THE ROMANIST BEFORE THE REFORMS OF FAMILY PROPERTY LAW OF THE OLD CATALAN COMPILATION[1]

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Dear Laurens, some years ago I undertook research into the strong Romanistic component of the old Compilation of special civil law of Catalonia of 21 June 1960, and studied some relevant topics such as the reception of the *SC Velleianum* and the *praesumptio Muciana*[2]. Now I need to take a break and outline a somewhat broader picture of the family property law compiled in 1960 and its recent evolution.

In this regard, the chapters of title III (*Del régimen económico conyugal*) of the first book (*De la familia*) of the Catalan Compilation (original text) provide a complete survey of the economic structure of the traditional family.

1. Chapter I (*Disposiciones generales*) regulated nuptial agreements (*capítulos matrimoniales*), a kind of economic vehicle for the rural extended family, a customary institution that does not derive from the Roman tradition.

Nuptial agreements serve, as is well known, to reflect (and where appropriate, to regulate in detail) the agreed regime of matrimonial property either based on a nuptial agreement or on the separation of property as stated by article 7: "*El régimen económico familiar de los cónyuges será el convenido en sus capitulaciones matrimoniales ... En defecto de pacto el matrimonio quedará sujeto al régimen de separación de bienes ...*". The dowry system tempered the harshness of this regime; however, the Catalan Act of

1 This article in honour of Laurens Winkel has been developed in the context of a Research Project funded by the Spanish *Ministerio de Ciencia e Innovación* ref. DER2010-17712 (subprograma JURI).

2 Linares, J.L./Carreño, R.M. *Para un inventario romanístico de la compilación de Derecho civil especial de Cataluña de 1960*, in *Index* 38 (2010) 418 ss.; Linares, J.L. *Una pieza del inventario institucional romanístico de la Compilación del Derecho civil especial de Cataluña de 1960 la prohibición de interceder del* senatus consultum Vellaeanum *(mediados del s. I)*, in *Libro Homenaje al Profesor Guzmán Brito* (in print) (available in *La Notaria. Revista del Colegio Notarial de Cataluña* 4 [2011-1] 2012 (nueva época) at 94 ss., online at *http //dialnet.unirioja.es/servlet/articulo?codigo=3936575*); and Linares, J.L. *Nota sobre la incorporación de la* praesumptio Muciana *al inventario institucional de la compilación del Derecho civil especial de Cataluña de 1960*, en *Revista General de Derecho Romano* in *IUSTEL* 16 (2011) 1-15.

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Fundamina 20 (2) 2014 ISSN: Print 1021-545X

30 September 1993[3] introduced reforms that modified the Compilation on patrimonial relationships between spouses, but no longer made any reference to the dowry system.

In this respect, nuptial agreements could stipulate the content of and security provided for the dowry (legal mortgage), donations *propter nuptias* and universal donations, the "*escreix*" or dotal increase by the husband, the widow's usufruct or universal usufruct, contractual succession (*heredamientos*) in its various forms, and *donationes mortis causa*.

Except in the aforesaid rural areas, nuptial agreements were already in sharp decline by the time of the enactment of the Catalan Compilation.

Before dealing with the traditional prohibition of donations between spouses (ch. III), article 11 determined in general terms that onerous acts and contracts between spouses were valid: "*... en régimen de separación de bienes serán válidos los actos y contratos que, durante el matrimonio, celebren entre sí los cónyuges a título oneroso ...*". However, the Catalan Act of 20 March 1984[4] (enacted by the legislative Decree "texto refundido" of 19 July 1984) reformed the Compilation to bring it into line with constitutional principles that followed the characteristic trend of modern family law towards contracts between spouses. In this respect the new article 11 (12) determined that spouses were allowed to enter into onerous and gratuitous contracts with each other: "*Los cónyuges podrán celebrar entre sí, durante el matrimonio, actos y contratos a título oneroso o gratuito ...*".

2. Chapter II was dedicated to donations and other marital arrangements and initiated the comprehensive regulation of the Catalan forms of *donatio ante/propter nuptias*. The general framework outlined in articles 12 and following was based on the principles of proportionality and interdependence of the economic contributions of the parties (in the form of the dowry and *donatio ante/propter nuptias*). The proportionality of their contributions will become evident when I list the so-called "paradotal institutions" below. Their interdependence is reflected in, among others, the nullity of retrodonations made by the heir or the beneficiary of the donation to the donor or his heirs, as stated by article 13: "*las retrodonaciones hechas por el heredero o donatario a favor de los heredantes o donantes o de sus herederos de los bienes comprendidos en un heredamiento o donación por causa de matrimonio otorgadas en capitulaciones matrimoniales ...*". In addition, article 16 severely limits the possibility of the revocation of such gifts.

Donations upon betrothal (not included in the matrimonial chapters, article 17 *et seq.*) followed the Roman model (*largitas sponsalicia*) while donations *propter nuptias* were the counterpart of the dowry brought by the wife: "*... se contraponían a las* donationes propter nuptias*, que constituían propiamente compensaciones realizadas por el marido a la aportación de dote por la mujer*"[5].

Article 19 dealt with the allocation of certain goods to the wife. The change of wording that followed the 1984 Reform was a reflection of the principle of legal equality between

3 Hereafter the 1993 Reform.

4 Hereafter the 1984 Reform.

5 Puig Ferriol, L./Roca Trías, E. *Fundamentos del Derecho civil de Cataluña* II *Derecho familiar catalán* (Barcelona, 1979) 320.

the spouses – a rudimentary norm in modern family law. That explains the disappearance of other traditional principles (such as the prohibition of intercession or the *praesumptio Muciana*) on which the relative standing of each spouse in the marriage had been based:

> Article 19: *Son de propiedad de la mujer los vestidos y ropas de su uso personal, aunque hayan sido adquiridos con dinero del marido …* (1984 Reform: *Al consorte sobreviviente, no separado legalmente o de hecho, le corresponderá siempre la propiedad de las ropas, mobiliario y enseres que constituyan el menaje de la vivienda conyugal ...*).

3. Chapter III regulated the traditional prohibition of donations between spouses, including, in article 20, the particular regime of validation established by the *oratio Severi* of AD 206:

> *Las donaciones entre cónyuges hechas durante el matrimonio fuera de capitulaciones matrimoniales serán nulas; pero si el cónyuge donante fallece sin haberse arrepentido de ellas o sin revocarlas quedarán retroactivamente convalidadas ... .*

In terms of the 1984 Reform, donations between spouses during marriage ("*donaciones entre cónyuges hechas durante el matrimonio fuera de capitulaciones matrimoniales* ...") are "merely revocable" (art. 21).

The *Praesumptio Muciana* had its place too, as is evidenced by article 23: "*Los bienes adquiridos por la mujer constante matrimonio, cuya procedencia no pueda justificar, se presumirán procedentes de donación del marido ...*".

The 1984 Reform introduced the so-called "*presunción muciana concursal*", a type of *praesumptio Muciana* in case of bankruptcy, in the following way: "*En caso de quiebra o concurso de acreedores de uno de los cónyuges … los bienes adquiridos por el otro a título oneroso durante el año anterior … o desde la fecha de la retroacción, se presumirán donados por el primero …*". The focus of the rule shifts from strengthening the authority of the husband to the protection of creditors.

Highlighting the special position of women, and particularly of married women, was also the prohibition of intercession that opened the fourth book, dealing with "obligations and contracts, and prescription" of the Catalan Compilation. The reception of the regime of the *senatus consultum Velleianum*, supplemented by *auth. si qua mulier* (derived from Nov. 134.8 (a. 556), and following C. 4.29.22 (a. 530) in the old editions) was to be found in article 321 ("*la mujer no quedará obligada, en virtud de fianza o intercesión por otro …*") and in article 322 ("*será nula de pleno derecho toda fianza o intercesión de mujer casada a favor de su marido …*").

With the fleeting precedent of the Catalan Act of 19 June 1934 on the legal capacity of married women and of spouses (art. 7), the 1984 Reform definitely abrogated the prohibition of intercession, finding it contrary to the principle of legal equality between the spouses.

4. Chapter IV regulated the limits of donations in case of remarriage and the "year of mourning".

Article 24 mirrored the ban of the *lex haec edictali* (Leo C. 5.9.6 (a. 472)) in the case of *secundae nuptiae* as follows:

> *el cónyuge que contrae ulteriores nupcias, teniendo hijos ... de anteriores matrimonios, sólo podrá favorecer con donaciones a su consorte dentro de los límites señalados en el art. 253 (sc. bienes por un valor que no exceda del que corresponda al hijo menos favorecido)*.

When the mistrust concerning remarriage had long disappeared, the 1984 Reform abrogated these limits.

The "year of mourning" together with the allocation of the household items listed above (with reference to article 19) to the surviving spouse, was in turn a *post mortem* patrimonial effect of marriage, separate from inheritance. The wording that followed the 1984 Reform is equally permeated by the principle of legal equality between the spouses. Article 24 states the following:

> *Durante el año de luto, la viuda que no disfrute del beneficio de tenuta ni sea usufructuaria universal de la herencia del marido tendrá derecho a ser alimentada con cargo al patrimonio de éste ... Este derecho es independiente de la existencia de dote, de 'escreix' o esponsalicio y de su devolución.* (1984 Reform: *Durante el año de luto el cónyuge superviviente, si no es usufructuario universal de la herencia del premuerto o si la viuda no goza del beneficio de 'tenuta', tendrá derecho a habitar toda la vivienda conyugal y a ser alimentada a cargo del patrimonio del premuerto ... Este derecho será independiente de la existencia de dote, de 'aixovar', de 'escreix' o 'esponsalicio' y de 'soldada' y de su devolución*).

This reform process drastically affected the complex regulation of the Catalan dowry (even when one considers the general framework provided by articles 1336-1380 of the Spanish civil code, in force until the reform of 13 May 1981), and of the dotal privileges and the so-called "paradotal institutions" (chs. V-IX). The Catalan family code of 1998 eliminated the regulation of the dowry, the "*tenuta*", the "*aixovar*", the "*cabalatge*" and the pact of equality of wealth and income; presumably because of disuse, although the preamble to the law does not say so specifically. With residual character, the second transitional provision of this law determines the following:

> *Las dotes, las tenutas, los 'aixovars' y los 'cabalatges', los esponsalicios o 'escreixos', los tantumdem, los pactos de igualdad de bienes y ganancias y los demás derechos similares constituidos y, en su caso, que se constituyan, se rigen por las disposiciones que les son de aplicación hasta hoy, contenidas en la compilación del Derecho civil catalán.*

Until that time, the draft of the first article of Chapter V (*De la dote*), stating that the father was obliged to provide a dowry for his legitimate daughters ("*el padre está obligado a dotar, cuando se casen, a sus hijas legítimas*" significantly amended in the 1984 Reform by: "*la dote sólo se constituirá voluntariamente ...*"); and the last paragraph of article 37, closing the chapter, which mentioned that the husband, in case of restitution of dowry, would enjoy the "benefice of competence" ("*el marido, en caso de restitución de la dote, disfrutará del beneficio de competencia*"), offered the scholar countless opportunities to draw parallels with the Roman dowry system (and to point out the singularities of the Catalan dowry).

Article 32, in turn, regulated a traditional privilege of the dowry: the dotal option, in terms of which, if the husband's property was seized, the wife could choose and separate out what she considered to be satisfactory, in proportion to the value of the dowry or the "*esponsalicio o escreix*", with a right to possess and administer it and to make it the object of a usufruct until the restitution of the dowry ("*... podrá elegir y separar ... los que estime convenientes, de valor proporcionado al importe de la dote y del esponsalicio o 'escreix', con derecho a poseerlos, administrarlos y hacer suyos los frutos ... hasta el momento de la restitución de la dote ...*").

Another traditional privilege, attached to the dowry and regulated in Chapter VI, was the "*tenuta*", in terms of which, according to article 38, the widow could possess the belongings of her husband, and enjoy the usufruct until the dowry has been restored and the "*esponsalicio*" or "*escreix*" has been payed ("*la viuda, mientras no se le restituya la dote y pague el esponsalicio o 'escreix', poseerá y usufructuará todos los bienes del marido ...*").

5. Chapter VII related to the treaty of the so called "paradotal" institutions. The customary roots of the "gifts in return" (of the dowry) reflect the idea of proportionality of the economic contributions mentioned above with reference to *donatio propter nuptias*.

The "*aixovar*" (bridal trousseau) was the husband's contribution in contemplation of the marriage, as defined by article 41: "*en contemplación del matrimonio ... puede aportar a su consorte bienes en concepto de 'aixovar' cuando aquélla, por razón de dicho enlace, sea instituida heredera ... El 'aixovar' produce los mismos efectos y disfruta de los mismos beneficios que la dote, salvo los de hipoteca legal, opción dotal y tenuta ...*".

The notes to a common edition of the Catalan Compilation[6] define it as a "civil dowry" paid by the husband when he enters into a marriage with a "*pubilla*" or heiress and resides in her house ("*Dote civil que aporta el marido cuando contrae matrimonio con una pubilla o heredera, pasando a vivir en casa de ésta* [*Fontanella*]").

According to article 43, the salary of the "*cabaler*", the son but not the heir of the family estate, who marries a "*pubilla*", constitutes his expected *peculium* ("*La soldada a favor del 'cabaler' que se casa con 'pubilla', acostumbrada en el llano de Urgel, la Segarra y otras comarcas, constituye un peculio crediticio del 'pubill' durante el matrimonio ...*").

The same edition explains that when the marriage is dissolved by the death of the wife, it is that portion of maintenance received by the "*cabaler*" when he married an heiress, which is due ("*Porción de alimentos que recibe el 'cabaler'; hijo no heredero del patrimonio familiar ... que se casa con heredera*[7]*... exigible normalmente a la disolución del matrimonio por muerte de la esposa*")[8].

6 In Civitas *Compilaciones del Derecho civil foral*, *vol II* (*Cataluña, Aragón, Baleares*)[4] (Madrid, 1987) 33 n. 24, ed. by Rams Albesa, J.

7 Op. cit. 33 n. 25.

8 Puig Ferriol, L./Roca Trías, E. *Fundamentos* cit. 316.

6. Chapter VIII dealt with a voluntary increase in the dowry that has echoes of the German "*Morgengabe*": the "*esponsalicio*" or "*escreix*", in which the idea of the proportionality of contributions reappears. Article 44 takes into account the personal status of the wife, by stating the following: "*El esposo, en atención a las condiciones personales de la esposa, podrá constituir a favor de ésta y en escritura pública esponsalicio o 'escreix'. Cuando la dote se constituya durante el matrimonio, no podrá el 'escreix' exceder de su importe*".

The proportionality of contributions becomes the equality of contributions in the case of the "*tantundem*", specifically described as a donation *propter nuptias* and regulated in Chapter IX, article 48: "*En el territorio del antiguo Obispado de Gerona el marido podrá prometer a la mujer donación 'propter nuptias' o 'tantundem' en una cantidad igual a la dote y como garantía de la misma*".

Upon the decline of this rich dowry system a number of remedies that had tempered the harshness of the rigid regime of separation of property also disappeared. The 1993 Reform introduced a brand new balancing mechanism to address the disadvantages that the spouse, who had performed the household chores or had selflessly worked for the other spouse, faced when such a matrimonial property regime ended: the economic compensation derived from unjustified enrichment foreseen in its article 23:

> *El cónyuge que, sin retribución o con una retribución insuficiente, se haya dedicado a la casa o haya trabajado para el otro cónyuge tendrá derecho a recibir de éste, cuando se extinga el régimen por separación judicial, divorcio o nulidad del matrimonio, una compensación económica, si por razón de dicho defecto retributivo se ha generado una situación de desigualdad entre su patrimonio y el del otro cónyuge.*

7. Because this Romanistic aspect ends with Chapter X, dedicated to paraphernal property, we shall not look at Chapter XI, which deals with some local community-of-property regimes also present in Catalonia, nor with the institution of "*compras con pacto de supervivencia*" of Chapter XII, but highlight the extraordinary richness of Catalonia's matrimonial property regimes.

The Romanistic echoes are apparent again in the transcription of articles 49-51, whereas the neutral language required by the principle of legal equality between the spouses is reflected in the 1984 Reform of paraphernal property. The abovementioned provisions read as follows:

> Article 49: *Son parafernales todos los bienes propios de la mujer al tiempo de celebrarse el matrimonio y los que por cualquier título adquiera después de contraído, siempre que no formen parte de la dote.*
>
> *En la duda respecto al carácter de los bienes propios de la mujer, se presumirá que son parafernales.*
>
> *La mujer tendrá el dominio, disfrute y libre administración de los bienes parafernales, pudiendo adquirirlos, enajenarlos, gravarlos, defenderlos en juicio y aceptar y repudiar herencias y legados sin licencia de su marido ...* (1984 Reform: *En régimen de separación de bienes, serán privativos todos los bienes propios de cada uno de los cónyuges en el momento de celebrarse el matrimonio y los que, por cualquier*

título adquieran después de contraído, siempre que no formen parte de la dote o de las instituciones dotales.

En caso de duda respecto al carácter de los bienes de la mujer, se presumirá que son parafernales).

Article 50: *Si los recursos propios del marido y los frutos y rentas de la dote fueran insuficientes para sostener los gastos familiares, la mujer deberá contribuir a ellos con los frutos y rentas de sus bienes parafernales ...* (1984 Reform: *Los cónyuges estarán obligados a contribuir al sostenimiento de los gastos familiares. A falta de pacto, lo harán en proporción a sus ingresos y, si estos no son suficientes, a sus patrimonios ... .*

Si hubiere dote u otros bienes afectos al levantamiento de las cargas del matrimonio, sus frutos y rentas ...).

Article 51: *La mujer podrá en todo momento conferir a su marido, expresa o tácitamente, la administración de los bienes parafernales y revocar, restringir o condicionar en cualquier tiempo tal concesión ...* (1984 Reform: *Cualquiera de los cónyuges podrá en todo momento conferir al otro, expresa o tácitamente, la administración de sus bienes privativos y revocar, restringir o condicionar en cualquier momento tal concesión ...*).

This article has tried to show to the reader, unfamiliar with Catalan family law, the strong Romanistic component of the traditional law received in the 1960 Compilation. For this purpose I have used well-known reference works such as the *Fundamentos del Derecho civil de Cataluña* of Puig Ferriol and Roca Trías; the volume dedicated to family law in the *Elementos de Derecho civil* of Lacruz Berdejo and Sancho Rebullida[9], with its valuable syntheses of the legal traditions of the different territories; and the *Capitulaciones y donaciones matrimoniales en el Derecho catalán* of Lalinde[10], a model for any attempt at historical interpretation of the Catalan Compilation. With regard to reference works on Roman law, to the usual list should be added the recent *Derecho privado roman*o of Antonio Fernández de Buján[11].

It is evident that the recent reforms of family property law have drastically narrowed the field of comparison between modern Catalan family law and its Romanistic tradition. For many modern civil lawyers, both scholars and legal practitioners, merely going back to the roots of the venerable Compilation of 1960 represents an historical *excursus*. One wonders whether those teaching modern family law should still relate the profound changes that were brought about in this field of private law during the second half of the last century, or whether lectures should be confined to the law currently in force. If the latter approach were followed, the student of modern civil law might think that the dowry system, the prohibition of donations between spouses and, in general, the wife's legal position were odd inventions of the Roman jurists, lacking any continuity in our civilian tradition.

A final consideration: for decades, traditional civil law in Spain was strongly influenced by our legal tradition, along with the drafting and study of the "*compilaciones forales*"

9 Barcelona, repr. 1984.

10 Barcelona, 1965.

11 Madrid, 5 ed. 2012.

(special civil law of territories such as Biscay and Alava (1959), Catalonia (1960), the Balearic Islands (1961), Galicia (1963), Aragon (1925 and 1967) and Navarre (1973)), a task that demanded a thorough acquaintance with the historical sources. With few exceptions, contemporary Romanists and legal historians, however, did not view the role of Roman law in legal education as under threat. They therefore confined their efforts to the study of our ancient sources, leaving the task of compiling the traditional civil law of those territories largely to modern civil lawyers and renowned legal practitioners. Does the current process of developing a European private law offer a similar opportunity to strengthen our position both in academe and in legal practice?

Abstract

Recent reforms have dramatically narrowed the basis of comparison between modern Catalan family law and the civilian tradition, strongly represented in the Catalan Compilation of 1960. This circumstance causes the author to reflect on the current value and purpose of our studies.