Constitutionalization of Civil Law by the Peruvian Constitutional Court Jurisprudence

DR. **MANUEL JESÚS MIRANDA CANALES**[1]
PRESIDENT OF THE PERUVIAN CONSTITUTIONAL COURT, Doctor in Law.

I. Introduction

The evolution of the legal sciences can be measured and contrasted by the dynamism and growth of its institutions. These will finally determine the materialization of the Law.

The Constitutional Law is no exception to this evolution; on the contrary, it displays all of its effects in the legal system. This process shall be called "Constitutionalization of Law", every time that the effects of our Constitutional Chart, shine on all the branches of the Law. Thus, the Peruvian Constitutional Court has determined, in the STC 0042-2004-AI/TC, the existence of a *constitutionality principle* and not only according to the law, *rule of law.* This remains the case inasmuch as the constitutional supremacy and the law enforcement principle are incorporated in our Constitution. The Constitution is not just a political document but also a legal rule, which implies that the legal system is born and based on the Constitution, but not in the law. The law enforcement principle of the Constitution means that whoever is called to apply the Law must consider the Constitution as a premise and a basis of their decisions. For the purpose of this presentation in the framework of the Modern Constitutional Justice, its Challenges and Perspectives, we will stop in the field of Civil Law, specifically in the Family Law, in order to show how it has been forming its own space in the Peruvian jurisprudential-constitutional model.

We must recognize the importance of the transition of a State of Law to a Constitutional State of Law, and with this new model, the reception of a

[1] President of the Peruvian Constitutional Court, doctor in law, ex Counselor of the National Council of the Judiciary, ex Judge of the Supreme Court.

constitutional principle that replaces the legality principle, which used to be the axis of the legal system. For this reason, it is relevant to mention some key concepts that will allow us to have a more complete perspective of the subject.

In addition to this, it is important to highlight how the Constitutional Court, in its role of higher interpreter of the Constitution and guarantor of the fundamental rights has jurisprudentially explain the family and marriage concepts, giving them new contents that adjust to the new demands of our society, exactly as a challenge of the constitutional justice of the 21st century.

In this regard, my intervention has no other purpose than to prove that the Constitutional Law, to this day, transcends all legal system and has it subjected to its provisions.

II. Constitutionalization of Law

Since the beginning of the 19th century, the legal system had the Law as a central and essential axis which conditioned the behavior of that society. In that regard, the Law established its foundations in the legality principle, which meant that the Constitution, conceived as such, was nothing else than a political regulation, devoid of every binding legal content.[2]

Since the middle of the 20th century, the framework of reference and parameter of the system stops being the Law, clearing the way for a new stage marked by the Constitution, which bases its contents in superior values and principles, placing the human person as the core of the legal system. Since then, the concept of Constitution has gone into a stage in which there is no doubt about its nature of supreme regulation in the national legal system.

Thus, we must recognize that today, the Constitution has managed to displace the Law as a primary and full source of the Right, and has irradiated (directly and imperatively) its effects on all the public and private authorities, subjects to the compliance of its orders. However, as accurately remembered by the professor César Landa, «it's not just about a change of hierarchy positions of the regulations, but what it [this transition] takes us to question

[2] Landa, César. « La constitucionalización del Derecho Peruano »(The constitutionalization of the Peruvian Law). *Revista Derecho(* Law Magazine*) PUCP*. Lima 2013, num. 71, p. 14.

the way of understanding law, jurisprudence, jurisdiction and the role of the judge in light of new contents in whose side lies the protection of the person».[3] Meaning, that the phenomena of the constitutionalization of the Law has not only affected the nature of the own regulation, but to the form itself in which Law is practiced, since the guiding principles that regulate it now are based on values and principles which importance lies in the respect of the fundamental rights.

The term constitutionalization of the Law came up, for the first time, at the meeting of the French Association of the Constitutionalists, in February, 1980, at the Faculty of Law of Saint - Maur, and had the purpose of changing the concept of Law, in order to subject it to a much more imperative regulation[4]. Thus, it was confirmed that the constitutionalization of the different branches of the Law marked a breaking point in the traditional model of State of Law to transfer us to a new paradigm: The Constitutional State of Law.

It is worth mentioning at this point which is the difference between a constitutionalized regulation and other that's not. The main difference is that, in the latter, the Constitution is limited to the field of its regulative nature and raises, only, as a document which contents consider just a catalogue of dispositions in order to regulate an adequate state action; it serves as a framework order that is only functional when a transgression of its purposes descriptively determined, is in sight. Instead, in a constitutionalized system, a coherent and fundamental structure is proved, which impose to perform determined affirmative actions and not only restrictions anymore.

The constitutionalization of the system is not an «all or nothing» quality, something that you either have or not, but it is configured as a process admitting grades or intensities.[5]

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[3] Prieto, Luis. « El constitucionalismo de los derechos» (The constitutionalism of rights). Spanish Magazine of Constitutional Law, 2004, p. 15.

[4]Favoreu, Louis. « Constitucionalización del Derecho » (The constitutionalization of Law.) Law Magazine, Universidad Austral de Chile, vol. XII, August 2001, p. 31.

[5]Guastiani, Riccardo. «La constitucionalización del ordenamiento jurídico: el caso italiano». (The Constitucionalización of the legal system: the italian case) Miguel Carbonell presentation. Mexico, 2001, p. 153.

In this regard, it is important to mention the attributes and faculties accompanying this phenomenon of constitutionalization of the Law.

2.1. Constitutional Rigidity

The Constitutional Rigidity means that any reform of the Constitution shall be only possible if the proceedings previously established for approval, amendment or repeal are performed. Thus, when defining and qualifying the competent authority for the reform of the Constitution, against other branches of government, the constitutional primacy is ensured.

A Non-Rigid Constitution shall leave everything in the hands of the people. A rigid Constitution generates in the legislator the ability to produce supported reasons for constitutional changes.[6]

2.2. Constitutional Justice (Judicial Control of the Constitution)

The constitutional justice introduces forms of defense of the Constitution; it has become a cornerstone to ensure the respect and compliance of their systems. This situation forced the Constitution be provided with custody mechanisms to ensure the compliance with fundamental rights.

Today we must acknowledge that the importance of constitutional justice is indisputable, and thanks to this the true balance of powers or, as nowadays known, the assigned functions to each of the components of the State is guaranteed.

This court procedure process, showed in the constitutional courts functions in charge of guaranteeing the fundamental rights, is also evident in the development of its international and regional globalization, which is not only economic but also political and social.[7]

In this context, we can assert that the Constitutional Court is the body to introduce constitutional justice, not only because the Constitution has directly granted this competence, but also because its purpose is mainly monitor

[6]Ferreres, Víctor. «Una defensa de la rigidez constitucional» (A defense of the constitutional rigidity) *Dœxa*, Universidad de Alicante, num 23, year 2000, p. 39.

[7]Ibíd., 1, p. 16.

compliance with fundamental rights. This task is only possible when the Constitutional Court interprets the fundamental contents and scopes comprehensively, combining the constitutional provisions with higher values and principles of society.

From the foregoing, we may state that both our system of justice administration and the relationship between individuals and legal entities, such as public institutions, initiates the foundation of its legal reasoning in the Constitution, since, as established by our Constitutional Court, "there is no area of law that is free of its control" necessarily because the law and the Constitution are designed to protect and defend the fundamental rights of the person.

Based on the foregoing, we consider important to mention a note of Cappelletti[8]: "The Constitutional Justice is the life, the reality and the future of the Constitutional Letters of our times».

2.3. Substantive Constitution

In the Constitutional State, the Constitution becomes a standard with great axiological burden. According to Aguilo, we can state that as the Constitution enacts a number of institutions and gives them competences (e.g. Executive Branch, Congress, Judiciary, Constitutional Court, etc.), it also prescribes a "value dimension". This means that apart from the strictly normative precepts and that tangibly imposed, it also recognizes situations and values equally important, such as popular sovereignty, dignity and safety of people, cultural diversity, education, public health values, among others[9]. The "rematerialization" of the Constitution implies that this not only determines how the power should be organized to make decisions but also what may or should be decided[10].

If the legal system lacked this substantive dimension, and was exclusively a set of commands supported by the rule of law, we could not use

[8] Cappelletti Mauro. *La justicia constitucional y Dimensiones de la justicia en el mundo contemporáneo (The constitutional justice and dimensions of justice in the contemporary world)* of UNAM, Law School, Mexico, 2007.

[9] Aguiló, Joseph. «Sobre la Constitución del Estado constitucional» (About the Constitution of the constitutional state)Doxa, Universidad de Alicante, núm. 24, año 2001, pp. 446-447.

[10] Ibíd., 2,. 48.

it to resolve conflicts between values which the Constitution itself contains.[11] Therefore, we must emphasize that understand the Constitution as a standard of material, and not just as competence, leads to very important practical consequence when performing the constitutional control, since not only be constitutionally valid those acts conducted by the authority and competent performance of their duties, but it will also be required to analyze the degree of involvement of a measure in a fundamental right.

2.4. The Constitution Soaked in the Legal System

The combination of the two last factors mentioned allows the Constitution to be "soaked" in all the system, this means, its effects are deployed in all the sectors of social and legal life. In this way, the legal operators do not longer access the Constitution through a legislator, but they do so directly; by the way, the Constitution has covered more areas of social relevance and, as a result of this, it is hard to find a legal problem lacking constitutional relevance.

In this regard, the constitutional precepts no longer act just as limits but as expansive forces recognized in the determination of the legal system, this is why it is possible to talk about «legal system as a development of the constitutional demands». The content of the legitimate legal system no longer shall be explainable in terms of respect of the limits and discretion understood as freedom, but in terms of realization of the rights from the «reasonable» deliberation of constitutional goods and principles.

III. The Constitution and Civil Law

Once the Constitutionalization of the Law and the role of the Constitutional Courts are explained in the exercise of the constitutional justice, it is convenient to analyze the effects that Constitution has over the Right of the private powers: The Civil Law.

[11]Gascón, Marina y García, Alfonso. *La argumentación en el Derecho* (*The Foundation in Law).* Second edition, 2005.

We must state that the Constitutionalization of the Civil Law is nothing else than the application of the constitutional regulations, which effects fall onto the relation with the private powers.

In fact, this has been happening in our system, since even though the judge is subject to the law it is also true that he also is, first and foremost, to the Constitution. The Judge makes a constitutional application of the law in sight of the specific case, to the extent that he must take into consideration the reasons of the law along with the reasons of the Constitution.[12]

The best guarantee of the enjoyment and exercise of the civil rights and freedoms is found in the reaffirmation in the fundamental rights. It is from here that the reform of the Civil Code shall have a better support as long as this is built as a Constitutional Civil Right.[13] This shall mean that the regulations of legal or regulatory nature must have coherence and be subjected to the Constitution not only in its formal aspect, but also in the material aspect, so that when applied to a specific case, the affectation of a fundamental right is shown.

Then, taking into consideration the regulatory nature of the Constitution, its effect in the civil regulation is undeniable reaching its contents and legal authorities. This means that many figures, regulations, and traditional civil rights have been constitutionalized, printing an impassable limit for the ordinary legislator. In this regard, the Civil Code, as a regulatory body guiding relationships between the private powers, shall be interpreted in light of the precepts established in the Constitution and the jurisprudence, in order to respect the fundamental guarantees.

Notwithstanding the previous, we must highlight that the reinterpretation of the civil regulations in light of the Constitution may certainly cause difficulties and excesses by the operators of the Law, since «an approach that extremes the constitutional principlism and separates the rights from the law»[14] causes severe conflicts for the civil judges, every time that

[12]Ibíd., 11, p. 42.

[13]Ibíd., 6, p. 22.

[14]Aragóm, Manuel. «El Juez ordinario entre legalidad y constitucionalidad» (The ordinary Judge between the legality and constitutionality). In the yearbook of the School of Law of *Universidad Autónoma de Madrid*, pp. 185-186.

these, when more related to the Constitution than to the law, might (as interpreters) exceed the limits when not applying legal precepts without restrictions under the excuse of an own interpretation of the Constitution, «shaking the principles of legal safety and certainty of the Right, which today constitutes the cornerstones of a democratic State of Law».[15]

However, the aforementioned situation gets corrected when the Constitutional Court grants mandatory observation guidelines which are the aim of the action of the ordinary judges. In this way, when the ordinary operators apply the corresponding right, however these shall certainly be subject to the constitutional parameters, thanks to the jurisdiction work of the Constitutional Court, which will prevent abuses and arbitrariness sustained in the specific interpretations of the Constitution.

Thus, The Code of Constitutional Procedure anticipated the following guideline: «(…) The Judges interpret and apply the laws or all other regulation with the status of a law and the regulations according to the constitutional precepts and principles, **according to their interpretation resulting from the resolutions issued by the Constitutional Court**» Following the same line, it is worth to mention that the Civil Right is directly influenced by the regulation and jurisprudence issued by the Constitutional Court, which allows the adaptation of the civil institutions to the constitutional tenets.

In this context, some of the Courts of the Judiciary Power, in light of the jurisprudence issued by the Constitutional Court, must have adjusted the sense of their Resolutions to the context of social change. This has not only happened in the most controversial and conflictive cases for the relationship between both bodies, as are the legal custody, privacy and personal image, where the controversy risen between the Constitutional Court and the Supreme Court has reached subjects relative to the public order, and also in others, which although no repercussion in the media was found, they stop being paramount for the improvement of the custody which the Law seeks to provide to every individual.[16]

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[15]Gutiérrez, Pilar. «La constitucionalización del Derecho Civil» (The Constitutionalization of Civil Law). *Revista Estudios de Derecho*, Universidad de Antioquia, year 2011, p. 76.

[16] Barber Cárcamo, Roncesvallles. «La Constitución y el Derecho Civil». (The Constitution and the Civil Law) REDUR, Electronic Magazine of the Law Department of Universidad de la Rioja, num. 2.

In this manner, the Civil Right is transitioning, due to the phenomenon of the constitutionalization of the Law adapts, modifies and grants new contents to the institutions involved. In this manner, its elements must be permanently in harmony with the constitutional regulations and the interpretation work which perform the legal bodies through the jurisprudence as a source of rights.

In this manner, and as an example, we shall develop the effect of the constitutional jurisprudence in the so called Family Law, proving that the composition of the current civil law, through its reforms, has laid out certain guidelines.

In the case of Peru, the Family Law was regulated and conceptualized for the first time in the Constitution of 1933, and with it, a guarantee for its protection by the State, for the first time. Years later, with the Constitution of 1979, the value assigned to the family had more importance; it was regulated as a civil and social institution, relating it to marriage.[17]

With respect to the Constitution of 1993, this follows the line stated by the previous Chart, although with a few important changes, such as the dissociation of the marriage as *sine qua non* condition for the existence of a family. This implies the acceptance of new forms of family, formed from a common law relationship.[18]

IV. The Civil Right in the Interpretation of the Compared Jurisprudence and the Constitutional Court Jurisprudence

The development of the Family Law has reached different latitudes, such is the case of Colombia. Indeed, the Constitutional Court in regular and uniform jurisprudence has stated on the assembled families "that have been

[17] Political Constitution of Peru of 1979, section 5°:

«The State protects the marriage and the family as a natural society and fundamental institution of the Nation.

The forms of marriage and the causes of separation and dissolution are regulated by law […]».

[18] Political Constitution of Peru of 1993:

«Section 4°: The community and the State protect […] the family and promote marriage. It recognizes them as natural and fundamental institutions of society. The forms of marriage and the causes of separation and dissolution are regulated by law.

Section 5.- The stable union of a man and a woman, free of marital impediment, forming a factual home, gives place to a community of good subject to the regime of a society of property when applicable».

defined as “the family structure originated from the marriage or common law relationship of a couple, in which one or both members has children from a previous marriage or relationship”, which is still a matter of doctrinaire dispute on the related to its susceptible formation of producing different modalities”. In this sense, it affirms that “it also happens that after the divorce or separation, new unions consolidate, in which case it originates “assembled families”. By “the concept of family does not include only a natural community comprised by parents, siblings and close relatives, but it expands even incorporating people unrelated by blood bonds, when there is a lack of some or all of the aforementioned members, or when, by different issues, among others related to the internal destruction of the home due to conflicts between the parents, and obviously, economic reasons, it becomes necessary to substitute the original family group for one that complies with efficiency, and as far as possible, with the same or similar effectiveness, the commitment of providing the child with a warm and understanding environment within which the child may develop in the different phases of the physical, moral, intellectual and psychic development”.

However, the opposite happens in Chile, because according to section 1 of the new Civil Marriage Law, Law 19.947 the marriage is the main foundation of the family, which may be interpreted as an implied recognition of other forms of constituting a family, which would be the case of the assembled families. It is exactly this interpretation that the Chilean Constitutional Court on Book Nº 1881-10-INA has given the aforementioned provisions. They argue that: “reconstituted families are those formed after a marriage ends or form previous cohabitations and in the framework of new couple relations legally recognized. About them, the legislator has also taken care of regulate aspects such as the care of the children, property issues, etc.”

In case of Peru, since the institution of the Constitutional Chart of 1993, the Constitutional Court has been able to develop, in few occasions, the concept of family. For example, the case of «José Antonio Álvarez Rojas», the development of the *iusconnubii* as a fundamental right corresponding to the field of right to the free development of the individual. In the judgment of said case, the Court breaks up the concepts of family and marriage as elements that used to be dependent and states that «more than some fundamental rights to

the family and marriage, it is really about two legal institutions constitutionally guaranteed» (Reason 13). In this manner, the aforementioned judgment makes reference to the following legal concepts:

> *One of these environments of freedom in which there is no place for state interference, because it has the protection of the constitution which exempts it from being part of the content of the right of free development of the individual, certainly the iusconnubii. By exercising it, the marriage is performed as an institution constitutionally guaranteed and, with it* ***[although not exclusively]*** *(emphasis added), at the same time, one of the fundamental and natural institutions of society, as it is the family. Therefore, every individual, autonomously and independently, may determine when and with whom to contract marriage (...) (reason 14)*

Then, the Constitutional Court, in another judgment, performs a more comprehensive interpretation on section 4° of our Constitution.

This judgment covers a defense request filed against the Peruvian Navy Center, due to the sued entity did not grant the family card to the plaintiff's daughter, because the child had the status of step daughter. For this reason, the Constitutional Court, protecting the Fundamental Rights, declared the claim as valid, ordering the sued entity to not make any distinction in the treatment received by the children of the plaintiff and his corresponding step daughter.

Thus, the Constitutional Court, according to the statement of section 4° of our Constitution, recognizes the family as a natural and fundamental institution of society; in this regard, the State and the Community are obliged to provide an special protection to it; accordingly, the Court had to reconsider the conceptual concepts of the family and marriage, in order to, under different interpretations, no fundamental rights are violated.

In this regard, it is important to mention the treatment of the family at an international level, which also receives considerable attention because it is protected and covered as a human right; thus, the *softlaw* says that men and women, from a nubile age, have the right (without restriction based on race,

nationality or religion) to get married and establish a family, adding that this is a natural and fundamental element of the society, which is why «it has the right to be protected from the society and from the State»

With the previous point exposed, and from a constitutional perspective, it must be stated that the family, being a natural institution, is inevitably at the mercy of the new social contexts, such as social and labor inclusion of the woman, divorce regulation and its high degree of occurrence, the great migration flows from the fields to the cities, among other aspects. All this mean an evolution for the traditional structure of the family, in which this laid its foundations, essentially a nuclear structure, and under the direction of a *pater familias*, into a more open figure, which formation incorporates new legal concepts on the family notion. As consequence of this, families with different structures have been generated, as those formed from a common law relationship, single-parent families or those that, in doctrine, have named *reconstituted families* (reason 7).

In this manner, «there is no agreement in doctrines about the *nomen iuris* of this family organization, with many names being used such as assembled, rebuilt, reconstituted, recomposed families, second-marriage families or step-families. These are families formed from widowhood or divorce. This new family structure rises as consequence of a new marriage or engagement. Thus, the *assembled family* may be defined as "the family structure originated from the marriage or common law relationship of a couple in which one or both members have children from a previous marriage or relationship».

This being so, and going back to the aforementioned judgment, it can be assured that there is a relationship «stable, public and recognized determining the objection of this family core, to which the step-daughter evidently belongs». However, the sued Association claims that the imposed measure is supported by their internal regulations, supported in the privilege it possesses to organize. It is worth to mention that these privileges must not attempt against other legal assets in any manner, especially if this have a greater relevance, such as the constitution of a family.

From this, the Court concludes that even though the marriage and family are concepts closely related one with the other, are, nevertheless, differentiable. «Thus, no dependency relation between both of them can be established, the right for marriage must be clearly distinguished from the right of family».[19]

V. Conclusions

Summarizing the stated along this document, we can conclude that the constitutionalization of the Law is a phenomenon which characteristics allow to guarantee the permanence and efficiency of the Constitution in the legal system.

In this line, the abandonment of a model strictly legal has made it easy for the legislator to understand the Law as a single unit to the parameters established in the Constitution, since, only from this, the regulatory system with which each area of the Law have receive a full meaning.

This being said, we must assume that the Civil Right is also immersed in the framework of the constitutional contents and its performance is ruled by constitutional principles taken from the constitutional Chart. However, it is not only subject to this supreme orders, but it is also permanently gifted with the constitutional content that the jurisprudence, by the Constitutional Court, develops and allows the Civil Right to keep transforming according to the dynamism by which our society goes through.

The Right of Family is a clear example of the stated, its evolution in the national legislation has not always been the same, but it has gone along with the development of the fundamental rights. This has allowed for its scope and precepts to occupy a broader spacer, with higher projection when referencing the past.

Thus, the constitutionalization of this Institution has allowed taking on new aspects, leaving aside some traditional concepts. All of this has made it possible to expand its protection margin, which reason for existence rests in the new social needs.

[19] Ibíd., 17, p. 7.

To summarize, the phenomenon of the constitutionalization of the Law today implies a reception of constitutional precepts, which core is the respect of the fundamental rights of the individual. In consequence, the respect of the dispositions originated from the Constitutional Chart must be of mandatory compliance for all the public authorities and for the relationship between the private powers.