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The Constitution and the Civil Law*

*Francis Delpérée***

I will speak about how the constitution and civil law can be compared from two points of view: form and substance.

With respect to form, I wonder whether the constitutions, and more particularly the constitution I know best—the Belgian Constitution, can be compared with the civil law, and especially, with the French Civil Code. Does the constitution lend itself as well to such codifications as those carried out by Napoleon? Or rather, does it have to be subject to shorter draftings, in order to enable the judge, and in particular the constitutional judge, to build up jurisprudence adjusted to the prevailing circumstances?

As far as substance is concerned, I question whether the definitions, categories, and concepts of the civil law are usable in constitutional law and vice versa.

To take a single example, when the Civil Code and the constitution both mention the term “property,” do they mean the same property or must two different meanings be applied depending on each discipline? To make that comparison, we have to start from both texts. The first one is the Code Napoleon. It is still in force in Belgium, though it has been modified in some respects over two centuries, even though the judges on both sides of the frontier have not always interpreted the same text in the same manner. The second text is the Belgian Constitution of February 7, 1831. It is the old constitution of a small state of ten million inhabitants. Together with the Norwegian Constitution, it is the oldest still in force in Europe.

The texts were drafted twenty-five years apart. Are they compatible? Do they express the same political philosophy? Do they form part of the same legal system? Do they give the citizens, the public authorities, and the judges a clear and unified vision of the judicial world? Or, in other words frequently used in European law, don't the public and civil law, the constitutional and the civil law, express, if not the same concerns, at least purposes which are compatible with one another? In that respect, the answer is clear; the Belgian Constitution and the Civil Code

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are the two pillars on which the whole legal system is built. They deserve equal interest.

CHAPTER I. THE FORM OF THE CONSTITUTION

First of all, let's talk about the questions of form. We need no reminder that the Civil Code aims at giving a rational and well-ordered presentation of a body of legal solutions. The code deals with all kinds of issues, ranging from family relations and the regime of property and patrimony, to the contractual relations between private individuals. The Civil Code consists of more than two thousand articles referring to one another and forming a body of concepts, techniques, and proceedings by which all the jurists abide.

It also goes without saying that the Civil Code carries along with it a certain conception of the part played by the doctrinal writer and the judge. The doctrinal writers, that is to say the authors, lecturers, and commentators, can contribute to the work of systematization, by showing the links which may exist between various provisions of the Civil Code, by underlining the principles which inspire the Code Napoleon, and by explaining the mechanisms, whether apparent or hidden, of the civilian construct. As far as the judge is concerned, his only mission is to apply the written statute to the concrete case that is referred to him. He is not, in any case, allowed to pronounce a judgment by way of a general rule. He may not enter the sphere of responsibility that belongs to the authors of the law. According to the well-known expression, which was remembered several times last year on the occasion of the bicentennial of the French Revolution, "the judge is the mouth of the law." And as the law cannot be mistaken, if I am to believe Jean-Jacques Rousseau, the judge who applies a good law also pronounces good rulings.

May we say that the Belgian Constitution, and the constitutions that it inspired or which share the same concerns, is in keeping with the civilian tradition? Before answering that question, I would like to say: we are the best. The Belgian Constitution could have been drafted by Alexis de Tocqueville but he was in the United States at that time. His work on democracy dates from 1835; four years too late. . . but it reflects the same concern.

The Belgian Constitution of 1831 quickly became the pattern, the prototype, of the liberal constitutions of the nineteenth century in Europe. Everyone copies it—Poland, Greece, Romania, the Netherlands, Luxembourg, even outside Europe. One of Egypt's constitutions is obviously inspired by the provisions of the Belgian Constitution.

Is that model constitution of the civilian inspiration? I answer that question as a Norman would. Yes and no, yes rather than no, yes but with important reservations.

1. *The Written Tradition*

The answer is yes because the Belgian Constitution, like most European constitutions, is a written constitution. Of course I exclude the Constitution of the United States, which as Tocqueville used to say is not to be found on library shelves. Even better, the Belgian Constitution is a constitution which pretends to regulate through its provisions a series of important issues dealing with the organization of the state, the functioning of public institutions, and the status of citizens.

This requires a word of explanation. The first example of civilian inspiration relates to "civil rights" or, even more generally, to "human rights." It is symptomatic that the Belgian Constitution expresses itself on this subject with twenty articles out of 140. In its text, it proclaims some rights as important as the freedom of the press, freedom of religion, and freedom of gathering on the public highway.

The Belgian Constitution did not have recourse to the system of the "bill of rights" (*déclaration des droits*), as in France in 1789. It does not set out civil rights, as would be done later on in France and in Italy, by a preamble, that sort of literary piece which comes before the constitutional text. No, it is in the very body of the constitution itself, among other maybe more technical articles, that Belgium declares the human rights it intends to protect.

Of course, this is not only a matter of form or of external presentation. By inscribing civil rights among its provisions, the constitution has a double effect. First of all, it gives to human rights an unquestionable legal value. It is not literature, catechism, or a program of civics; it is law, good law, real law, law which creates legal duties for the citizens as well as for the government. Furthermore, the constitution brings its techniques and controls to the service of human rights; it appoints judges who will have to see to the protection of the rights that are proclaimed. The constitutional machine works at the service of human rights.

A second example is that of the European integration. Everyone knows that over the past thirty-five years, first six, then nine, and now twelve states of Western Europe have decided to join their efforts in the field of economic and monetary integration. Such a European integration was only made possible thanks to transfers of sovereignty from the states to the communitary authorities. Nowadays, the council of ministers of the European Communities may pass judgment against a state or a firm which has violated the rules laid down in the treaties. Thus, entry into the Common Market is a sign of considerable institutional upheaval. Can the Belgian Constitution ignore that phenomenon? Can it remain as if nothing happened? Certainly not. The constitution was, therefore, revised in 1970. The new text allows some institutions of international public law to be entrusted with specific powers. The

formula is particularly cautious. Although it is not mentioned, it is of course the E.C. which was affected by that provision.

A third example of the civilian influence in the Belgian Constitution is found in the organization of the federal government. Belgium was created in 1831. It is, like most European states of that time, a unitary state. There is a single law applicable throughout the whole territory of the state. Of course, in that unitary state there are municipalities, and also, as in Canada, what we call provinces. But the municipalities and the provinces are subject to political controls which place them under the direct tutorship of the central government.

In 1970 and in 1980, the structure of the Belgian state was deeply modified. Three regions were organized—Flanders, Wallonia, and Brussels, which are set up as federated states within a federal-type system. Thirty percent of the public income is taken from national authorities to be managed by the regional entities. But possibly the most important point is that the constitution defines the principles of that “regionalisation” (division into regions). It states how many regions there are, what their territorial attribution is, as well as what their competence, their means, and their financial resources are. The constitution, together with some specific statutes which extend its provisions, lays down, in full form, how the state is to be organized.

If we compare those provisions of the Belgian Constitution with those of the United States Constitution, and in particular, with article IV on the states and the federal government, we come to see that the Belgian Constitution is obviously more ambitious, or, in other words, that it has less confidence in the politicians’ goodwill, in the judges’ wisdom, or the citizens’ common sense. It seems to state everything, write everything, calculate everything, not leave anything to chance, anticipate everything. However, this seeming specificity is probably an illusion. For the constitution cannot be as detailed on matters as the Civil Code. It cannot provide for situations it cannot foresee. Therefore, the constitution must keep some secrets, some silences, some open questions.

Let us not forget that the constitution must be a short document, readable and synthetic, with the consequence that it leaves many questions. The Belgian Constitution includes 140 articles. Those are 140 concise and limited articles with short paragraphs. Of course, many questions are not tackled, which raises the question of how to fill in those gaps.

2. *The Silence of the Constitution*

As to the question of how to fill in the gaps of the Constitution, the Belgian legal system offers two types of solutions. One of them is obviously of civilian inspiration. The other one is closer to American jurists’ methods of reasoning. How can that be?

The method of civilian inspiration may be summarized as follows. This text does not say anything. Another does not say anything either. But maybe I can confront the two texts, maybe I can oppose them, maybe I can combine them? As a result, between the lines new rules, not expressed but implicit, will appear—rules which are discovered at the starting point of the constitution, which constitute its grounds, its foundations, rules which witness its spirit, without having to be written out in full letters.

Here is a simple example. The Belgian Constitution, does not, any more than other constitutions, formally provide that the decisions taken by the majority shall prevail over the will of the minority, nor that a government which does not enjoy the trust of the Chambers must resign, nor that the new government must be supported by a majority within the Parliament. Yet these rules are the basis of constitutional law in a parliamentary regime. A careful reading of the text must allow those unwritten rules of the constitution to be revealed.

Here is another example, which is a bit more complicated. Belgium is a monarchy. The king acts with his ministers. It is understood that the head of state is not vested with personal prerogatives. He has no power of decision, but he has influence on the members of the government. To quote the British jurist Bagehot's expression, he has the right to warn, to stimulate, to advise. He has no right to decide in the place of the ministers.

Thus, a question arises. When the king has a meeting with his ministers at the palace of Brussels, is one allowed to take those conversations into account? May we get to know the king's point of view? The constitution does not say anything in that respect. But according to a traditional maxim, "*nul ne peut découvrir la couronne.*" No one may uncover the crown. No one may reveal the king's part in the decisional process. Is this a rule of courtesy, of fair play, of morality, or is it an unwritten constitutional rule? Nowadays, public law specialists tend to consider it as a genuine juridical rule. The acts achieved by the executive are accomplished in the king's name, but before Parliament, the Ministers are responsible for the acts of the Executive. Between those two constitutional provisions, there is a missing link, which is also of a legal nature: the ministers and the king must express a common will; if there is any disagreement, it must be expressed in what I sometimes call "the confessional."

Thus, the civilian conception of combined interpretation of texts enables one to remedy some silences of the constitution. This methodology, however, is not always sufficient to accomplish the task. What then are we to do when the constitution remains silent, when it does not express itself either explicitly or implicitly on a series of issues? In such a case, one has to turn towards the judge.

Tradition allows leaders, for instance, to find a solution in case of a political crisis, which is commonplace in a country like Belgium where governments have an average duration of two years. The crises are difficult. They last a long, long time and are complex. Tradition has created a procedure by which the political parties abide in fact, if not in law. For instance, before forming a government and appointing ministers, the king must consult the leaders of the different political parties. He must choose a so-called "informateur" who will try to set up the basis for a coalition. Then he will appoint another person, the "formateur," who will usually become the Prime Minister. He will organize the negotiations between the political parties of the majority. The party congresses must then approve of the program of the coalition. It is only at the end of the quite officious process that the king exercises the power that he is given by the constitution, i.e. to appoint the ministers.

Thus constitutional tradition, and maybe even constitutional custom, must not be disregarded. It must be taken into account not only in order to study political science, but to know the proceedings and the techniques of organization of the powers. Yet if tradition itself is silent, then we must turn ourselves towards the judge. It is this perhaps which will sound most peculiar to American jurists. The judge comes last in order; however, his intervention is important, and it is often definitive. It takes place only after the other methods have been applied.

It is in the sphere of public liberties, human rights, that the judge's work is most characteristic. "The press is free," says the constitution; only four words to affirm the existence of an essential freedom. Right away, some questions arise that the text is unable to solve. Is it the written press: newspapers and books, or is it also freedom of the radio and television? Does that liberty allow anyone to spread calumny, insults, or immoderate criticisms? Is the government allowed to seize newspapers or books? May the public authorities ban the broadcasting of a program? Do the same rules govern the free radios and those of public utility? As far as those issues are concerned, it is the judge who takes over, who puts the constitutional principles in concrete form, who fills in the gaps of the text and practice.

It would be an exaggeration, however, to say that in Belgium and Western European countries the part of the judge, whoever he is, is intrusive, that the judge elaborates the constitutional law, that constitutional law is mostly a casuistic law. This does not square with reality. When I start a lecture before my students at the University of Louvain, I always keep the text of the constitution at hand. I read it; I interpret it; I comment on it; I shed light on it; I give some examples of its use; I illustrate its use with practical cases.

Much less often, I lecture with the compilation of opinions delivered by the Supreme Court, "la Cour de Cassation," or by the Constitutional Court, "la Cour d'Arbitrage." Of course these opinions exist; there are

compilations of opinions. But the latter shed less light on the constitution than on the statutes that are passed pursuant to the constitution. Anyway, the judge's decisions remain in keeping with the provisions of the constitution.

CHAPTER II. THE CONTENT OF THE CONSTITUTION

What about the content, the substance of the constitution? Do the constitution and the Civil Code correspond to one another? Do they converse with one another? Or do they ignore each other? One regulates the organization of the state, the other regulates the relation between private individuals; however, these legal instruments do not ignore each other. There are mutual transfers and influences. The Civil Code influences the drafting of the constitution as well as its interpretation. But, inversely, the evolution of constitutional law influences ideas in the field of matters dealt with by the Civil Code. It is worthwhile to underline these phenomena.

1. *The Influence of the Civil Code*

The French Civil Code of 1804 influenced the drafting and the interpretation of the Belgian Constitution of 1831. Here are two examples. The constitution intends to define human rights. It does so under a heading "About Belgians and Their Rights," which immediately raises the question of "who is Belgian?" Article 4 of the Belgian Constitution answers: "the acquisition, loss and recovering of nationality occurs in accordance with the rules determined by the civil law." In fact, this determination is made by the Civil Code, which in the first book—articles 9 to 20—includes a few concise but fundamental rules on the law of nationality. Those provisions, complemented by other statutes, in Belgium are the constituent rules of the law of nationality.

Here is another example. Among the human rights, the Belgian Constitution, like a good liberal constitution, includes the property right. It preserves that right from any excessive intervention by governmental authority. But what is this protected property, if not the property of article 544 of the Civil Code? Property was already presented in the French declaration of citizens' rights as an "inviolable and sacred right," with the exception of reason of public necessity.

Nevertheless, it is not clear that one may transpose all the concepts of the Civil Code into those of the constitution. The same word is sometimes used by the Civil Code and by the constitution with different meanings. The example of the word "domicile" is particularly striking. The Civil Code laid down the rules on "domiciliation": it is the place of the main establishment of an individual. Twenty-five years later, the Belgian Constitution used the same term twice. First of all, it lays down the rule according to which "the domicile is inviolable," which means

that any ordinary place that I use as a shelter—a house, a car, a hotel room, a tent, a caravan, a boat, etc., must be protected against any intervention from the public authority; private life must take place there freely. It goes without saying that this definition of domicile does not correspond to the one of the Civil Code.

In the sense of the Civil Code, people have but one domicile. In the sense of the constitution, domiciles are multiple, diverse, changing. The constitution adds another provision, that in theory the electors vote in the municipality of their domicile. The electoral statute adds that this domicile must be understood as the place where a person usually resides with his family. This is something other than the civil domicile. Thus, there are autonomous meanings which are attributed to some words, terms, and concepts of the Civil Code by the authors of the constitution.

2. *The Influence of the Constitution*

What about the constitution? Does it have any influence on the Civil Code? Don't the constitutional conceptions of the contemporary period influence the drafting and the interpretation of the Civil Code? I think the answer should be yes.

As far as the drafting of the Civil Code itself is concerned, constitutional evolution can presage the evolution of the civil law.

For example, the voting franchise had long been reserved to males. It was not until 1949 that women were allowed to participate in the operation of the renewal of Parliament. Belgium was one of the last countries to give women the right to vote, and still men and women had to be twenty-one years old to exercise this right. In 1981, it was specified that the franchise belongs to citizens age eighteen and over. How can there not be a link between that amendment to the constitution and the legislative change which will occur at the beginning of the year 1990 which reduces to eighteen the age of civil majority; the age required to get married, the age required to start a business? It was difficult to make young Belgian people understand why they were allowed to elect a senator or a deputy, but were not allowed to choose their wife or husband.

Yet there is more. Changing constitutional law can also have influence on interpretation of the Civil Code. This is a phenomenon of vital importance that is closely connected to the "problématique" of human rights.

The constitution acknowledges the principle of individual freedom, freedom of thought, of opinion, etc. But towards whom am I going to use that freedom? The classic answer to that question amounted to saying: towards the state, the public power, towards any authority which is the expression of the power's will. The constitution, as everyone

knows, particularly at the liberal period, aims at protecting the individual agent against the public power, or more concretely, against the powers. Human rights must therefore be understood in a vertical perspective. At the top, the state; at the base, the individual. The individual must not be crushed by the state.

Today, however, under the influence of German doctrine, a question arises: cannot the human rights consecrated by the constitution be applied in a horizontal perspective? Can they be applied between individuals, between enterprises, or rather, in private, professional, and social life? Or, in other terms, is it conceivable that a family father, a manager, a press group, or a union would not abide by the constitutional principles regarding human rights? It is the *Drittwirkung* doctrine, the doctrine of the enforcement of the human rights in the relations between individuals, that is evoked here.

This is the problem of relations between individuals—how to ensure human rights within the family. Is there an equality between all members of the family? Does the free choice of education belong to the child or to his parents? Is the one who holds the patrimony of the family allowed to use it alone, or must he respect the right of every member of the family to enjoy it? May the parents' right to bring up their children prejudice those children's right to a private life? Does it, for instance, allow them to open the children's correspondence while the constitution proclaims the right to the inviolability of the secret of letters?

There are still no clear solutions regarding these issues. There are no definite rulings, but there is, and this is the most important, a legislator's will to find solutions which guarantee the human rights within the family. The idea that both spouses are equal before the law is the translation into the Civil Code of the rule stated in article 6 of the constitution that all Belgians are equal facing the law.

Similarly, there is the question of the relations between individuals and private groups. As University of Paris Professor Jean Rivero writes, that problem is even more delicate, for in this case the forces are by definition unequal. The group holds the power and can force it upon the individual. What can constitutional law accomplish in that field? Once again, it is the state that must intervene to have the elementary rights of the individual respected. For instance, the state may deny subsidy to a group that applies for its support but whose by-laws or behavior reveal the will to disregard the rights of the individual.

These few examples show that the Civil Code and the constitution are not impermeable to one another. There is an osmosis between the texts, between the issues, and also between the solutions. The Belgian Constitution and the Code Napoleon belong to the same tradition, the one of the liberal nineteenth century. That common origin, both historical and ideological, accounts for many affinities.

But there is more. The Belgian Constitution has evolved. The Civil Code has been modified. The society in which both are enforced has been transformed. It is characteristic to notice that those changes have been for a large part parallel. The brother texts have become cousin texts, but their parentage remains the same. The explanation for this is simple. The Civil Code is more than a body of juridical and technical rules. It is a way of conceiving the law—not only the law which governs the relations between individuals, but the whole of juridical relations within the state.

In its entire history, Belgium has been under France's authority for only fifteen years. But those fifteen years were those of the Consulate and the Empire. Those fifteen years were Napoleonic. They determined the Belgian conception of the administration and of the army. They gave Belgium the Civil Code of 1804. They left a certain way of conceiving the written law, of the civil law which inspires the whole legal system. Men, however great, pass on, but their spirit remains. Constitutional and civil law are the fruit of the same inspiration.