

THE MEETING OF THE ROMAN LAW AND THE COMMON LAW IN THE PHILIPPINES*

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During the Pre-Spanish period the Filipinos were living under a native system of customary laws. They were fragmentary and unorganized; not general but localized, hence diverse. There was no attempt at systematization. Notwithstanding these defects they were not entirely devoid of good qualities. We must not judge them by twentieth-century standards.

The discovery of the Philippines by Magellan on March 16, 1521, marked the beginning of a new era in the history of Philippine law. It meant the introduction of a system of laws which were not based on the customs and usages of the people. This was accomplished by the extension to the Philippines of the laws and codes of Spain either expressly by Royal decree or by implication.

Among the collections and compilations of Spanish laws which were probably in force in the Philippines before the movement for the scientific codification of the laws of Spain began, were: the *Fuero Juzgo*, the *Fuero Real*, the *Siete Partidas*, *El Ordenamiento de Alcalá*, *Las Leyes de Toro*, the *Nueva Recopilación*, the *Recopilación de las Leyes de las Indias*, and the *Novísima Recopilación*.

The modern Spanish codes which were extended to the Philippines and were in force at the time of American occupation were the Penal Code, the Code of Commerce, the *Ley Provisional*, the Code of Criminal Procedure, the Code of Civil Procedure and the Civil Code. In addition to these codes the following special laws were also extended to the Philippines: the Marriage Law of 1870, the Mortgage Law, the Mining Law, the Law of Waters of 1866, the Copyright Law, the Railway Law, the Notarial Law of 1862, the Law of Foreigners for Ultramarine Provinces, and the Spanish Code of Military Justice.

The victory of Admiral Dewey in the battle of Manila Bay on May 1, 1898, followed by the capture of Manila on the 13th of August of the same year and the formal ratification of the Treaty of Paris which transferred the sovereignty over the Philippines to the United States, is another landmark in the history of Philippine jurisprudence. It marked the inception of a new tendency in the development of Philippine law. Thenceforth, Anglo-American juridical thought was to play a very important

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role in the evolution of Philippine jurisprudence.

On the advent of American occupation the political law of the Philippines — that is, the laws regulating the relations sustained by the inhabitants to the sovereign — was almost totally abrogated. Only such portions of it as the United States authorities expressly declared should continue in force were saved. On the other hand, such municipal laws of the Philippines as affected private rights of persons and property, regulated local institutions, and provided for the punishment of crimes, were all considered as continuing in force, pursuant to the instructions of President McKinley to General Merritt, Commander of the Army of Occupation. It was further ordered that these laws be administered through the ordinary tribunals substantially as before occupation. President McKinley said:

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

In other words, the Spanish codes and special laws which were then in force were perpetuated, to the same extent as if the Congress of the United States had enacted new laws for the Philippines modelled upon those Spanish statutes, but the judicial decisions of the Spanish courts based on those statutes were not to be considered binding as precedent. This retention of the local private law was merely in accordance with the principles of international law in that regard. However, by the mere fact of the change of sovereignty, all portions of that statute law which might be termed political law were abrogated immediately by such change of sovereignty. Also, all Spanish laws, customs, and rights of property inconsistent with the Constitution and with American principles and institutions were thereupon superseded.

The various Spanish codes which were in force in the Philippines on the transfer of sovereignty to the United States have suffered different fates. The Civil Code has been amended but very slightly.* This fact is eloquent testimony to the merit of that monumental work and a tribute to the excellence and magnificence of the Roman law on which it is based.

An American writer has said of the Spanish Civil Code:

This is a model of concise, comprehensive, and systematic codification. Divided into four books it follows, in the main, the arrangement of Justinian's Institutes and treats, in a volume of little more than three hundred pages, the subjects of Domestic Relations, Property, Wills, Decedents'

*Ed. Note: In 1949, the Congress of the Republic of the Philippines enacted a Civil Code for the Philippines which took effect on 30 August 1950.

Estates, Contract, etc., whose exposition in our law requires more than a half-dozen ponderous tomes. Nor is this treatment of the Spanish Code superficial. By skilfully adopting the phraseology of the Roman Code and carefully studying the art of condensation the Spanish codifiers have been able to express the principles of their substantive law in a very small compass.¹

The Code of Commerce has been reduced to a skeleton code because of repeated amendments with the end in view of introducing up-to-date business and economic concepts.

The Penal Code has been revised and re-enacted as the Revised Penal Code, Act No. 3815.

The Code of Criminal Procedure and the Code of Civil Procedure were completely repealed by the new Code of Criminal Procedure, General Order No. 58, and the New Code of Civil Procedure, Act. No. 190, respectively — both of which patterned after American models.

It is needless to say, therefore, that, at least in so far as the substantive law is concerned, the Philippine legal system is saturated with Roman law and civil influence. In some cases, only the Roman principle is contained, couched in modern terminology; in other cases, the Roman text itself is perpetuated.

I do not possess the capacity for, nor does time permit, the enumeration and discussion of all these cases of Roman influence. I hope I can render partial justice to this paper if I cite a few typical instances by way of example.

In the realm of the law of Persons and Family Relations the following illustrations may be mentioned.

A survival in a limited sense of the Roman law doctrine of the wife's subordination to the authority of her husband — *manus* — is found in the following provisions of the Spanish Marriage Law of 1870:

(1) The wife must obey her husband, live with him, and follow him when he changes his domicile or residence except when he moves to a foreign country.

(2) The wife cannot make contracts, or acquire property by will or descent, without the permission of her husband, except as provided by law.

(3) The wife cannot sue or be sued alone except in some specified cases.

(4) The wife cannot publish any literary or scientific work of which she may be the author without the husband's consent or in its defaults a judicial authorization.

¹Charles S. Lobingier, *Blending Legal Systems in the Philippines*, 21 L. Q. REV. 401 (1905).

Maine considers the Roman doctrine of *patria potestas* as "the first and greatest landmark in the course of legal history." The Roman family in ancient times has been likened to an *imperium in imperio* with the *paterfamilias* as absolute ruler. Under the XII Tables, his *patria potestas* included the power to sell, expose, or put to death his children.

Under our law, the authority of the parents over their children is not quite so extensive as the *patria potestas* of the Roman *paterfamilias*, but it is not very feeble either for it includes the right: (a) to keep the children in their company; (b) to correct and punish them moderately; (c) to approve or disapprove their adoption; (d) to grant or withhold consent to their marriage if they are below twenty years in the case of males, and eighteen years in the case of females; (e) to disinherit them for cause; (f) to defend them from unlawful aggression; (g) to demand support from them in certain cases. Furthermore, it is explicitly provided that "the father, or in his default the mother, may exercise parental authority over their unemancipated legitimate children and children are bound to obey their parents while subject to such authority and at all times to treat them with respect and reverence" (Art. 154). It must be noted that all these rights of the parents refer only to the person and not to the estate of the child. The parents are not now entitled to the administration of the child's estate unless so ordered by the court. If they are so ordered they have the power of administration not by virtue of their *patria potestas* but by virtue of the judicial appointment as guardians of the estate of the child.

Following the imperial Roman law, it is provided in the Civil Code that natural children — *i. e.*, children born out of wedlock of parents who at the time of the conception of such children could have married — may be legitimated by the subsequent marriage of the parents.

In the field of the Law of Property, the Civil Code retains the Roman classification of things into public and private, movable and immovable, consumable and non-consumable, corporeal and incorporeal.

According to Paragraph 1 of Article 339 of the Civil Code:

Property of public ownership is — (1) that devoted to public use, such as roads, canals, rivers, torrents, ports and bridges constructed by the State, riverbanks, shores, roadsteads, and that of a similar character.

The provision is reminiscent of Book II, Title I, Paragraphs 1, 2, 3, and 4 of the Institutes of Justinian.

The distinction between mere *detentio* and legal possession is succinctly pointed out in Article 430:

Natural possession is the holding of a thing or the enjoyment of a right

by any person. Civil possession is such holding or enjoyment, coupled with the intention on the part of the possessor of claiming the thing or right as his own.

A clearer statement of the concepts of *corpus* and *animus* is difficult to find.

The elements of *dominium* — *jus utendi, jus fruendi, jus abutendi, jus disponendi, and jus vindicandi* — are embodied in Article 348 which defines ownership as:

the right to enjoy and dispose of a thing without further limitations than those established by law. The owner has a right of action against the holder and the possessor of the thing to recover the same.

The Roman modes of acquisition whether *jure naturali* or *jure civili* are recognized in Article 609 which provides that:

Ownership is acquired by occupancy. The ownership of property and other rights therein are acquired and transmitted by law, by gift, by testate or intestate succession, and in consequence of certain contracts, by tradition; they may also be acquired by prescription.

It will be noted that accession is not included therein. The reason for this is that in our law, accession is regarded as a consequence of ownership, *i.e.*, as one of the rights flowing from ownership, and not as a mode of acquiring ownership.

In his Institutes, Book II, Title I, Paragraph 12, Justinian says:

Wild beasts, birds, fish and all animals, which live either in the sea, the air, or on the earth, so soon as they are taken by any one immediately become by the law of nations the property of the captor . . .

This is reflected in Article 610 of the Civil Code which reads as follows:

Things which by their nature are susceptible of appropriation, but which have no owner, such as living creatures which may be taken by hunting or fishing, hidden treasures, and abandoned personal property, may be acquired by occupancy.

According to the Institutes (Book II, Title I, Paragraph 39) :

the Emperor Hadrian, in accordance with natural equity, allowed any treasure found by a man in his own land to belong to the finder, as also any treasure found by chance in a sacred or religious place. But treasure found without any express search, but by mere chance, in a place belonging to another, he granted half to the finder and half to the proprietor of the soil. Consequently, if anything is found in a place belonging to the Emperor, half belongs to the finder, and half to the Emperor . . .

The same idea is restated in clearer language in Article 351 of the Civil Code, thus:

Hidden treasure belongs to the owner of the land in which it is found. Nevertheless, when the discovery is made on property belonging to another or to the State, and by chance, one half thereof shall be awarded the finder . . .

Thesaurus, says Paul (D. 41.1.31.1), *est vetus quaedam depositio pecuniae, cujus non extat memoria, ut jam dominum non habeat*. "By treasure," says the Civil Code (Art. 352), "is understood, for legal purposes, hidden and unknown deposits of money, jewels, or other precious objects, the lawful owner of which is unknown." Any similarity between the two provisions is surely not coincidental.

According to Roman law ownership cannot be transferred by mere agreement — *non nudis pactis, sed traditione dominia rerum transferuntur*. The agreement, even though it be in the form of a legal contract, serves only as an expression of the intention of the parties and does not affect the transfer of ownership from one party to the other. To bring about the transfer of ownership there must be tradition or delivery besides. This doctrine is not to be interpreted as meaning that a contract without delivery has no effect whatever. The contract, if it meets all the requirements of the law, may be perfected and therefore enforceable, but notwithstanding, it does not of itself cause the transfer of ownership. The perfection and enforceability of the contract are one thing, and the transmission of the ownership is another. In other words, the contract creates only a personal right or right *in personam*, against the promisor; it does not create a real right, or right *in rem* to the thing which is the subject of the contract. In conformity with this doctrine, the Philippine Supreme Court has repeatedly held that the ownership of movables cannot be transferred to the prejudice of third persons except by delivery of the property itself, and a sale without such delivery gives the would-be purchaser no rights in said property other than those of a creditor.

Under accession there are provisions in the Civil Code governing: alluvion; avulsion; abandoned river bed; islands formed in rivers; building, planting and sowing; adjunction; commixtion; and specification. The codal provisions are faithful counterparts of the corresponding Roman law rules. For instance, in Paragraph 29, Title I Book II of the Institutes we find that *omne quod inaedificatur solo cedit*; Article 358 of the Civil Code states:

Whatever is built, planted, or sown on another's land, and any improvements or repairs made on it, belong to the owner of the land . . .

The Civil Code treats of the real rights of usufruct, use and habitation separately from the subject of servitudes, including under the latter only praedial servitudes, to wit, right of way, servitudes of party walls, of

light and view, drainage of buildings and servitudes relating to waters.

With respect to usufruct, Article 467 of the Civil Code says:

Usufruct gives a right to enjoy another's property under the obligation of preserving its form and substance, unless the title creating it or the law provide otherwise.

How well has this Article preserved the form and substance of its progenitor (Institutes, Book II, Title IV, Pr.), which says:

Usufruct is the right of using, and taking the fruits of things belonging to others, so long as the substance of the things used remains . . .

As to the law of inheritance, formerly, in the Philippines, succession was governed by the Civil Code in all its aspects, but after the change of sovereignty following the American occupation, the provisions of the Civil Code relating to the making of wills and the administration of estates, both testate and intestate, were repealed by the corresponding provisions of the Code of Civil Procedure, Act No. 190. The latter code, however, did not repeal the provisions of the Civil Code relating to the substantive rights of persons in succession.

In the Roman law, by institution of heir meant the declaration who is to be heir, that is, who is to carry on the legal existence, the *persona*, of the testator. The institution of the heir was the all-important part of the will, since without it there would be no one to continue the legal personality of the testator and consequently no one from whom the other dispositions in the will could derive force. The institution of the heir was the head and foundation of the will — *veluti caput atque fundamentum totius testamenti*; all the other dispositions were merely accessories to it, or to be more precise, only conditions imposed on the heir. If the former was wanting, the latter fell. Since the heir was the continuation of the legal personality of the testator, he acquired the totality of the rights and obligations of the latter. Their two estates were fused, and if the liabilities of the testator exceeded his assets, the heir was answerable with his own property.

The notion that the heir was the necessary prolongation of the *persona* of the testator was adopted by the Spanish law. The Civil Code provides that a person is called an heir when he succeeds under a universal title, and a legatee when he succeeds under a particular title. This distinction was swept away on the passage of the Code of Civil Procedure, Act No. 190. Under this law, "heirs" are the relatives of a person who inherit his property when he dies intestate. Those who succeed under a will — whether relatives or not — are "devisees" if they inherit immovables property, or "legatees" (in a narrower sense of the word) if they inherit

movable property. At present, therefore, all successors *mortis causa* stand in the same position as the legatees in the Roman law and Spanish law. They are not liable for the debts of the decedent beyond his estate.

Justinian defined a legacy as "a kind of gift left by a deceased person." According to the Civil Code, as explained above, a legacy is some determined property or portion of the testator's estate which he directs to be separated from the inheritance and to be given to some one. Under this system it is incumbent upon the heir to comply with the testator's direction. But now that there is no longer an heir in the Roman law sense of the word, it seems that the duty to carry out the legacies devolves upon the executor. To the uninitiated it may seem very strange that our law, like the Roman, permits the testator to give as a legacy property belonging to a stranger. Formerly the heir, and now probably the executor, is obliged to acquire the thing from the stranger and deliver it to the legatee, and if this is not possible, to give the latter its value.

The Law of Obligations and Contracts covers a very large portion of the Civil Code. Out of one thousand nine hundred seventy six articles, eight hundred eighty-eight deal with this subject. They are permeated with Roman principles.

The next to the opening article (Art. 1089) provides:

Obligations are created by law, by contract, by quasi-contract, and by unlawful acts or omissions or by those in which any kind of fault or negligence occurs.

— a reprint of Paragraph 2, Title XIII, Book III of the Institutes which says that obligations arise *ex contractu*, or *quasi ex contractu*, *ex maleficio*, or *quasi ex maleficio*.

The Roman doctrine of liability on account of *dolus*, *culpa*, and *mora*, is reflected in Article 1101 which provides:

Any person who is guilty of fraud, negligence or delay in the fulfillment of his obligations, or who in any manner whatsoever shall fail to comply with the terms thereof, shall be liable for any damage caused thereby.

Philippine law distinguishes between *culpa contractual* and *culpa aquiliana*. The former is a breach of a pre-existing duty arising from contract or quasi-contract; the latter is negligence independent of contract.

The Institutes in Book III, Title XV, Paragraph 2 reads: *Omnis stipulatio aut pure aut in diem aut sub conditione fit*. The Civil Code likewise recognizes pure or simple obligations, obligations with a term, and conditional obligations. In the first the obligation is at once due and

demandable; in the second it is due but not demandable until the day arrives; in the third it is neither due nor demandable until the condition is fulfilled.

A word about *causa*. The treatises of text-writers on the subject of *causa* or cause present a bewildering picture. In the first place, they are divided into two camps, one, the causalists, maintaining that there exists an absolute necessity for *causa* in contract; the other, the anti-causalists, denying it and describing it as a "juristic figment." In the second place, those who uphold the theory that cause is required are not quite agreed as to what its real nature is. The state of confusion is aggravated by the attempt of some to identify the "consideration" of the English law with the *causa* of the civil law. Be that as it may, the first question is not a problem in our system, for the statute categorically provides that "contracts without cause or with an illicit one produce no effect whatsoever."

With respect to quasi-contracts, the Civil Code, retaining the Roman concept in its unadulterated state, defines them (Art. 1887) as:

licit and purely voluntary acts which create an obligation on the part of the actor in favor of a third person, and, at times a reciprocal obligation between the parties concerned.

Illustrations of obligations *quasi ex contractu* in the Civil Code are: *negotiorum gestio* and *solutio indebiti*.

In the Philippine legal system, there is no separate department called the law of torts in the same way that there is a branch known as the law of contracts, or the commercial law. However, Article 1902 provides:

Any person who by act or omission causes damage to another by his fault or negligence shall be liable for the damage so done.

It is interesting to note the striking similarity between the wording of the Institutes in Book IV, Title V, Paragraph 1 and that of Article 1910 of the Civil Code. The former reads:

So, too, he who occupies, whether as proprietor or gratuitously, an apartment, from which anything has been thrown or poured down, which has done damage to another, is said to be bound *quasi ex maleficio* . . .

The Civil Code provides:

The head of a family dwelling in a house, or in a part of the same, shall be liable for any damages caused by the things which may be thrown or which may fall therefrom.

The foregoing is an inadequate attempt to indicate to what extent the Roman law and the modern civil law have influenced the Philippine legal system. It remains now to show in what Anglo-American thought has affected Philippine law.

To my mind, the most important and lasting contributions of American institutions to Philippine law are:

(1) In the field of public law, the republican form of government with the traditional separation of powers and a complete bill of rights. Also, the principle of constitutionalism which according to Beard embraces four necessary elements: (a) the great rules for governing ourselves shall be made by the process of proposal, discussion, and popular decision at the polls; (b) the powers of all officials shall be restrained by fundamental rights reserved to the people; (c) all officials exercising power shall be chosen by the voters directly or indirectly; and (d) directly elected persons, having limited powers for a term of years, shall be automatically subjected to review at elections held periodically.

(2) With respect to the structure of the government, the conception of an independent judiciary. Another of the priceless contributions of the American regime to our government is the implantation in the Philippines of the doctrine of judicial supremacy, according to which the judiciary, a co-ordinate branch of the government, becomes the particular guardian of the terms of the written constitution.

(3) In the branch of adjective law, a scientific and simplified system of procedure. The substantive private law of the Philippines, based on the Spanish codes, was found to be well suited to the conditions of the people and was left unchanged. But in the matter of procedure there was a general desire for reform.

(4) In regard to commercial law, a set of up-to-date business based on modern economic life.

Opinions differ as to the present character of the Philippine legal order — whether Romanesque or Anglican, a blend of the two or a composite. I venture the following conclusions:

First, the greater bulk of Philippine law is Romanesque.

Second, there has been an increasing infiltration of common-law principles into Philippine jurisprudence, due to several causes, to wit: (a) the automatic replacement of the Spanish political law by the American political law, upon the transfer of sovereignty; (b) the continued drawing from American patterns by the Philippine Legislature in the enactment of new statutes; (c) the growing reliance by the bar and the bench on American decisions in the application and interpretation, not only of American-derived statutes, but also of the old statutes of Spanish origin; (d) the imitation of the system of American legal education by the law schools of the Philippines. The last-mentioned cause is by no means the least in effect. It must be remembered that the revival of Jus-

tinian Roman law in all Europe in the twelfth century was largely due to the lectures of one law professor at the University of Bologna.

Third, despite the rapid increase of the common-law element, the Romanesque portion of Philippine law still predominates and will continue to predominate. It is too sturdy to be relegated to the background. "Law is a tenacious plant," says Lord Bryce, "even harder to extirpate than language."

Fourth, although many common-law provisions and principles are being literally grafted on the law tree of the Philippines, the case-law method of adjudication, which is a condition *sine qua non* of the common-law system, is not adopted. The doctrine of *stare decisis* does not obtain in the Philippines in the same sense that it obtains in common-law countries. Precedent is only evidence of the law in the Philippines and not the law itself; consequently, the Philippine legal system can never be a common-law system, in the strict sense.

Be that as it may, the noteworthy fact is that the two greatest world legal systems, the civil law and the common law, have met and found a common ground in the Philippines. In the words of Justice Malcolm:

There is in the Philippine Islands a unique legal system, in which the two great streams of the law — the civil, the legacy of Rome to Spain, coming from the west, and the common, the inheritance of the United States from Great Britain, amplified by American written law, coming from the east — have met and blended.

And Judge Lobingier concludes:

"Finally, the experiment has demonstrated the feasibility of blending segments of the civil and common law — the two systems which divide the civilized world — thus confirming the statement that at root the two systems are really one and bringing appreciably nearer the day dreamed of by Rome's greatest orator and advocate, when '*Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore una lex et sempiterna, et immortalis, contenebit.*'"²

²*Civil Law Rights through Common Law Remedies*, 20 JUDICIAL REV. 107 (1908-9). Cic. de rep. 3.22.33.