Гражданское право

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НАСТОЯЩЕЕ И БУДУЩЕЕ ГРАЖДАНСКОГО ПРАВА

Аннотация. Автор даёт краткий анализ самой сути гражданского права и подчёркивает его потенциал для адаптации к новой эре. Статья начинается с исторического обзора, и на его основании проводится дальнейший сравнительный анализ ситуации применительно к современности. Особое внимание автор обращает на обширную трансформацию гражданского права в 20-м веке: сокращению исторического отставания и концентрации на основных технологических разработках конца тысячелетия: законодательным вопросам собственности, кредитов, семьи и гражданской ответственности. В статье подробно рассматриваются некоторые тенденции развития гражданского права, среди них принципы солидарности, де-ассимиляции и де-кодификации, "преимущества пострадавших", социализации и коллективных явлений. Кроме того, автор статьи размышляет об изменениях в испанском гражданском законодательстве в условиях европейской интеграции. В заключение автор предостерегает от тенденции принятия законов только затем, чтобы потом изменить их в угоду политической конъюнктуре, что, по существу, низводит научное обоснование законодательства до простой техники.
Ключевые слова: гражданское законодательство, Гражданский Кодекс, диверсификация гражданского законодательства Испании, коллективные явления, центробежное гражданское законодательство

Civil law

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THE PRESENT AND FUTURE OF CIVIL LAW

Abstract. The author has sketched out a brief analysis of the “body” of Civil Law, which has the capacity for adapting to the new era. The article begins with a historical overview that gives sufficient basis for the following comparative analysis of the modern situation. Reader's attention is drawn to the great transformation of Civil Law during the 20th century that consisted in removing historical backlog and latching on to the major technological developments of the end of the millennium: property, credit, family and civil liability. Certain trends of Civil Law development are highlighted, among them its principles of solidarity, de-assimilation and de-codification, the favouring of the victim, socialisation and collective phenomena. Also, the article reflects upon the

changes in Spanish Civil Law due to European integration. In the conclusion the author warns against the tendency of making laws only to change them alongside political change as it is essentially converting the scientific foundation of Law into mere technique.
Keywords: Civil Law, Civil Code, diversification of Spanish Civil Law, collective phenomena, centrifugal Civil Law.

1. - HISTORICAL AXIS OF MODERN CIVIL LAW

In order to look at the concept of Civil Law we must start by examining its history. This approach falls into line with one of its major features: its presentation as a *historical category* - dynamic, changing, a product of legal experience, in permanent contact with social reality (show DE CASTRO).

However, the historical nature of Civil Law always includes an element of stability and permanence which is equally important. So, there is an "insurmountable ambivalence" between immutability and legal contingency, between the old and the new, between transcendence and immanence, between rationality and history. This forces us to look at what is new in early 21st century society, in order to reject and renew those redundant things which are sure to remain in our discipline, and to draw on and strengthen old, timeless institutions insofar as they still offer a solution to real problems.

The historical background of Civil Law can be condensed into three main phases:

1º - The long formation process which, starting out from the ancient *ius civiles*, shaped through Reception, and matured with Codification, is crystallised into the true origin of modern Civil Law. We cannot forget that we have inherited a legal tradition dating back thousands of years; that even today our system is filled with numerous laws originating in the Roman Law of the Twelve Tables, that we often use proverbs taken directly from the Pandects, and our Spanish Supreme Court frequently quotes texts from the Medieval Laws known *Partidas* or *Leyes de Toro.* We cannot forget, that the systematic edifice of Civil Law which houses our Civil Code, all our disciplinary treaties and manuals, and the Course Content itself, is still deeply rooted in the tradition which emerged in Rome. However, that evolution is well-known to us all, and I do not plan to write about it here.

2º - Moving on to the second phase, it is indisputable that civil lawyers, naturally, date back to the *Corpus iuris civilis*, that is, the *Civil Code* and the handful of specialist text which complete it (Mortgage Law, Civil Registry Law, Civil Procedure Law, etc). Just as the lawyers of *Ius Commune* worked using the *Corpus Iuris Justinianeo* and the texts of the *Ius Proprium*, we, doubtlessly the most favoured heirs of that legal tradition, adopted, in the 19th century, our own *Corpus iuris.* Of course, this is not to undermine the traditional prior to the Code, and today there are Civil Lawyers who are fully familiar and versed in the Roman sources, the texts of *Ius Commune* and the works of CUJACIO, DONELLO, DAUMAT, POTHIER, and our great Spanish classics GREGORIO LÓPEZ, COVARRUBIAS, VÁZQUEZ DE MENCHACA or RAMOS DEL MANZANO. But we should recognise that this branch of Civil Law doctrine is clearly in a minority, and *rara avis in terris.* One could say that it all began with that *Corpus* which made up codified Civil Law, with its own contexts. To mention but a few:

a) Civil Law is placed within Private Law (free will, regulations and civil liberty).

b) There is a classic identification between Civil Law and legislation or statutes for individuals. This is legislation of the *status personae.* It is an equation which cannot be accepted alone, as it is too generalised: other branches of the law (commercial or employment) deal with highly significant aspects of a person's individuality. For this reason, to be more specific, Civil Law is focused on establishing the basic principles of personality, and looks at the person in legal intimacy, in the most intrinsic aspects affecting mankind. It does not regulate specific personal situations or activities (trader, employee, businessman or litigant), but rather the deepest-rooted expressions of a human being, and therefore those of greater community involvement. In other words, the private aspects of the free development of personality as stated in the Constitution.

c) So, with its liberal, bourgeois and conservative backbone, that codified Civil Law is based on the following institutions as summed up recently by my mentor ALONSO PÉREZ:

- A trend for unlimited private property.
- Equalitarian contractual freedom.

- Bourgeois family patriarchy, where the male holds *patria potestas* over his children and *manus* over his spouse.

- Canonical marriage, or subsidiary civil marriage under great difficulty, neither of which can be dissolved.

- discriminate filiations by birth right.

- A prevalence of agriculture over industrial or urban values, with a rural right over property which was an anachronism even for its time.

- An abstract, static, timeless law of obligations, geometrically built to benefit free exchange and bourgeois capitalism.

- A right of succession tending to favour perpetual private property, and an instrument of *posthumous* bourgeois family cohesion, with generous, legitimate and widespread limitations over the freedom to bequeath.

3º - But this is not, in any way, the "current" post-codified Civil Law of the early 21st century. Spanish society and Civil Law in 2009 differ greatly from those of 1889 - the date of our Civil Code. Too much has changed for us to be satisfied with a Civil Law limited to the context of the former Code. The shape of our State has changed, as has its constitutional and territorial organisation and our geopolitical position within the European framework. Many of our presiding values have altered, as has our economic model – today founded on welfare, consumption and the social State, and family organisation and other social areas have transformed radically.

Our Civil Law is not passive to all this. It cannot do so with impunity. Proof of this is seen the profound changes which have been made to the Civil Code, in particular since 1981.

2.- DIAGNOSIS OF MODERN CIVIL LAW

Next, in a rather superficial way, I would like to compare that Civil Law which many of us have studied with current Civil Law, in order to see how the tradition passed down from codification has changed, the faults in our old discipline, and the remedies we can prescribe to tackle them.

1) First of all, we must look at the famous *"crisis" in Civil Law*, which has been shouted out from the rooftops since the 1920's. However, this crisis actually hones in on an inherent gnoseological problem in our discipline, and the need to enliven and revitalise it. The

codified Civil Law was certainly suffering from excess dogmatism (*idola rationis*), and excess historicism (*idola Historiae).* And this is something which has been being corrected.

Overall, and to paraphrase SUPERTRAMP, I ask myself "*Crisis, what crisis?*", and I prefer to talk of an ongoing dialectic of articulation between new and old in this discipline - they are not mutually exclusive realities, but in fact perfectly compatible with each other. Consistency does clash, not in the least, with the dynamics which dominate the structure of our society. There is no reason to speak of a "crisis", or other similar expression, when Civil Law is structurally adopting that creativity and dynamic, a means of becoming existentially parallel to reality and personal values, and harmonising it all with the stable and constant elements, knowing just how to do away with others which are merely circumstantial and anecdotal.

The great transformation of Civil Law during the 20th century consisted in removing historical backlog and latching on to the major technological developments of the end of the millennium: property, credit, family and civil liability in 2000 are a far cry from those of the 19th century. Modern Civil Law is the "mortal enemy" of old glories, impractical traditions, redundant medieval patterns and Latinisms and of that Cartesian dogmatism so distant from real social issues. Yet it still incarnates and forms part of History, as a reality and an experience with which we must always remain connected. A good example of this can be found in the application of the old community Law serving the right to enjoy appropriate environment conditions, set forth in article 45 of the Spanish Constitution and imposed as a social requirement.

2) We have known for some time of the need to submit the old Ulpian *summa divissio* to mere criteria of preponderance, (from Bullinger and Raiser) so that Public and Private Law are not axiologically contrasted, but set up in a parallel structure and complementing one another, creating fields of preponderance or relative intensity for public and private matters. Fields which in Private Law are based on the value of autonomy, in the institutions most closely linked to individual free will and initiative, through subjective rights and legal business.

The Civil Law = Private Law identification should also be subjected to the *principle of solidarity*, as mentioned by RODOTÀ (less private autonomy in order to the common good).

Overall, current Civil Law experts are concerned very little with whether their Law is public or private: it is an *ius novum*, with something of everything. Construction Law, Damage Law, Family Law and Real Estate Law all require interaction between public and private regulations.

3) Classically this was identified in the systematic order of Civil Law with general Private Law, insofar as (apparently) their fundamental concepts contain the principles upon which Private Law is based. And undoubtedly, it appears as a supplementary and integral part of other specific regulations.

This must be examined in the light of the so-called "*de-assimilation process*" of Civil Law, which was authoritatively formulated by DEMOFILO DE BUEN one hundred years ago, and which refers to the gradual branching out from the old common trunk: Commercial Law (despite the unifying trend, which is difficult to achieve in Spain for constitutional reasons) , Employment Law or Procedural Law).

However, faced with this de-assimilation process, the scale of the issues and regulation which make up some subject matter means that many believe – or many of us believe – in true specialisation: Damage, Consumer, Construction, Notary, Real Estate, Family, Business Laws, etc. Just as General Medicine has unfolded into Oncology, Cardiology, etc.

4) In *legislation terms*, Civil Law has inherited the codification resulting from the rational system: mathematical, precise, with well-constructed and often concise articles. The aim was to condense under each legal precept the rich tradition and legal experience built around the *Corpus iuris civilis.* The Civil Law established in the 20th century has broken with the system, with written reason, with the exact linguistic formulae. It is a Law made up of disorderly, long-winded and often poorly written articles, constructed outside the systematic order: rooted in the most bare-faced positivism, and detached from historical experience. Legislators have to wade through an endless muddle of special laws, at times a long as an entire legal code, devised only for the present day. These are legal provisions born for the short

term, and subjected to the same vertiginous and rapid change as our post-modern society.

Compared to the codified Civil Law, made -like the large institutions of the *ius commune*- to last the ages and serve as a classic paradigm, Civil Law in the early 21st century has a lot of disposable elements, born of consumerism and of itself, just like its first born, Commercial Law, the regulation of consumers and market relations.

All this formally translates into the *de-codification* of Civil Law, as described by IIRTI, BUSNELL, SACCO and others. The Civil Code no longer occupies a central position in the private legal system, and indeed in modern times had become just another part of one of the multiple "micro-systems" which make up the "poly-system" and which would include a so-called "special" legislation (despite there no longer being anything special about it) as described by GIORGIANNI as "inundating, torrential and elephant-like".

While in the past codified Civil Law, as a child of divine right, was essentially condensed into the Codes, "written reason", and the few special laws, revolved around the code as the centre of the legal solar system (*centripetal Civil Law*), today quite the opposite is true: just like the universe, it is constantly expanding. In modern Civil Law, the Civil Code is the big bang, remaining as a tiny star casting a gentle light over the huge constellation of regulations found in the special laws, many of which are core elements making up the *ius civile novum,* compared to the *vetus.* And if we think of the immensity of what was once known as Foral Law, now called the Law of Autonomous Communities (Spanish Regions), the Civil Code is a fading star: and we are thus left with *centrifugal Civil Law.*

However, despite of all this, there is a practically unanimous view that the Code should not be left for dead because, as BERCOVITZ says, "it is the vestige of all legal dogmatism, originating in the common law, transferred to modern law precisely through the codified texts". And LACRUZ shows that "it still supplies the explanatory keys to resolving problems and, if put to good use, these would render many of the adjacent special regulations unnecessary".

5) As regards *institutions and content,* modern Civil Law experts are no longer concerned with subjects which have been obsolete for some time. The Civil Law of today is open to the changes and demands of the technological society in which we live. It must

regulate new realities, and the major concerns and preoccupation of its authors are as follows:

- Damage - in a society which is in essence harmful and harmed;

- Large modern constructions (private housing estates, retail centres, large industrial warehouses, hotel chains and tourist complexes, etc);

- Contractual relations in cases of inequality (adhesive and predisposed contracts); laws for general conditions, consumer regulations, etc.

- The defence and protection of the environment, where private Law has proven to be more efficient than criminal and legal administrative solutions.

- The innumerable special sales (purchases on credit, from trade outlets, homes, etc.), and the countless special lease agreements (leasing contracts, urban lets, country land).

- The extremely complex forms of modern ownership of property (horizontal, industrial, intellectual, farm, urban, timeshare, etc); horizontal property law, building laws, intellectual property, multi-property, etc.

- New family arrangements, which bear no relation to that former patriarchal and authoritarian right (common law partnerships, homosexual couples, single-line family units, adoptions, fostering, the rights of minors, new fertility treatment technologies, etc.).

6) The *person* still plays the leading role in Civil Law. That old concept by PICO DELLA MIRANDOLA, the idea of the free development of personality, has been consolidated in the Constitution, consecrating the essential property of the person as superior values, and establishing purely civil mechanisms for protecting personal rights.

But a "Law on people and basic scope" (DE CASTRO, HERNÁNDEZ GIL, etc.) has shifted considerably towards a "Law on economic relations, market, consumption and the demands of neo-capitalism". From a Law which regulated basic legal relations *inter cives*, to an order of a welfare state (referring to housing, repair of personal, property and moral damage, the defence of users and consumers, the weaker contracting party, new family units, leisure, open spaces, etc.). From the dignity of the person to making the best social and communal use of property and services.

There is therefore a shift from the first model (luckily, never fully abandoned) to the second. To sum up, the separation of a Classic Civil Law, of the individual and his legal status, born of illustrated reason and the conceptual system, from an eminently economic Civil Law, wider-spread, in an anarchic legal, doctrinal and jurisprudential expansion.

7) Closely linked to the above, we can talk of a "breakdown" of the *civil status*, which defines the capacity for the person to operate. In practice, the *civil status* does not exist.

8) From a heritage point of view, some *basic pillars* of the old trunk such as private property or free will have been affected, from the moment in which they were no longer included in the section of the Constitution referring to the fundamental rights under privileged protection, and they are subject to an unmistakable phenomenon of publification. In accordance with mass production and the handling of significant sources of risk, the old dogma of guilt gives way to a model of objective civil liability, whose centre of gravity lies in damage and not in blame; on the victim and not the perpetrator. The *favouring of the victim* or *pro damnato* principle has adopted a key role among the general principles of the Law.

9) The Social Law State imposes a Civil Law which is sensitive to *general and collective interests*, the protection of which must constitute an active part of all legal relations, and which the State must enforce, as it no longer occupies a neutral position in the relationships between individuals. For this reason, we can talk of a true "*socialisation*" of Civil Law, which is no longer seen in the pejorative sense, or as an attack on Civil Law. This should cover social or collective interests and adapt to the protection of the interests of the weakest members of society (consumers, end users, minors, the disabled, the victims of damage or crime) and of presiding collective values (equality, the productivity of wealth, rational use of the environment, etc.).

Modern civil lawyers are not losing sight of the significance of *collective phenomena*, and the social concept which at times replaces and at others rises above the concept of the individual. "Less and less private issues. Increasingly incorrect, the golden rule of Civil Law, *res inter alios acta"* (CARRASCO). Given the regulation of primordially individual activities, current Civil Law is the regulation

of the "associating forms" of "human cooperation" which characterise all modern economic activity. The concepts of social solidarity and protecting general and collective interests are no longer alien to Civil Law, and they preside – as required by the social and democratic State of Law – over the old and new institutions which form it. But in the family context too, there is this dominant mentality of "collaboration" insofar as the concept of equality has replaced authority in all family relationships.

10) The activity and *modus operandi* of lawyers have also changed. Today, with some exceptions, there no longer enough time – as there was in the past – to make proper inroads into other legal areas which run alongside Civil Law. Let us recall those works of legal philosophy, legal history, Roman Law, etc., by DE CASTRO, HERNÁNDEZ GIL, VALLET, DE DIEGO, PACCHIONI or SAVATIER. Today, however, civil lawyers are less concerned with the writings of JUSTINIANO or GARCÍA GOYENA, and much more interested in the varied, diverse, and often contradictory language, and endless rulings by national or European courts. We feed off the indigestible databases of the Official State Bulletin.

We are facing a Law which, I repeat, is disposable, an adaptation to the countless special laws which concern us. We have returned to critical analysis, to the rush to provide solutions to the constant demands of our legal hypertrophy: the concept, the system, the rigour of legal thought, still system-orientated, have become insubstantial, almost unnecessary. We have shifted from interpretation to comment, with no compared, historical, reasoned, analytical or argued references. Raw, hard positivism: once more, "that's how it is". Naturally, there are still many lawyers cultivating Civil Law who are not moving in this direction, but, I insist, they are in the minority, and are often rejected.

For this reason, we see how the pit is growing wider. The pit which, as said by ESSER, separates theoretical and practical lawyers. And that is a dangerous affliction for our modern Civil Law, as it has forgotten - deliberately or otherwise - its scientific dimension. Civil Law, after the *Methodenlehre*, the preface to which can be found in the great LEIBNIZ, who followed in the footsteps of his mentor PUFFENDORF by laying the foundations for legal methodology, arose

like an "art of the just" (BIONDO BIONDI) and it is a great shame for this path to be cut off so suddenly.

11) Alongside the "quasi-constitutional" loss of value of the Civil Code, there is another phenomenon of true "constitutionalisation" of Civil Law. The Constitution (together with European Law) is, for many current civil lawyers, the true new *Corpus iuris civilis.* A large part of current Civil Law emanates from the in-depth analysis of constitutional precepts and an infinity of European regulations. As written by GALGANO, the Constitution is now not only the supreme source of Public Law, but also serves as the fundamental basis for Private Law, and a major driver behind change.

The play of constitutional principle forces a "re-launch" (to quote PERLINGIERI) of our discipline, both in order to place it within constitutional legality, and to provide new content and scope for certain institutions, in personal, family and heritage matters, the meaning of which is different in the light of these principles.

12) The current direction of the European Union, headed towards a far more ambitious unification that just monetary union, means that we must also refer to *European Law* in our examination of current Civil Law. The Civil Law of the future will be, or will tend to be, a new *ius commune*; a "European Contract Law" is already in the making. There will be professorships in "European Private Law". We are currently trying to find a mid way point between *common law* and the continental *civil law.*

13) In Europe a new codification movement has re-emerged. On the opposite side of the de-codification I previously mentioned, and in the "post-codification" era (TOMÁS Y VALIENTE), ZIMMERMAN says that the concept of codification is re-born, which means we can talk of a true "re-codification" (DÍEZ PICAZO). Dutch Private Law has been codified, and Germany is drawing up a Code of Contract Law. In early 1994 the Civil Code of Québec came into force, and several central and eastern European countries are preparing to replace their old socialist codes. France is planning to codify all its legislation into 60 codes by 2010. Argentina is hoping to approve a new unified civil and commercial code. And so on.

14) Meanwhile, civil codes are also being prepared by authorities at local level. It is no longer strictly correct to talk of the "foral issue". The new model of plural Civil Law established under the

Constitution forces us to talk about a real *diversification of Spanish Civil Law*. Indeed, the Spanish Constitution adds a new dimension to the so-called *foral* issue, for three different reasons: a) the recognition of historical laws in *foral* territory. b) The existence of a separate legislative power in each Autonomous Community. c) The spread of responsibilities which, in civil matters, is established under the confusing (deliberately ambiguous, one could say) article 146.1.8. From problems of a terminological nature (the naming of these Laws have always been a cause for debate) to the very interpretation of this article, these are complex issues upon which I cannot elaborate today. But they can lead us to conclude that:

a) There is a phenomenon of diversification taking place in Spanish Civil Law, which no longer consists of a single regulation, but of plurality.

b) That there is a consolidation of *Foral* Laws taking place, which in some Autonomous Communities is similar to a process of parallel codification. From "development", we shift over to the "construction" of a regional Civil Law.

c) We are witnessing a process which is still open, still in the development phase, and, given the ambiguity which had to be included in the Constitution, we do not know exactly where it will lead.

Catalonia, which already has a Code of Succession and a Family Code, is now finalising its Civil Code. These are paradoxes of a Law known as *commune:* while heading towards a common private Law in Europe, the nationalisms are shutting themselves in with a new *ius propium* which, under examination, is *proprium civitatis,* but it is *commune*, because in line with many of its institutions, these are common to the other *civil law* societies: *omnes gentes utuntur).*

3. - FINAL REFLECTION BY WAY OF ADVISE

We have sketched out a brief analysis of the "body" of Civil Law in the new millennium, which proves the ongoing vitality to be found in our discipline. Almost like a chameleon, it has the capacity for adapting, to our new era. This is why it is so great. In terms of the "should be" element, perhaps we need a new VOLTAIRE to appear on the scene and repeat the same chorus of the enlightened sage: "Burn your laws and make new ones". Indeed, making laws which last,

because they have been well prepared, is to believe in the magnitude of the Law. Making them only to change them alongside political change, is to convert the scientific foundation of Law into mere technique. Judges need to adapt and rejuvenate laws every day, because, as ARISTOTLE said in *Politics* (2, 8, 24), "a readiness to change from old to new laws enfeebles the power of the law".

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