugal partnership when all the properties may have been transferred from hands to hands, and when evidence of identity and ownership would have been rendered difficult of proof. The other two remedies he pointed out of going to court and having such fraudulent acts of the husband recorded, as well as of asking for the separation of the conjugal partnerships are cases of little avail to her the first constituting very scant protection de-

feasible by prescription, and the second an extreme which few wives will take.

That the present state of the law is deplorable has been pointed out by sources of unquestionable eminence in the realm of the Civil law, among them Rivarola, "Condicion Juridica de la Mujer" Vol. 16 p. 264; 9 Manresa pp. 73, 95, 697; 2 Valverde, 285 Tratado de Derecho Civil Español"; Castan, "Administracion de la sociedad de gananciales". Another consideration which argues for the amelioration of the wife's interests in the conjugal partnership, at least in the Philippines, is that in this country, wives have already been emancipated with respect to their paraphernal property by the recent enactment of Act No. 3922 known as the paraphernal property law.

As possible sources of guidance in the framing of the law in this respect, the legislations of the following countries are of interest to study:

- (1) Civil Code of Brazil, Arts. 235, 237.
- (2) German Civil Code, Arts. 1444, 1445, 1446, 1447, 1449, & 1456.
- (3) Civil Code of Porto Rico, Sec. 159.
- (4) California Civil Code, Secs. 172, 172a.
- (5) New Mexico, Chapter 6 Sec. 6.
- (6) Nevada, Act No. 1873 as amended by Act No. 1897 Sec. 6.
- (7) Idaho, Revised Statutes, Sec. 2505.
- (8) Washington, Rem. Code, Sec. 5918.

Of Adoption

(1) Section 765 et seq. of Act No. 190 in relation to Article 174 of the Civil Code is ambiguous upon the question of whether parents with legitimate or legitimated children should or should be permitted to adopt since while one writer affirms that the Code of Civil Procedure allows it,³² yet another with great authority sustains that it does not.³³

(2) There should also be an express provision permitting adoption of natural and spurious children; as the present law stands natural children cannot be adopted by their natural parents although Manresa believes spurious children may be.³⁴ The reason for this is that adoption is intended to establish arti-

³² Hilado, 4 Phil. Law Journal, 316.

³³ Bocobo, Law of Persons and Family Relations, Chapter 12.

³⁴ Bocobo, Ibid; 2 Manresa, pp. 71, 72.

ficial filiation among those not so related by blood, but since an spurious child may be adopted, there should be no reason why a natural child may not be adopted.

Of Rights Arising from Legitimate Filiation

(1) Articles 129-141 C.C. Under our jurisprudence, "the effect of these articles is to declare that a natural child has no rights whatsoever unless he has been recognized in one of the ways pointed out by those articles. A natural child not acknowledged has no rights whatsoever".³⁵ This rigid condition of the law should be modified so as to conform to the opinion of Manresa to the effect that he should be entitled to support at least.³⁶ This is in accordance with the trend of modern legislation. In England, the former rigor of the law which also completely denied support to bastards was ameliorated as early as 1576 when the Poor Law Act of that year put the duty of providing maintenance on both parents. In the United States, while the illegitimate child under the Common Law does not inherit from the father, the statutes of probably all the States of the Union have recognized the right of the illegitimate child to inherit from its mother. According to President Bocobo, in Germany, legitimate and illegitimate children have the same rights with respect to the mother, observing in his own inimitable way "that this seems to be reasonable as they are all equally her children anyway, and that as a matter of fact, the illegitimate child is perhaps even dearer to her being a reminder of her love and romance". Manresa sees justification for the plea for support on the ground that the children should not be made to bear the consequences of the evil deeds of their parents.³⁸

Of the Modes of Acquiring Ownership

Upon the classification of the modes of acquiring ownership, Sanchez Roman found fault as follows:

(1) That it is unsystematic because it is not based upon sound classification.

(2) That it is imperfect because it includes donation which is contractual.

(3) That it is incomplete because it does not include intellectual creation.

³⁵ Buenaventura vs. Urbano et al., 5 Phil. 1, 10; Concepcion vs. Untaran, 38 Phil. 704.

³⁶ 6 Manresa, 573.

³⁷ Brann vs. Bell, 192 Fed. 247.

(4) And, lastly, that it is illogical because prescription should have been included in Book Three respecting the modes of acquisition of ownership and not in Book Four under obligations and contracts.

According to him, the classification should be:

- (1) Intellectual creation.
- (2) Occupation.
- (3) Tradition.
- (4) Prescription.
- (5) Succession.

He took off law and donations as means of acquiring ownership and inserted in intellectual creation and prescription.³⁹

Manresa however strenuously defended the inclusion of donation among the modes of acquisition of ownership on the following grounds:

First, there are differences between donations and contracts. For example:

(1) Many who can contract may not have capacity to donate and on the other hand, there are those who may be donees and even accept donations who have no capacity to contract.

(2) A person may contract with respect to all his property but he may not donate all his property, and no one may give or receive by donation what he cannot give or receive by will.

(3) There are special rules of donations referring to its recession by fraud of creditors, its special causes of revocation, its reduction because inofficious—rules which do not apply to ordinary contracts but to donations alone.

Second, there are similarities between donations and successions. For example, both successions and donations are in general gratuitous. Again, successors are not always the continuators of the personality of their decedents, even under the Civil Code because there is among its provisions such a thing as acceptance of inheritance with benefit of inventory.⁴⁰

De Cardenas justified the inclusion of donation among the modes of acquisition of ownership by explaining that the character of donation as a contract is doubtful. "Este es, por cierto, uno de los casos dudosos que ofrece la clasificacion de las leyes. Disputase si la donacion entre vivos en un mero acto legal, como el testamento, o un verdadero contrato. Pero no se puede negar

³⁸ 6 Manresa, 573.

³⁹ 3 Sanchez Roman, pp. 204-206.

que hay en ella dos periodos o momentos diferentes, en cada uno de los cuales ostenta diversa naturaleza juridica. Aceptada por el donatario, reviste la donacion las condiciones de un contrato sui generis? pero que es ella en el momento anterior, desde su otorgamiento por el donante hasta su aceptacion por el donatario? Todavia no es contrato y sin embargo envuelve una obligacion aunque revocable, como los testamentos; y sujeta a una condicion potestativa, pero que si se cumple, convierte el acto unilateral en bilateral contrato. Y como no es facil separar las disposiciones legales referentes a cada uno de los periodos diversos del acto, tanto puede estar la donacion entre los contratos, como entre los modos de adquirir el dominio, en compania de los legados y testamentos." ^{40a}

The question of which is the more reasonable opinion with respect to the inclusion or non-inclusion of donation, I leave to the legislator to decide. But I consider the enumeration of the modes.

The question of which is the more reasonable opinion with respect to the inclusion of donation among the modes of acquisition of ownership and therefore should be followed, I leave to the legislator to decide. But I consider the enumeration made by Sanchez Roman, by eliminating law and by including prescription and intellectual creation, progressive and therefore recommend that it be adopted in the revised edition of a Philippine Civil Code.

Of Joint and Mutual Wills

By virtue of decisions of the Supreme Court in the case of *Macrohon vs. Saavedra*, 51 Phil. 267 and *Cabigting vs. Samia*, 35 Phil. 284, it has been assumed that joint and mutual wills are now allowed in the Philippines in spite of the provisions of Articles 669 and 773 of the Civil Code expressly abolishing such wills. A close study, however, of the true effects of these decisions will reveal that the Saavedra case was passed upon sub silentio by the court, the question of whether the joint will there made was valid or invalid by virtue of the enactment of Act No. 190, not having been raised and argued by the parties nor consequently inquired into and passed upon by the court. The court in this case simply assumed that such a will was valid without inquiring into the reason why. And in the Samia case,

⁴⁰ 5 Manresa, 63-66.

^{40a} Introduction to Manresa's Commentaries.

the decision of the court could have no bearing upon the present status of the law because the will there involved was one executed before the Civil Code and therefore governed by laws under which such wills were valid and not under the Civil Code.

Because of this, there has been some question as to the exact status of the law. In the revision of the Code it is proposed that Article 669 C.C. be preserved expressly, thus clearing the ambiguity existing in the law at present. The same reasons which induced the Spanish codifiers of the Civil law in repealing Law 9 Title 7 and Book 3 of the Fuero Real, and of Law 35 Title 11 of 5th Partida, argue for the abolition of the joint and mutual will, namely, that they offered a fertile chance for any of the spouses to exercise fraud and undue influence over the will of the other consort, and, in not a few cases, hasten his or her death.⁴¹

Of Relative Incapacity to Inherit by Notary

Dispositions in his favor by the person of whose last will and testament he intervened in the drafting are valid in accordance with the doctrine laid down by the Supreme Court in the case of Valera vs. Purruganan, 4 Phil. 719. The reason is that the intervention of the notary public is no longer required. But there is a very tenable opinion expressed by President Bocobo to the effect that the provision of the Civil Code relatively disqualifying an attorney or notary public should be considered still in force because (1) the law clearly placed the notary public in the same level with priests and guardians with respect to this relative disqualification, and since by the same court, it had been held that with respect to the former two,⁴² the provisions of the Civil Code are still in force, there is no reason why with respect to the latter it is not. (2) As a matter of fact, there is greater temptation for the lawyer to practice undue influence upon the client than the priest or guardian. The contention that under the present law, the intervention of the notary public is not required does not adequately cover cases in which they do actually participate. (3) The reasoning of the court in the case of *In re Smith's Will*⁴³ to the effect that the

⁴¹ 6 Sanchez Roman, 311.

⁴² Calderon vs. Provincia del S. Rosario, 28 Phil. 164.

⁴³ *In re Smith's Will*, 95 N. Y. 516, Costigan 43.

lawyer who drew up the instrument in whose favor dispositions are given gives a presumption of undue influence and that the burden of proving the contrary is upon him, is more reasonable.

Of Adultery as Ground for Disinheritance

(1) Article 756 section 2 paragraph 2—ambiguous. With respect to the provision of section 2 paragraph 2, there has been a question as to whether incapacity by reason of unworthiness is applicable only to paragraph 2 or to the different numbers of the whole of Article 756 numbering seven causes in all. Manresa is of the opinion that the incapacity referred to here applies only to paragraph 2 of sec. 2 of Article 756, so that in case of an attempt against the life of the testator, his spouse or descendants or ascendants, the legitime shall not be lost by such attempting person.⁴⁴ President Bocobo again on this point expressed a different opinion, that is, that the incapacity by reason of unworthiness is applicable to the whole of Article 756 especially in view of the fact that, (1) there are graver circumstances than merely attempting against the life of the testator which are including in Article 756, such for instance as the commission of adultery against the wife of the decedent, and (2) also that Article 761 with respect to the right of representation by the children of the person to be incapacitated refers to any or all of those mentioned in Article 756 and not to paragraph 2 specifically only. I believe with the opinion above set forth but to obviate any doubt, the law should be made to express itself to this effect.

Of Incorporation by Reference

The present status of the law with respect to the doctrine of incorporation by reference is uncertain. While some authoritative sources consider that this doctrine is not possible in the Philippines by virtue of the express provisions of the Code of Civil Procedure requiring the signature of the testator in each and every page of his will in order that the same may be considered as duly executed and valid, yet others have held that since the law referred to above is of American origin, it is therefore bound persuasively to follow American jurisprudence in which this doctrine is admitted. As a matter of law, by virtue of the case of *Unson vs. Abella*, 43 Phil. 494, incorporation by reference

⁴⁴ 6 Manresa, 61.

may also be said to be valid in the Philippines upon the fulfillment of certain well-defined conditions stated in this case. I believe, however, that our law is very clearly against the decision of the Supreme Court because of the requirement of signature by the testator in each and every page of his will which could not be strictly attained if incorporation by reference were recognized as valid. It is recommended therefore that the doctrine of the Abella case be revoked expressly by a contrary provision in the proposed revised code.

(NOTE: *This thesis is to be continued in the next issue.*)