

Foreword

When Burkhard Hess and Loic Cadiet suggested presenting on, at the Summer School, “a book on civil procedure (national or international) which you consider as a fundamental or an important contribution” – Burkhard Hess himself choosing “a classic” – I thought of presenting on a classic as well. My choice is the Spanish author, Francisco Beceña, with the intention of addressing both the person and his work.¹

Why Francisco Beceña?

Francisco Beceña is the Spanish scholar who turned procedural law into science, on the one hand, and opened our (the Spanish academia) views beyond our borders, on the other. He broke with the traditional conception of procedural law in Spain, which until then focused on the proceedings (the *procedimiento* or *procedimientos*) and their practical difficulties. Before Beceña, Spanish academia was dormant as regards procedural law;² differentiation between the concepts of , for example, evidence or claim, and their materialization in court, starts with Beceña.

Francisco Beceña was also an outstanding figure in the development of procedural law as a subject matter taught at universities.³ At a time when professorship did not entail specialization (therefore,

¹ On the life and work of Francisco Beceña see among others A. Enciso, “Francisco Beceña”, *Revista de la Facultad de Derecho de Madrid*, 1940, pp. 45-47; J. Montero Aroca, “Aproximación a la biografía de Francisco Beceña”, *Revista de Derecho Procesal*, 1980, pp. 131-163; id., *Estudios de Derecho Procesal*, Bosch, 1981, pp. 603-632; M.A. Bermejo Castrillo, “En los orígenes de la ciencia procesal española. Francisco Beceña: trayectoria académica, inquietudes docentes y aportación doctrinal”, *Cuadernos del Instituto Antonio de Nebrija*, 2008, pp. 143-211; F. Gómez de Liaño González, “Historia del Derecho procesal en la Universidad de Oviedo”, *Revista Jurídica de Asturias*, 2012, pp. 61-114 (76-88); A. Álvarez Alarcón, “Guerra, dictadura y procesalismo científico”, lecture for the seminar *El Derecho Penal de la Postguerra*, Huelva, April 2014. I have had the opportunity of consulting Beceña’s *Casos de derecho procesal civil para uso de los estudiantes*, Madrid, Librería de Victoriano Suárez, 1925, and *Magistratura y justicia : notas para el estudio de los problemas fundamentales de la organización judicial*, Madrid, Librería General de Victoriano Suárez, 1928, at the library Concepción Arenal, Faculty of Law, University of Santiago de Compostela.

² The autonomy and relevance of Procedural Law, as a separate independent discipline and not as mere appendix of substantive law, is still a common claim of the Spanish academia.

³ Even the denomination “Derecho Procesal” is linked to him. As recalled by F. Gómez de Liaño González, pp. 68-69, during the XIX century the subject matter (rather: what can be deemed to be its precedent) received several names: “Estilo y elocuencia con aplicación al foro”, “Oratoria forense”, “Teoría de los procedimientos y práctica forense”, “Teoría de los procedimientos judiciales”, “Práctica forense”, “Asistencia a bufete”. In 1931 the usual label was “Procedimientos judiciales y práctica forense”.

professors enjoyed the possibility of swapping chairs and disciplines), the teaching staff for procedural law was mainly composed of practitioners devoted to explaining the art of performing before a court; the idea of procedural law as a science was alien to them. At universities the subject matter of “procedural law” (rather, “Procedimientos judiciales y práctica forense”, as it was then called) focused merely on solving practical, everyday problems; its contents were reduced to presentation of the different types of proceedings.

Some Facts of the Life of Francisco Beceña

Francisco Beceña was born in 1889, and died (actually, he was abducted and disappeared), in 1936, the year the Spanish civil war began, at the age of 45.

He presented his PhD under the title *El interés del capital y la Ley Azcárate contra la usura* in 1915.⁴ The topic was one of pure civil law. Only later, after some time spent in Bern in which he got in touch with foreign academics and ideas, did Beceña turn to procedural law. He unsuccessfully applied for a chair at the University of Santiago de Compostela in 1919; he was appointed to the University of La Laguna in 1920 and to Valencia’s university in 1924. He nevertheless preferred to swap his position and occupy a chair in Oviedo, where he remained until he moved to the University of Madrid in 1930.

Francisco Beceña combined his academic activity with political engagement: he was affiliated to the Partido Liberal Demócrata, and ran as a candidate for the Cortes Constituyentes in 1931. The combination of this out-of-academia activity and the shortness of his life accounts for the limited number of publications he achieved. He nevertheless managed to address the technicalities of procedural law and to write very critically about the judiciary. As well, before his death he also prepared materials to be used by students, which are worth mentioning because of the novelty of his approach.

Beceña and the Judiciary

Magistratura y justicia: notas para el estudio de los problemas fundamentales de la organización judicial, published in Madrid in 1928, is probably Francisco Beceña’s main work. His interest in the subject matter had been already announced in 1921, when a paper entitled “La formación de la magistratura” was released in the *Revista de Derecho Privado*.⁵

Magistratura y justicia developed one of the favorite topics of the author, namely the need for a thorough reform of the judiciary. In it, Beceña pleaded that the system of selection of judges -as it was at the time- was not suitable, and that professional incentives were missing. According to Beceña the existing mechanism to become a member of the judiciary had the advantage of simplicity, but did not permit a proper evaluation of the abilities or competences of the applicants, apart from their memory. Beceña’s central idea was that justice is done through the judicial process; that the judge is the president of the process, at the peak of it; therefore, if the judiciary is not taken care of, its final function

⁴ Published in 1923, Madrid, Librería General de Victoriano Suárez.

⁵ *Revista de Derecho Privado*, 1921, pp. 155-159.

will fail. He added that the judge must be seen as the chief of the court or tribunal's staff, and enjoy the conditions to develop an enhanced role in the managing of the proceedings as well.

In Beceña's view, reform of the judiciary had to start with an effort to attract the most gifted jurists to the service.⁶ Selection should entail passing an exam and a period of training (with the help of history and comparative law, but also with the aspirants working as courts assistants, or even assuming judicial tasks on an interim basis); afterwards the candidates would be evaluated again. In the context of this second assessment, knowledge should not be the most important item; a candidate should rather show the appropriate legal sensibility when looking for an adequate answer to the social problems before him, besides the ability for further learning. The individual character and personal qualities of each applicant should be taken into account as well.

One of the most striking features of Beceña's book is the insight he provides into other legal systems in order to highlight the deficiencies of the Spanish one. He was familiar with the working of the judiciary in the UK and France, and analysed them in detail, together with the Roman system. He praised their virtues and commented on their weak points. Not only that: he also explained how they achieved their particular degree of development. For instance, referring to the English judiciary, he said that it worked better than the Spanish one because the human component was placed above the institutional organisms, and dominated them; that allowed for faster adaptation to changing circumstances and needs in order to reach key objectives. According to Beceña, this particularity was due to an education oriented towards the acquisition of specific abilities – observational, understanding and perception skills. Other ingredients of the successful model were the promotion of personal virtues, such as the love of truth, sense of justice and fairness, and moral integrity. He added that this collection of personal qualities had to be accompanied by a wide margin of freedom to manage proceedings, as well as to investigate the applicable rules.

As for the French system, Beceña described the relationship between the executive branch and the judiciary and the influences of the former over the latter. He also explained that French judges had been able to apply the same legal provisions for more than a century, in spite of the economic, political and social changes that had put the existing rules to the test. Judges had also been able to adapt rules drafted in a general and abstract way to everyday life. In this respect, the French judiciary represented to him the archetypical example of the penetration of juridical science into the practice of law. No need to say that Beceña admired the qualities of the French judiciary; he was therefore surprised by the selection processes, operated by the government and for which no condition or suitability capacity was required. He concluded that the reason why the French judiciary performed well was linked to cooperation and communication between academia and the judiciary. In France, this cooperation was reflected in the *Revue critique de législation et jurisprudence*, where case law was published; also in the comments to case law, which provided a meeting point for practitioners and scholars, and which was, and is, so common that there was even a school of "arretistes". This "literary genre" had acted as a

⁶ Apparently the profession of judge was not considered an attractive one, remuneration being much worse than other professions, such as notaries or registers. That explained why only weak students wanted to become judges.

bridge, creating a rich and dynamic cultural environment, where the judges felt inclined to improve their diligence and care when rendering a decision.

Beceña's work was never well received among members of the judiciary (not only the judges but also the clerks and tribunal staff). He was certainly hard on them: in his opinion, Spanish judges had earned a bad reputation due a poor level of general, even legal, culture; they lacked imagination, they followed the law to the letter instead of conducting a true work of interpretation and integration. The author also addressed the thorny question of promotion, inspection or surveillance, and remuneration (in this regard, he proposed that salaries ought to be proportional to performance, and also that they should be calculated having in mind the allowances of other civil servants). Actually, Beceña's monograph led judges and tribunal staff to gather in a cooperative movement to safeguard their interests. Beceña's work was clearly perceived as a threat. It is submitted that this was probably an overreaction and certainly a misunderstanding. True, the author concluded that the urgent improvement he claimed for the judiciary must be entrusted to an inspection body⁷ with the authority and competence to create an environment of work and cooperation; and this, because he believed that where, as in Spain, there was a deeply-rooted tradition of blind submission and disinterest in the function, the ability to self-govern was doubtful. However, Beceña was not blind to structural problems affecting the selection, formation, and performance of the tasks of the judges: overload, lack of time, lack of resources; and lack of interest of the auxiliary staff. Nor was he unaware of what he described as the social, cultural, and scientific environment in which judges deployed their activities; in particular, he recalled rules of political inspiration tending to restrict the attributes and role of the judges (the shrinking of the capacities of the judge in managing proceedings). At the end of the day, he knew and he deplored that judges, in spite of being central to the judiciary, had a very small role in its operation.

Beceña as a Researcher

Through several brief papers published in the *Revista de Derecho Privado* Beceña delved into technical issues such as claims ("Valor jurídico de la demanda. Notas a una sentencia del Tribunal supremo");⁸ enforcement ("Los procedimientos ejecutivos en el Derecho procesal español. Notas de sistematización");⁹ costs ("Costas en el procedimiento civil"),¹⁰ or the allowances of the court's staff ("Sobre la retribución de los funcionarios judiciales").¹¹ Nonetheless, his most relevant piece of research into Spanish procedural law at the time was a contribution to a commemorative volume for G.

⁷ His proposal being that of a Commission of members belonging to the highest levels of the administration of justice, with the exception of Bar associations, to be renewed periodically.

⁸ *Revista de Derecho Privado*, 1920, pp. 44-48.

⁹ *Revista de Derecho Privado*, 1920, pp. 222-226.

¹⁰ *Revista de Derecho Privado*, 1922, pp. 33-52.

¹¹ *Revista de Derecho Privado*, 1924, pp. 161-164.

Chiovenda entitled “Los caracteres generales del proceso civil en España”,¹² where he presented the first Spanish Code of Civil Procedure (Ley de Enjuiciamiento Civil, enacted 1881).

According to Beceña, the Code of Civil Procedure of 1881 did not qualify as a real legal system, being more of a cluster of provisions of different origins. He believed that, behind this jumble, the features of a real system may have been detected; however, it seemed that the legislative work needed to provide coherence and unity to the whole stopped in the late nineteenth century, after codification. He also submitted that firm anchoring in tradition explained the imperviousness to foreign influences - interestingly, while this fact was interpreted by Chiovenda as a feature of the autonomy of Spanish law, for Beceña it only showed an inability to assimilate European trends and progress.

From this point of departure Beceña explained the main principles and traits of Spanish law: those related to the allocation of powers to the judge and the parties as regards starting and development of proceedings; principles regarding the formalities prescribed for any activity within proceedings; principles establishing the framework of relations between the parties, and between the parties and the judge; principles concerning the entitlement of third parties to get information on the development of proceedings. Beceña highlighted particularities of the Spanish design: for instance, as regards a defendant who does not enter an appearance; at a time when other systems protected him against any kind of coercive measure, in Spain his assets could be seized provided he had been properly served. Other key features of the Spanish procedural scheme then in force were: exemptions to the contradictory principle, represented by judicial orders and injunctions granted without the defendant; the predominance of written -as opposed to oral- proceedings, which in practice were even further degraded as judges, too busy, were not always acquainted with documents – only the auxiliary staff were. Another characteristic emphasised by Beceña was the strong tendency in favor of indirect communication (*mediación* as opposed to *inmediación*) between the judge and the parties. The author finally recalled the principle of free assessment of proof, underscoring the propensity to attach to confession an identical value to other means of proof.

Beceña concluded his essay on a very critical note: the Spanish civil process was firmly tied to the medieval past; an update was imperative, which had to include changes in the judiciary, and also changes in academia so that a truly scientific basis could be built. According to Beceña, in no other legal branch was an exclusive leadership of practitioners as dangerous as in procedural law.

Beceña as a Professor

In 1925, Beceña wrote a book for students entitled *Casos de Derecho civil para uso de los estudiantes*. He never published any other textbook: he died too soon. At the time of his disappearance he had nevertheless collected copious materials, which were later put together by his disciples, M. Perales

¹² In *Studi di diritto processuale in onore di Giuseppe Chiovenda nel venticinquesimo anno del suo insegnamento*, Padua, Cedam, 1927, pp. 2-21.

García and A. Enciso Calvo, producing two typed volumes amounting to almost 800 pages.¹³ Two elements of the text are worth mentioning: firstly, the system followed to present the contents in an orderly way which was later taken up and generalized by other scholars; secondly, the introduction at the beginning of the book of several chapters dealing with key concepts of procedural law (such as the theory of the action, its types and features; or jurisdiction as a function and a power of the State), whose presence reflect his idea of procedural law as a science.

Conclusion

It is certainly not an exaggeration to say that there is “before” Francisco Beceña and “after” Francisco Beceña in Spanish procedural law. Within Spanish legal science he represents the first attempt to adapt to modernity the level of education and teaching of procedural law, as well as the conception of procedural law itself. Along with the essays and works we have briefly summarized he was also the author of book reviews of foreign authors (such as J. Appelton) and of journals (in 1924 he commented on the birth of the Italian *Rivista di Diritto Processuale Civile*), which became known in Spain thanks to his effort. His thinking was deeply influenced by foreign tendencies and scholars such as G. Chiovenda and P. Calamendrei; he was also familiar with German developments and discussions represented by Müther, Windscheid or Buelow. All this he conveyed to his disciples, as the academic “father” of prominent Spanish scholars in the field of procedural law: José María Serrano Suárez, Emilio Gómez Orbaneja, Leonardo Prieto, Jaime Guasp, Valentín Silva or Ángel Enciso.

¹³ *Notas de Derecho Procesal Civil* and *Notas de Derecho Procesal Penal*. The volumes reflect the syllabus of the subject matter as taught at the time at the Faculty of Law in Madrid – which followed Beceña’s programme.