# SOME SUGGESTIONS FOR THE REVISION OF THE CIVIL CODE

*(Continued from the January number)*

*By* RICARDO MONTELIBANO *

## CHAPTER VI

### ON DEFICIENCIES OF THE CIVIL CODE OF SPAIN

The third major suggestion advanced by the writer is that the deficiencies of the Civil Code be filled up so as to make it up-to-date. Of these deficient parts, the following may be mentioned as among the most important:

*Governing Conclusive Presumption*

(1) There should be a provision in the law expressly providing for a case of conflicting conclusive presumption.[45] Of course, there is the view sustained by some that when there are two presumptions in conflict with each other, supposed to be conclusive by the law, neither case could be taken as conclusive in fact, and that therefore both become rebuttable. This is not clear, however, but is only a deduction that has been made without any foundation in law. It certainly is safer to have some express provision governing the matter.

(2) As for the arbitrariness of the time fixed in Section 333 paragraph 3 of Act No. 190, I leave it to the legislator to determine. Because of its interesting nature, however, it is indicated here. The interesting and lively debate between President Bocobo and Mr. Herzog [46] and the thought provoking chapter of Dr. De los Angeles on the subject [47] in his text book on Legal Medicine furnish ideal starting point for the legislator in his investigations. The writer could not help making the observa-

* LL.B., College of Law, University of the Philippines.

[45] See Problems presented by Sebastian, 11 Phil. Law Journal 43; De los Angeles presenting similar problems, Legal Medicine pp. 480-482.

[46] Bocobo, Phil. Law Journal, 160; Herzog's Answer to Dean Bocobo's Article, 12 Phil. Law Journal, 501.

[47] 4 Manresa, 53.

tion however, after reading the able briefs for scientific change in the law in accordance with supposed advances in Medical science, that the Philippines is not yet ripe for this kind of reform because Medical science has not advanced in this country to the same extent as in some countries of Europe, like Germany for instance, in which this scientific law on paternity and filiation could be safely maintained.

*Governing the Classification of Possession*

Article 430 C. C. does not attempt to classify possession contenting itself in stating two of its concepts.[47] In this respect, it is deficient, for according to the most reasonable view of writers in Civil law, there are four kinds of possession, namely, (1) mere holding in fact, without any reason whatsoever in law; (2) holding which may be called juridical but not real right of possession; (3) the true real right of possession; and, (4) the right of dominion.[48] Although these different kinds of possession may be found scattered in the Code, they should have been embodied in Article 430 as enunciating the concept of possession in all its juridical aspects.

Manresa pointed out that the concept of possession is one of the most difficult phases of the Civil law and the object of the most diverse opinions among civilists. As he graphically expressed it, "La posesion constituye uno de los pasos deficiles (del codigo civil) * * * materia sobre la cual se ha escrito mucho y aun queda mucho que decir. Ni como dar gusto a todos cuando cada escritor puede decirse que refleja una opinion diferente." [49] But even he objects to the two notions enunciated by the Code of natural and civil possession, preferring the classification of Article 474 of the Portuguese Civil Code.[50]

*Governing the Ownership of the Air Space*

From the provisions of Article 350 C. C. the ownership of the air and the air space above the land cannot be deduced, for surface (superficie) cannot be interpreted to mean and include all that is above the land. As Manresa says this article does not expressly say anything with reference to the ownership of the aerial space, a problem which has given rise on these days to so much discussion and difficulty. A decision of the Supreme

[48] 3 Sanchez Roman, pp. 405-406.
[49] 4 Manresa, pp. 5-6.
[50] 4 Manresa 67.

Court of Spain on Feb. 1, 1909, however, held that the owner's right to the space and air above extend only so far as is necessary to the enjoyment of his property. This vague condition of the law necessitates positive provisions in the Civil Code regarding air space especially because of the growing importance of aviation. As sources of comparative study in this respect, the following may be consulted:

(1) Art. 352, French Civil Code
(2) Art. 2552, Argentine Civil Code
(3) Art. 905, German Civil Code
(4) Art. 667, Swiss Civil Code

*Governing Intellectual Property*

Articles 428 and 429 C. C. contain the meager rules governing the ever growingly important branch of human activity as authorship, the first giving the author of any literary, scientific or artistic work the right to profit and dispose of it, and the second, subjecting such rights to special rules, in default of which, to general principles of rights of property established in the Code. The Special Law referred to is that Spanish Law of January 10, 1879, on Intellectual Property, which was extended to the Philippine Islands by Royal decree of May 5, 1887.[51] Spanish commentators have pointed out that this part of the Civil Code is unquestionably deficient.[52] As evidence of recognition of this deficient character of the Code on this point, our legislators passed Act No. 3134 approved March 6, 1924, known as the New Copyright Act. In the revision of the Code it is recommended that the rules to govern the rights regarding Intellectual Property be embodied in it.

*Governing Industrial Inventions*

There is not any single provision at all in the Civil Code governing industrial inventions. Manresa sought to explain the failure of the Spanish Civil Code Committee to include rules governing this kind of property by saying that (1) the redactors of the Code in taking Base 10 of the ley de Bases of May 11, 1888, literally interpreted its provisions in so far as it required them to include rules governing waters, mines and "scientific, literary and artistic productions" as not comprehending industrial inventions, aside from the consideration that

[51] Serrano vs. Paglinawan, 44 Phil. 85.
[52] 3 Manresa, 663-689.

those three causes of scientific, literary and artistic productions were treated as one by the then Special Law of January 10, 1879, industrial inventions not being one of them. (2) Moreover, industrial inventions were already governed by a special law which was understood by the codifiers as having a mixed mercantile-administrative character and therefore thought by them incongrous in a Civil Code. Manresa himself however, believed that Base 10 could have been made to comprehend industrial inventions as he seemed to agree with the opinion of Sanchez Roman that the law on industrial inventions is of a similar character to those governing intellectual properties and therefore a proper subject of the Civil Code. The latter expressed, "Solo en cuanto se refiere a la manera de garantirla y autenticarla o sea a las formalidades para la concesion de patentes, marcas, etc., es en lo que cabe atribuir competencia al Derecho y Poder adminitrativo".[53]

*Governing Leases*

As has been pointed out under the chapter on general criticisms of the Code regarding its contents, Sanchez Roman said that the dispositions of the Civil Code governing leases of rural as well as of urban lands are deficient. To this Manresa seemed to have agreed when he said, "Hubierase el Codigo limitado a dejar la materia de aparceria sometida exclusivamente a las reglas de la costumbre, si no consideraba oportuno su desarollo dentro de el", although his attack was concentrated on the defective and anomalous wording of Article 1579 C. C. on the ground that "El articulo 1569 ya lo hemos dicho en el curso de este comentario, no puede mantenerse. La impremidita aplicacion a la aparceria de las disposiciones del contenido del contrato de sociedad, carece de fundamento. Asi se ha reconocido ya en las esferas legislativas.[54] That this article is really defective is shown by the fact that was back in 1905 a Royal decree was issued in Spain urging that Articles 1579 and 1678 of the Civil Code along with Article 1565 paragraph 1 of the Ley de Enjuiciamiento Civil.[55] On the reform of the Code in this respect, it is suggested that Chapter IV of the Italian Civil Code on Aparceria be made a subject of comparative study containing as it does in its Articles 1647 to 1664 the most com-

[53] 3 Manresa pp. 690-691; 3 Sanchez Roman, pp. 338-9.
[54] 10 Manresa, 713.
[55] 10 Manresa, 714.

plete regulation of this institution. The following will also be of help:

(1) Tenancy Law of the Philippines, Acts No. 4054 and 4113
(2) On Article 1579 especially, the following may be consulted:
    (a) Arts. 1763 & 1764, French Civil Code
    (b) Act of July 18, 1889, Fr.
    (c) Art. 3133, Civil Code, Lower Cal.
    (d) Art. 1103, Austrian Civil Code

*Governing Leases of Works and Services*

Economic and social progress create new juridical relation and demand corresponding juridical rules. As Cimbali has well explained: "Las legislaciones civiles, pues, vienen siendo el producto de la necesidad y de las condiciones economicas y juridicas de otros tiempos: el de pequeña industria en el orden economico y de la individualidad en el orden juridico, vienen a ser incapaces para abrazar y gobernar en su infinita variedad las nuevas necesidades sentidas, y relaciones sociales de indole privada derivadas de las conquistas cotidianes de la gran industria, de los triunfos progresivos de la sociabilidad".[56]

The truth of this fact has exposed to the attention of commentators the deficient condition of the provisions of the Civil Code regarding the labor and industrial movement. One great obstacle in the Civil Code in this respect is the strict individualist philosophy which animates most of its provisions. Manresa admits both charges of excessive individualism and deficient character of the Civil Code in this respect, pointing out "que el legislador español, habiendo perdido la noción del tiempo y de la epoca, figurose que aun suplaban los vientos individualistas que dieron vida al codigo Napoleon, y pareciole lo mejor transcribir los preceptos de este, incluso aquellos cuya derogación en Francia era ya un hecho".[57]

In the proposed filling up of the Code regarding this deficiency, it is interesting to have for a basis of comparative study the newly promulgated Code of the Republic of China which is a product of consummate skill in giving a social trend to a revised code which was originally founded on the familiar type. Says Dr. Foo Ping-Shung, Chairman of the Civil Code

[56] Cimbali, qouted by Manresa in 10 Manresa 728.
[57] 10 Manresa, 727.

Codification Commission of this characteristic of the new Chinese Civil Code. "The traditional Chinese legislation is familiar; it subordinates the activities of the Individual to the interests of his family. The new Chinese legislation (Civil Code), based on the Three Principles, racial, democratic and economic, is going one step further and will have a deliberate social turn.

For securing a more equitable distribution of wealth among the people, it is essential that the less fortunate elements of the population be protected against the hardships which they would suffer if the strictest rules of law were always indiscriminately applied. Sumnum jus, summa injuria, says the old Roman doctrine. The Code introduces an element of humanity by allowing the courts, when passing judgments on civil claims, to take into consideration the respective circumstances of the debtor and of the creditor and to grant time to the debtor for the performance of his obligation * * *" [58]

"As a complement of the whole system of protection the Code decides in its Article 148 that a right cannot be exercised for the purpose of causing injury to another person mainly, thus doing away with the antique theory which defines ownership as the right to use and abuse the thing owned."[59]

There is a wealth of materials for the study of this phase of the Civil Code in foreign legislations. (See 10 Manresa pp. 730-731). The Philippines has the following legislations already supplementing the Civil Code from which the proposed codal provisions may be based:

(1) Act No. 4053 providing for mediation, conciliation and arbitration in controversies between landlords and tenants, and also between employers and employees.

(2) Act Nos. 4113 and 4054 known as the Tenancy Laws regulating the relations between landlords and tenants devoted to rice and sugar cane.

(3) Act No. 3961 providing for free emergency medical treatment for employees and laborers.

(4) Act Nos. 3960 & 1414 declaring debts for accrued wages and salaries as preferred claims and their order of preference thereof.

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[58] Preface to the English translation of the Civil Code of the Republic of China.

[59] Ibid.

(5) Act Nos. 3998 & 3259 requiring public and private contractors to furnish bond for the protection of laborers.

(6) Act No. 3812 amending Act No. 3428 known as the Workman's Compensation Act.

(7) Act No. 3071 regulating the employment of women and children in shops, factories and other centers of labor commonly known as the Women and Child Labor Law.

(8) Act No. 2549 prohibiting the forcing, compelling or obliging of laborers to purchase merchandise, commodities or personal property under certain conditions. Also Act Nos. 3085 & 2537 prohibiting the payment of laborers' wages by means of tokens or objects other than the legal tender currency of the Philippines.

(9) Act No. 2300 confirming existing legislation re prohibition of slavery, involuntary servitude, peonage and sale or purchase of human beings.

(10) Act No. 1874 regulating the responsibilities of Employers commonly known as the Employers' Liability Act.

*Governing Recovery for Mental Damages*

Our law of damages was developed from the womb of the Civil Law. The coming of Anglo-American law implanted, however, Common Law principle on some parts of our law of damages. Two concrete examples of this is the Libel Law and the Employers' Liability Act.

Under the Spanish law, the general rule is that only actual or compensatory damages are recoverable. There are a few instances where exemplary or punitive damages are allowed and only when the act is tainted with fraud, malice or violence. (Arts. 1896 & 455). The doctrine of nominal damages is entirely unknown, for if no damages have been actually incurred, there can be none to repair.[60]

The tendency since then, however, is to recognize the right of recovery for mental suffering in cases in which recovery is not based in the Civil or Penal Code. This tendency of our jurisprudence should be made complete by express provision in the Civil Code allowing this recovery. Such an improvement is in line with the progress of modern legislation. It has been said that even in Spain, the land of compensatory damages, the right of recovery for moral damages on the ground of breach

[60] Mercado vs. Abongan, 10 Phil. 676, 678; Algarra vs. Sandejas, 27 Phil. 284, 292.

of promise to marry had already been recognized, and as early as 1912.[61] And our own Supreme Court, irresistibly drawn to this modern impulse of the law, in a recent case held: "Counsel for appellees point out that there is no satisfactory proof to establish pecuniary loss. This is true. But in cases of this character the law presumes a loss because of the impossibility of exact computation. There is not enough money in the entire world to compensate a mother for the death of her child. In criminal cases, the rule has been to allow as a matter of course ₱1000 as indemnity to the heirs of the deceased.[62] This is the nearest approach in our law of damages to feelings being allowed. But in order that it may prosper, the court had to invent a fiction. To obviate this round about way, the Civil Code should expressly provide for a right of recovery in cases of injury to feelings.

## CHAPTER VII

## INSTITUTIONS OF THE CIVIL CODE IN CONFLICT WITH FILIPINO CUSTOMS

As the heading suggests, provisions of the Civil Code which are in conflict with Filipino customs will be pointed out briefly in this short chapter. As will subsequently become apparent, these provisions largely concern family matters. The reason is clear. Family laws should have their basis in the practices and usages of the people which are handed down from generation to generation. Otherwise they will be foreign and incongrous to the customs of the people and as such unknown or if known, irritating to them.

### *Of the Dowry Institution*

The institution known in the Law of Persons and Family Relations of the Civil Code as the dowry is one of those often prominently mentioned by authoritative writers as an exotic plant in the legal field of the Philippines on the ground that it has no counterpart in Philippine customs and usages. The truth of this fact can be demonstrated by inquiring into the history of Filipino customs on the matter of dowry and of the practices now prevailing. The first will reveal that dowry among ancient Filipinos are invariably applied to gifts given to

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[61] Bocobo, Advanced Civil Law p. 1 citing decision of the Supreme Court of Spain, December 6, 1912. Revista de Legislacion y Jurisprudencia Vol. 131, pp. 88-100.

[62] Bernal vs. Ice Plant, 54 Phil. 329.

the bride or the spouses or her parents by the bridegroom or his parents or relatives. The second will also bring out the fact that this is still the meaning of the so called customary dowry in the Philippines. They are called by different names in various parts of the Islands naturally,—"bugay" by the Visayans, "purong" by the Bicolanos, "bigay-caya" by the Tagalogs, "duro" by the Pampangos, "dasel" by the Pangasinan people, "sab-ong" by the Ilocanos and "sambu" by the Zambals—but invariably they mean the same thing, which is that already explained as at present prevailing in the Philippines. As one careful researcher explained, the old customary dowry has been handed down up to the present time almost unchanged being still the common practice of the bulk of the inhabitants.[63]

The Spanish concept of dowry is diametrically opposed to that understood in the Philippines since under the former, it is the wife who brings it to the marriage in order to be given to the husband to help him maintain and establish the new family, (Article 1336 et seq. C. C.) while under the latter, it is the husband who gives the dowry in consideration of his winning the hand of the bride. So great is the hold of the customary dowry in the masses that for almost four centuries of Spanish law, it is said that there has been in our jurisprudence but one instance in which the dowry of the spaniards has ever been involved,[64] the case of Gonzales vs. Mondragon, 38 Phil. 105, and even in this case the parties are at least Spanish mestizos if not Spaniards. The Spanish dowry should therefore be reformed.

*Of the Guardianship Over the Child's Property*

Section 553 of Act 190 repealed by implication the provisions of the Civil Code relating to that portion of the patria potestas which gives to the parents the administration and usufruct of the property of their minor children.[65] True, under it the parents may still be appointed guardians of their children's property but their right flows not from the natural force of their parental authority but from the letter of guardianship issued by the court. This innovation is out of harmony with the nature and scope of parental authority and in direct

[63] Tirona, Nationalization of Our Family Law, Graded 1, College of Law Thesis.

[64] Ibid.

[65] Aldecoa vs. Hongkong & Shanghai Bank, 30 Phil. 228.

contravention with the closeness of relationship and the spirit of sacredness pervading the Filipino family.[66] For while young people of today have more liberty than those of yesterday, yet the average young man or young woman now does not marry or transact an important business in flagrant disregard of the old people's wishes, and in actual practice many a son or daughter still surrenders to the parents the salary earned at the end of the month. The law should again on this score be reformed in order to make the natural guardianship of the parents' over the child's property the general rule, and court intervention the exception.[67]

*Of the Order of Intestate Succession*

One of the most important provisions of the Civil Code which Filipino writers consider as in conflict with the customs and practices of the people refers to the order of preference as to who will inherit the property of the surviving spouse in case of intestacy. A review of some articles written on the subject revealed the interesting fact that they are almost unanimous in demanding a change or modification of the Civil Code in this respect so as to make the law conform as faithfully as possible to the usages of the people.[68]

A recapitulation made of the inheritance customs of the Philippines has revealed that the following is the customary order of intestate succession in the Philippines:

(1) Legitimate children and descendants;
(2) Surviving spouse
(3) Ascendants
(4) Brothers and States
(5) Collaterals
(6) Natural Children [69]

The same author indicated that the salient tendencies of legislation in different countries with respect to the order of intestate succession is as follows:

(1) Legitimate children and descendants
(2) Surviving spouse
(3) Ascendants

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[66] Calderon, Revista, Historia de Filipina, Vol. I No. 10.
[67] Tirona, Ibid.
[68] Tirona, Ibid.
[69] Javier Gonzalez, 7 Phil. Law Journal, 263.
[69] Ibid, p. 262.

(4) Natural Children
(5) Collaterals
(6) The State [70]

The order of intestate succession under the Civil Code, however, as is well known places the surviving spouse in the fifth order which is not only against our more kindly disposed customs towards her but is also against the tendency of practice in other countries and certainly against the precept of reason and justice. Hence the universal desire among students of the Civil law in this country for a reform of this aspect of the Civil Code.

## CHAPTER VIII

## INSTITUTIONS OR PROVISIONS WHICH SHOULD BE ABOLISHED

### *The Institution of Censo*

One of the institutions recognized and regulated by the Civil Code which is undoubtedly of no utility in the Philippines is that of censo. Therefore it is recommended that in the proposed revision it be entirely abolished. In the discussion below the writer will endeavor to justify his apparently radical stand. The exposition is a little more extended than those made of the previous topics because of the serious nature of the proposition advanced.

### *General History of Censo*

In the brief epochs of the history of all peoples individual ownership of land did not exist. Only the possession by the tribe or later by the family and the recognition of a superior right in the Divinity, Emperor, the Privileged Castes or the State obtained. In the name of the State or of the Emperor the lands were apportioned among the people with the obligation on the part of the latter of paying rent or part of the products in lieu of rent. The apportionment was either in perpetual ownership as censos or in leases which, however, in time became censo also.

We read in the Genesis that Job, son of Jacob, ceded to the Egyptians, in the name of the Pharaoh, various lands reserving the right to receive a gift of the fruits thereof. It was said that the Spartans delivered to the enslaved Macedonians whom they conquered the cultivation of the latter's own original prop-

[70] Ibid.

erties by way of canon, reserving a specie of superior dominion to themselves. In other lands, after wars and consequent conquests of territories, the victors gave to the defeated the latter's own lands with the obligation of contributing part of the utilities. The same thing occurred with the "hospitalities" of the German towns. These in general were the original manifestations of censo.[71]

*Origin of Legal Censo*

But it was in Rome that the institution of censo received its complete economic as well as juridical recognition and development. The Italian soil as well as those of the various provinces of the Empire were considered as of public ownership, belonging in principle to the State, the Roman public in whose name they conquered, the residue belonging to the Empire City.

The special contract about which we have been treating, finally received a name taken from the Greek enfiteusis (of en and phyteno, meaning the act of planting) and the Emperor Zenon affirmed its proper and independent character as contract distinct from lease or sale, and dictated various rules for its constitution and effects, which rules were in turn later completed by Justinian. Thus was completed the historical institutions of emphyteusis, one of the earliest manifestations of censo.[72]

The development of the other two phases of censo came about later. About C. A. D. the transmission of the full dominion of land by the payment of a determinate pension began the phase known as reservative censo. The consignative censo appeared according to Corbella, only in the Middle Ages when Priests, Popes and Religious Councils began to fulminate their anathemas against usury and when the laws of the Christian States were responding to the echoes of the universal reprobation of usurious contracts.[73] The nature of the consignative censo reveals that its principal object was to transform the contract in the light of current belief of those days as a moral and therefore permitted institution in the guise of consignative censo.

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[71] 11 Manresa, pp. 19-20.

[72] Ibid, pp. 20-21.

[73] Historia de los diferentes species de censo, memoria 1892.

*Flourishment and Decadence of Censo*

The emphyteutic, reservative and consignative censo continued for a long time one of the most numerous and characteristic forms of contracts. The example of the State was followed by the nobles and the landed gentry at large. When feudalism came into being, the kings and nobles who owned all the lands in the kingdom, also distributed their lands to their vassals upon the principles of censo. The Church also, when it attained ascendency and big tracts of land became concentrated to them by donations from their followers, gave the same lands to the donors to till for life upon condition of payment of canons and when the donors have died and ownership have consolidated in the Church, these lands were again distributed to the people upon the same arrangement. Thus during feudal times did the institution of censo flourished.

But as times passed and progress in economy and political ideals advanced, the idea of divided ownership of land which is the central theme of censo was little by little being abolished, property became emancipated, the so-called dominio util of the tiller of the soil gradually but irresistibly obtained preponderance, which materially reduced the corresponding compass of the dominio directo of the big landlord. The reservative censo which is but a little different from sale by installment and therefore transferred ownership to the buyer-tenant, usufruct and lease, then became much more frequent and emphyteutic censo more rare. The explosion of ideas of liberty and individualism which were occasioned by the French revolution, the overthrow of feudalism in most countries of Europe and the steady advance of democratic ideas have all contributed to the dwindling importance of the institution of censo among the people and in the economic and legal field of the world.[74]

*Its Legal and Economic Justification*

The legal justification of censo is founded upon ownership. As Sanchez Roman said, "su justicia es indiscutible pues son una manifestación del poder dominical". But he questioned its convenience as an economic institution. "En el orden economico los censos son una consecuencia de la concentración de la propiedad en escasas y priviligiados manos; pertenecen a la epoca de los grandes propietarios, y si causo recurso de circunstancias aliviar los inconvinientes de la propiedad acumu-

[74] 11 Manresa, pp. 23-26.

lada, lo cierto es que esa misma bondad relativa, condicional y expresiva de una imperfecta situación economica de la propiedad, hace su proceso y les niega bondad intrinsica y absoluta. La forma censal empeora, por lo general, el cultivo, resiente las virtudes productivas de la propiedad incita al abuso en la producción para obtener mas pingues rendimientos, no mantienen tan vivos los estimulos de cuidado y vigilancia de la propiedad en el censualista, y en el censatario, como si fuesen absolutos dueños, divide a los hombres en trabajadores y ociosos, siendo mas peculiar de los tiempos feudales, que pasaron para no volver, y reemplazar y mas y menos artificiosa de una organizacion positiva. Historicamente la forma censal, y en particular la enfiteusis que la generalmente usada, tiene su justificacion y aun es digna de elogio, pero su oportunidad paso y sin duda alguna".[75]

Manresa, although subscribing in part with these observations, at least in so far as emphyteutic censo is concerned, yet differed with Sanchez Roman concerning the other points raised by the latter. He wrote, "En este terreno debe anatematizar con razon la perpetuidad y irrimidibilidad de los censos * * *. Cuando su ejercicio pueda depender en absoluto de la voluntad del censualista, caracteres todos propios del censo enfiteutico, en toda su pureza; pero fuera de esto, tienen los censos sobre otros gravamenes, la ventaja de la modicidad de la pension que permite cumplir facilmente la carga, y el poder hoy en cualquier tiempo redimirla, sin apremios ni polestos vajeciones".[76]

With respect to the attack on the promotion of laziness, Manresa dismissed the contention rather futilely in these words: "Con los censos y sin ellos, siempre existiran esos seres ociosos, verdaderos parasitos sociales, que viven solo a costa del trabajo de los demas".[77]

On its economic justification, Manresa said: "Los censos precisamente se constituyen, aun hoy, para cultivarse los incultos o para mejorar el cultivo ó transformarla de un modo mas util, y se constituyen por quien no puede realizar esos hechos y en favor de quien se halla en mejores condiciones para llevarlos a cabo".[78] Moreover, he wrote, "Los censos favorecen tambien

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[75] Sanchez Roman, 669.
[76] 11 Manresa 16.
[77] Ibid, 17.
[78] Ibid, 17.

la distribución de la propiedad, evitando la acumulacion en pocas manos, y los inconvinientes de los latifundos".[79]

*Why Censo Should be Abolished*

The institution of censo and the classes of contracts which it recognizes should be abolished in the Philippines because it has no justification for existence in this country either historically, legally or economically. Censo as we have seen was a consequence of the concentration of property in a few hands; it pertains to the epoch of vast landholdings; but it has no reason to exist here where these conditions do not exist. Historically, it had its basis in feudalism; historically, we never knew of such an institution in the Philippines. The system of encomiendas introduced by the Spanish conquerors of these islands, does not even approximate the feudal system nor anything similar to it. The encomienda was a system of government rather than of landholding, and the tribute collected were for the support of the government and not of the encomendero, although the latter is more of a spiritual than a governmental official.[80]

Manresa, as we also have seen above, sought to justify its existence on the ground that it facilitates the cultivation of lands. But this is true only as we have seen where the feudal system of landholding exists and not in the Philippines where there are but few tracts of land of so vast a character as to need this especial system. Moreover, there are already in vogue in the Philippines different local systems of "aparceria" or tenancy system which govern the relationship between landlords and tenants even in those cases of a little extensive landholdings which, however, are very few.

But if there be need at all of preserving in some measure some of the characteristics of the contracts of censo, they may be done by abolishing them and in their stead provisions of existing law similar to them should be broadened. For example, if we analyze the definition of emphyteutic censo embodied in Article 1605 C. C. we will discover that it resembles a great deal the contracts of usufruct and lease; that consignative censo (Article 1606) is similar to mortgage; and that reservative censo (Article 1607) is very much like sale by installment. These manifestations of censo therefore may as well be absorbed, at

[79] Ibid, 17-18.
[80] XIII Phil. Law Journal 251.

least in our country, by the corresponding contracts analogous to them.

Any way, the institution of censo belongs to the past and not to the present. A survey of the legislations of different countries will reveal that not only has it vanished in the legal realm but it is also prohibited in others. For instance:

(1) Emphyteutic censo is not admitted in:
   (a) Vaud
   (b) Chile
   (c) Argentina, and
   (d) Uruguay; and it is expressly prohibited in Guatemala.

(2) The Codes of France and Belgium do not admit emphyteutic censo; although reservative censo may be said to be admitted;

(3) Reservative censo is not admitted in Guatemala, is prohibited in Portugal and is considered as sale by installment in Mexico.

(4) Consignative censo, although it exists in the Codes of some 12 countries including Spain is in great decadence. It is again prohibited in Guatemala.

(5) The modern Codes of Germany and Switzerland do not make any mention whatsoever of emphyteutic censo because it is considered as incompatible with contemporary economic and juridical ideals, neither do they make mention of both reservative and consignative censo.[81]

*The Contract of Pacto de Retro*

The pacto de retro contract is another institution of the Civil Code which the writer advocates should be abolished. The discussion of this proposition will again be a little extended.

*General History of the Contract*

The contract of pacto de retro or conventional redemption sale originated, it has been said, from the Bible. The canon law, it has also been reputed, has never considered this contract as against conscience,[82] although I am inclined to believe that it had not been so badly employed heretofore as it is now used

[81] 11 Manresa, 26-28.

[82] M. Q. Scaevola, Derecho Civil, Vol. 23 p. 750.

to cover usurious loans in the Philippines. The Roman law recognized a similar contract. (Second Codex, Book IV, Title LIV; Difest, Lib. XX Title V.) The Spanish law on the subject began in Law 2, 3, and 4, Title I, Book IV of Fuero Viejo of Castilla; also Law 42, Title V, Partida V. These precedents seem to refer, however, to the legal rather than to the conventional redemption. The present law on the subject is found in Article 1508 et seq. of the Civil Code.

*Movement for Abolition*

The plan to abolish this contract in the Civil Code began as far way back as 1841. The Spanish Congress of Deputies in its session of June of that year appointed a Commission to study a bill abolishing the contract of redemption in general. The majority of the said commission recommended that the said bill be tabled on the ground that it was not the most opportune time for its discussion due to the fact that there was a proposition to revise the Codes; the minority, however, dissented contending that its abolition was essential so that the same may not be considered by the codifiers any longer. When the question was submitted the majority stand was adopted as the more expedient.[83] In the Italian Code, there also had been a proposition to abolish provisions recognizing and regulating this contract but the movement was defeated.[84]

*The Question of its Abolition*

Manresa, summarizing the arguments in favor of abolishing this contract enumerated them as follows: "It is claimed that conventional redemption (1) foments usury, (2) that it places the debtor in a lamentable situation by denying him all means of defense against the greed of money lenders, and, (3) that it is prejudicial to the property itself for the reason that the purchaser would be more inclined naturally to gather for himself all the fruits he could get than cause the property to be cultivated and improved according to the purpose for which it is intended". He does not subscribe to these views, however, explaining that:

(1) A careful examination of the arguments against conventional redemption will reveal that it is combated because of its intrinsic merits or defects as a juridical institution.

(2) In regard to its interest, it is undoubted that its rate depends upon the conditions of the market and the value of the

[83] 23 Scaevola, 754.

[84] Aquitana y Velasco, Codigo Civil Italiano, p. 218.

money, which fluctuates as it is affected by various causes, among them the law of supply and demand.

(3) It is to be borne in mind that there is in practice really no limit to the rate of interest * * *. Conventional redemption is not the seat of usury such that this evil will become exterminated as soon as conventional redemption is abolished.[85] Why the Contract should be abolished in the Philippines.

Whatever may be the opinion as to the advisability of this contract in other lands, there are special considerations why it should be abolished in the Philippines. Primarily, these reasons converged upon the fact that in this country, pacto de retro has attained its perfection as an instrument of usurious transactions. So easily is this contract converted into usurious conveyances here that our Supreme Court has been forced to employ more than ordinary means in discovering the true character of the supposed contract of pacto de retro sales. If we examine our jurisprudence we will find that our Supreme Court has even resorted to uncommon means with which to protect the unwary from the clutches of merciless money lenders. For instance, in various cases the following facts have been sufficient to qualify what in the face of a document is in fact a pacto de retro sale, as one which in truth is merely a loan to cover usury.

(1) Inadequacy of the price. Cabigao vs. Lim, 50 Phil. 844.

(2) Possession of vendor. Rosales vs. Reyes and Ordoveza, 25 Phil. 495.

(3) Vendor pays taxes. Cristobal vs. Gomez, 50 Phil. 810.

(4) The "borrower" and "lender" and "borrow" and "lend" are present. Tolentino et al vs. Gonsalez, 50 Phil. 550.

(5) Where the conduct of the parties point to a contract of loan. Tolentino case, Ibid.

So great is the appreciation of the Supreme Court of this fact that it has been forced to lay down as rule of law in this jurisdiction that in case of doubt as to the exact nature of the contract, it will be held as that contract which involves the least transmission of rights.[86]

We agree with Manresa that the abolition of this contract will not necessarily mean the stamping out of usury. But in this country, it certainly will contribute a great deal to the minimizing of this persistent and rampant evil in view of the

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[85] 10 Manresa, 307-310.

[86] Cruz vs. Joaquin, 2 Phil. 503; Olino vs. Mendoza, 13 Phil. 379; Padilla vs. Linsangan, 15 Phil. 65.

fact that it constitutes the most facile means known so far in our law with which the rigor of the campaign being waged by the government, the pulpit and the press against usurers are being evaded with impunity.

There is this other consideration that although usury is considered evil in Spain, the policy there has not yet reached that stage where exaction of high interest by the lenders is expressly prohibited by law. This is an interesting fact which is true nevertheless. As Manresa himself reveals in his third argument for the retention of the conventional retention contract: "It is to be borne that there is really no limit to the rate of interest; nor is it legally permitted to fix a limit thereto without the law being evaded somehow and without doing violence to economic laws." This state of the law in Spain is in direct contravention with the laws concerning usury in force in this country. As is well known the policy of the State here is express prohibition of this abominable transaction, penalizing severely those caught in its toils both criminally and with civil liabilities.[87] Moreover and finally, the abolition of this contract will mean a corresponding resort by the people to the legal means of pledge, chattel mortgage, real estate mortgage and to banking facilities that exist in this country.

## CHAPTER IX

## CONCLUSION

The justification for the point of view adopted in this discussion, as had been adverted to in the introduction, is its timeliness. It is timely because the committee in charge of the revision of the Civil Code is still at work at present. The wisdom of framing some definite instructions that should steer the efforts of the revisers of our code on civil matters to certain well defined paths could be gleaned in the success of the pattern after which the Civil Code of Spain has been framed, the so-called "ley de Bases de 11 de Mayo de 1888".

The writer concludes this dissertation with the principal suggestions which form the results of his investigations, namely

[87] The Usury Law, Act No. 2655 as amended by Acts 3291 and 4070.

that in the revision of the Civil Code the following ideas, among others, should be followed:

(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 into consideration;

(3) That the deficient parts of the Code should be filled up;

(4) That provisions in conflict with Filipino customs and practices should be reformed; and;

(5) That obsolete provisions should be abolished.