Equity in Spanish Law?

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Within the great variety of aspects which the complex phenomenon of « equidad » entails, we want to point out one as the nucleus of our reflections : the transcending of the identity of law and legal norms which it entails. [1] In effect, few elements make so manifest the non-viability of this equation as does the effort by particularizing to make justice concrete, which is proper to classic « equidad ».

What role does « *equidad* » play in Spanish law? Is *equity* really an Anglo-Saxon phenomenon with no equivalent in « continental » law? We want to review three significant aspects of the problem, confident that we shall not only provide data for a comparative study of the subject but that at the same time problems will become manifest which derive from the impossibility of identifying law and legal standards and of the consequent skepticism as to the attainment of juridical certainty and safety without fissures. [2]

An initial approach to the Spanish set of laws would reveal a disconcerting balance : « equidad » does not appear as a juridical element, properly speaking. The Civil Code, born in an atmosphere faithful to the equating of law with legal norms proper to the legal positivism of the XIXth century, erects the legal norm as the supreme juridical source. Subsidiarily, consuetudinary law comes into play. Finally, the « closing » of the

[1] We feel that this palliates the danger of ambiguity which the parallelism between the terms « *equidad* » and « *equity* » and « *Aequitas* » brings up. Both the specially material dimension of « *Aequitas* » — as a search for an ethical content supplementary to law — and the formal predominance of « *equity* » as a special procedure which makes it possible for common law to be flexible on the basis of the force of precedent, coincide in the impossibility of reducing law to legal norms. On this, H. RIDDER, *Aequitas und Equity*, in : *Archiv für Rechts- und Sozialphilosophie, 1950-51* (39), pp. 185, 196, 199.

[2] « Equidad » always demands a relaxing of strictness with relation to the specific case. — R. A. NEWMAN, *I due livelli della moralità nel diritto*, in : *Rivista Internazionale de Filosofia del Diritto*, 1968 (1), p. 50. Also *Equity and Law*, in : *Anales Catedra Francisco Suarez, 1967-68* (7-8), p. 3.

juridical system is guaranteed by the « general principles of law » which, although they might mean something else today, then were only the skeleton of a dogma abstracted from the legal standards. Not only does « equidad » fail to appear among the sources of law (except for its problem-filled characterization as the general principle of law) [3], but judicial activity does not even appear as such. [4]

But this framing of the question of « equidad » as an extra-legal problem is not merely an historical relic. The law of XII-22-1953 considers « equidad arbitration » to be that realised by « natural persons in full use of their civil rights who can read and write », who rule « subject to their knowledge and understanding ». [5] Given the fact that this is opposed by « legal arbitration », few doubts remain as to the non-legal character attributed to « equidad », which consists, perhaps, in an intuitive search for the just. [6]

Our conclusion would be : law is equivalent to legal norms. Only on the basis of a prior agreement would it be possible to submit the solution of conflicts to an extra-legal instance : « equidad ». But is this in keeping with the practical reality of Spanish law? We want to analyze three aspects which neatly belie this conclusion.

« Equidad » and the Autonomy of the Will

The identification of law with legal norms brings up problems, in the first place, in the field of the use of individual rights. In effect, one of the consequences of such a starting point would be to admit that « it is a universally recognized principle that he who uses his right hurts no one ». [7] If there is no right out-

[3] Thus, in the civil field, the principle « *Aequitas in dubio prevalet* » which frequently appears as the equivalent of another which is hardly juridical : *In dubio pro benignitate.*

[4] This has been the cause of an abundant bibliography concerning article 6 of the Civil Code. Especially recent, *Jurisprudencia y fuentes del derecho*, E. La Laguna, Pamplona, 1969.

[5] Articles 20 and 4 of the aforementioned law.

[6] This concept would find broad historical support in the frequent connection of « equidad » and common or natural sense in Spanish provincial law. On this, M. Sancho Izquierdo, *La equidad y el sentido natural de los fueros*. Also E. Wohlhaupter, *La importancia de la « equidad » en la historia del derecho en Espana*, in : *Investigación y Progreso*, 1930 (10), p. 107.

[7] As does the sentence of the Supreme Court of V-13-1911, fully reiterated later on.

side of law, no one who is within the law can have overstepped his rights.

In the face of this framing of the question, the vital reality of law as a just solution to be reached in specific situations, and not as a generic proposition given beforehand, has been giving way to the birth of the doctrine of the *abuse of law*. The reality of individual conflicts has implacably opened a road for which a technical justification has been looked for later on. We find ourselves, without a doubt, before a case in which « equidad » plays a role, understood as justice made specific, based on the recognition of a law which transcends the legal norm. It is therefore not surprising that the abuse of law has been considered « a bridge which stretches between strict law and 'equidad' or morals ». [8]

Little by little, the purely legal center of this doctrine gained ground. It was judicial activity based on direct contact with the legal problems experienced in society, which profiled its sense and scope. So, the sentence of the Supreme Court of II-14-1944 discarded the possibility of unlimited use of subjective rights since « apart from their legal limits, frequently defectively defined, they have others of a moral, teleological or social order ». It is possible to take refuge in an external legality and violate the « borders imposed by 'equidad' and good faith ». Jurisprudence thus backed the work of the scientific doctrine which has been defining the elements which justified this limitation of the prerogatives recognized by law : the use of an objective or externally legal right [9] ; the subjective intention of doing harm or excessive or abnormal use of law [10] in the lack of legitimate interest in the author [11] ; with intense injury to a third party whose interest is not specifically protected by a legal norm. [12]

In any case, the limits pointed out do not seem to be considered as appropriately juridical. The vision of « equidad » as

[8] The qualification of « strict » attributed to law here sweetens the obvious extra-legal nature given « equidad », together with morals. — J. CALVO SOTELO, *La doctrina del abuso del derecho como limitación del derecho subjectivo*, Madrid, 1917, p. 127.

[9] Apart from the sentence indicated, that of XI-25-1960.

[10] Sentence of III-9-1960 and that already indicated, of XI-25-1960.

[11] Sentences of III-I-1965 and XI-25-1960.

[12] The degree of injury obtains from the existence or non-existence of the desire to injure, as is indicated in the sentence of XI-25-1960. Another, of II-12-1964, insists on the lack of protection for the interest of the injured party.

an extra-legal phenomenon is still present, as is made clear by this paradogmatic definition of the abuse of law : « the collision or struggle between a right without interest and an *interest without law* ». [13] The identification of law with legal norms and, as a consequence, that of subjective right with the power recognized by it, palpitates in the background, perpetuating the confusion.

However, the properly juridical nature of this doctrine continues to gain ground. To this end, attempts have been made to connect it to legal norms. So, articles 520 and 529 of the Civil Code, concerning the possible use of the rights of usufruct, use and habitation, or article 1902, which establishes liability through guilt or negligence. If that were not enough the revised text of the urban lease law of XII-24-1964 already refers, in article 9, to the « manifest abuse or abnormal use of a right ».

But, beyond any connection with previous legal norms or possible subsequent connection, it seems clear to us that this problem lets us see a reality through it : the attainment of justice in the solution of specific cases has required us to go beyond law texts to find the law applicable to them. What is involved are cases which cannot rest on a law (the lack of legal protection of injured interest is, as we have seen, a requirement of any abuse of law) nor on a custom to back such a solution. Concerning the possibility that what is involved might be a play on a general principle of law, this would mean setting to one side the positivist concept of the law in order to consider it to be a set of originally pre-legal juridical principles, thus breaking the equation of law with legal norms.

Law is a decisive instrument for obtaining social harmony in the interlacing of individual, autonomous wills. There is no room for thinking that harmony can be reached by merely setting norms by legal means. If the principle of legality is a necessary condition for attaining juridical strength, the attainment of justice in specific cases through their equitable solution requires a deep study of law, transcending the legal norms without negating them. The doctrine of the abuse of law serves as a sample of the fact that this reality is in force in Spanish law.

[13] Sentence of XII-18-1964.

« *Equidad* » *and Administrative Discretion*

If limits on individual autonomy are an indispensible condition to the attainment of social peace, the defense of individual rights — in which respect that peace finds meaning — imperatively requires subjecting the activity of the executive power to law. This means, in the first place, observing the principle of legality. If, in inter-individual relations, one begins with the licitness of everything which is not expressly prohibited by the state, in the private sphere there is room for action on the basis alone of competence granted by a previous norm. The requirements of « equidad », and among them the need for going beyond respect for the law in order to attain a true submission to it, are going to arise as a consequence of the *discretion* which a legal norm can give to the administration in order to orient its activity.

In effect, through the prism of identifying law with legal norms, discretion would be the same as arbitrariness. Once the legal limits have been fixed, the activity of the administration within them would be comparable to free individual autonomy. The need for a change of focus arose very soon. The legal limits are not the only things which condition the activity of the state, but rather it is law (necessarily transcending the legal norms) which erects itself in their framework. « It is never permitted to confuse the discretional with the arbitrary, as it should be covered by sufficient motivations, arguable or not, but considerable in any event, and not merely by a quality which makes them unattackable ». [14]

The French doctrine of « détournement de pouvoir », which has had no small effect on Spanish administrators, tends to the solution of this subject. But later on they found a new zeal for finding the solution through recourse to an instrument, the utility of which for the fulfillment of « equidad » we have already indicated : the *general principles of law.*

These principles are not now understood as a mere systematic sublimation of legal norms, but rather they appear as « principles of material justice », « nodules of condensation of ethical-social

[14] Sentence of III-10-1969.

values and also centers of organization of the positive regime of the institutions and movers of its operation », which « express the basic values of a juridical system ». [15] This brings up the characteristic problem of any non-positivist concept of such principles : their possible objectivisation which would prevent them from being reduced to an open, rhetorical system, irresponsible, of ethical or political judgments, and which would thus make it possible to overcome legalistic positivism without ignoring juridical positivism. [16] Only by means of such an objectivisation can these principles serve as an instrument for the fulfilment of « equidad », understood as the juridical concretization of justice and not an open door to the play of extra-juridical factors.

An initial attempt to attain this objectivisation is that which led to repeated connections — with different intentions — of the general principles of law with those of natural law. Evidently, if there are juridical principles which are valid independently of their formal reception in legal norms, it is because they form part of a « transpositive » juridical reality, the existence of which constitutes the central nucleus of natural law thought. [17] But we are not now worried about the ontological foundations, but rather about the possibility of an objective formulation of the contents of these principles. This is a problem which this throwback to natural law is far from solving easily. [18]

Only through judicial work do we consider it to be possible to reach a formulation of these principles which would make it possible for them to fulfil their function. So, principles recognized by the Supreme Court such as that which establishes that « when the administration can chose between several forms

[15] E. GARCIA ENTERRIA, *Legislación delegada, potestad reglamentaria y control judicial*, Madrid, 1970, p. 32.

[16] By the same author, *Reflexiones sobre la ley y los principios generales del derecho en el Derecho Administrativo*, in : *Revista de Administración Publica*, 1963 (40), p. 211.

[17] Based on this, E. ELIAS DE TEJADA defends the *Necesidad de sustituir los principios generales del derecho por el Derecho natural hispanico*, in : *Revista General de Legislación y Jurisprudencia*, 1962 (1-2), pp. 19 and 20. For E. GARCIA ENTERRIA, on the contrary, it is the general principles of law which make possible the objective formulation of the principles of natural law — *Reflexiones* ..., p. 199, *Legislación* ... p. 222.

[18] We alluded to the problem of the formulation of natural law in *Eficacia jurídica y participación social*, in : *ACFS*, 1967-68 (7-8), p. 130, and in *Juristische Argumentation und metaphysische Krise* in : *Le raisonnement juridique* (Proceedings of the World Congress for Legal and Social Philosophy), Bruxelles, 1971, p. 555.

of action to attain a certain end, it should make use of that one which is least harmful to the rights of those under administration » [19] open interesting possibilities of equitative control of the activity of the state [20], beyond strictly legal limits. The end is not for administrative action to cease being discretional and find itself specifically determined, but rather that limits on its discretion become more necessary [21] since it is now law, and not only legal norms, which acts as such.

The doctrine born of the reiterated jurisprudence of the Supreme Court has curbed the theory of the abuse of law and opened channels to a possible role of the general principles of law as an equitative control of administrative discretion. Without going into the scope granted up to now to this role nor into the extremely cautions attitude with which the Supreme Court allows it — frequently reducing it to a mere decorative supplement of the legal groundwork of its decisions — we must, in the end, see if the very judicial work itself does not also require a new field of action for an equitative supplement to the law which makes it possible to make justice juridically concrete.

« *Equidad* » *and Judicial Subjectivity*

The identification of law with the legal norms entails a hermeneutic dimension : the reduction of judicial activity to merely *applying* legal norms. Only in exceptional cases would this require a previous interpretation for dissipating doubts or palliating imperfections in the legal text. However, the examples which we have just seen present us with a judicial task which cannot be reduced to being a spokesman for the legal norms, but is, rather, forced to transcend them, reaching a *comprehension* of the law, which must always be accompanied by interpretation and application. [22] This explains that if the positivist

[19] Sentence of X-21-1969.

[20] Although the jurisprudence of the Supreme Court, ignoring this juridical dimension of « equidad » and backsliding in its moral characterization, rejects as administrative material the allegation of reasons of « equidad » — sentences of I-30-1932 and I-14-1959.

[21] M. CLAVERO, *La doctrina de los principios generales del derecho y las lagunas del ordenamiento administrativo*, in : *RAP*, 1952 (7), p. 93.

[22] Especially interesting in this respect, the hermeneutic framing of the question

framing of the Spanish Civil Code does not count jurisprudence as a source of law — because it considers it as a mere mode of expression of the legal norms — the juridical reality has ended up by raising the doctrine of the Supreme Court as the keystone of Spanish Law.

It would therefore be possible to end our reflections here and flatly answer the question which gave them life. To do so, all that would be necessary would be to do away with the question mark and conclude : *Equity in Spanish Law.* The jurisprudence of the Supreme Court illuminates the law thanks to the concretization of the legal propositions, curbing customary norms and recognizing certain general principles of law. This would fulfil the task of supplementing legal norms, of contributing flexibility enriched by customary elements and, in short, the attainment of an equitable juridical solution. [23]

But the problem is far from being definitively closed, since it revives in a new dimension which it seems we must illuminate if we do not wish to renounce the effective attainment of « equidad » demanded by the realization of law. To this end, it is necessary to keep its abandonment from being cloaked by confidence in a procedural artifice which is implicitly endowed with a kind of infallibility in determining the law of a specific case, perhaps presenting its operation as purely mechanical. On the other hand, it is only possible to transcend legal norms and manage to attain specific law on the basis of the role of judicial subjectivity.

Autonomy of the individual will and administrative discretion need an equitable control which will subject them to law and not only to the legal norms. This control will materialize thanks to the judicial task, which is not now a simple means of legal expression, but rather an instrument for attaining law, the vehicle for an understanding of the law which contains subjective elements. Is this subjectivity free from equitable control? If the answer is affirmative, all we have done is to replace the tyranny of legal norms with that of judicial arbitrariness. If

of J. Esser, in : *Vorverständnis und Methodenwahl in der Rechtsfindung*, Frankfurt, 1970.

[23] J. Puig Brutau has insisted on this similitude between the Anglo-Saxon juridical reality and the Spanish juridical reality, presumably « continental », *La jurisprudencia como fuente del derecho*, Barcelona, no date, p. 236.

we answer in the negative, another question is forced upon us : what instance can serve as an instrument to this control?

If individual freedom demands limits in order to prepare the way for social peace, and if administrative discretion has to be placed in a strong framework so that it will not degenerate into arbitrariness, the judicial task cannot limit itself to respecting a simple framework, but it must develop without ever abandoning the field of law. The judge is not a citizen with the privilege of converting his personal opinions into laws, nor is he even a functionary who has been granted especially relevant discretionary powers. He is a servant of law, the content of which he must tirelessly pursue although he may never be able to attain the guarantee of an exhaustive objectivity of his decisions. That is why in juridical life no intervention needs the control of « equidad » so badly as does that of the judge.

In the same Spanish legal norms we find support for this affirmation. So, for example, article 1154 of the Civil Code points out that « the judge will *equitably* modify » the penalty in the case of partial fulfilment of obligation ; article 1103 points out that liability for negligence « can be moderated by the courts *depending on the cases* » ; article 70 admits that the judge can « apply his *discretionary criterion*, depending on the *particulars* of the case » when executing sentences of annulment of marriages... Do we have here an easy road to judicial subjectivity? We are of the opinion that, on the contrary, this is a recognition of the existence of such a subjective intervention and the imposition of an *equitable* control, based on the *peculiarities* of the case.

But is it possible to make an objective formulation of « *equidad* »? The general principles of law cannot by themselves effectively help us, for two reasons : 1. such a formulation is unthinkable without there entering into play the very judicial action which we wish to control ; 2. this is an attempt to control a specific decision and these principles are « general » and therefore just as much in need of « concretization » as any legal norm. Nor is there room for identifying « equidad » with a lucky intuition on the part of the judge, since this rather entails reflection, prudence and an accommodation of the norm to the circumstances, all of which requires a mental adjustment

which is completely opposed to instinctive evaluation. [24] « Equidad » more correctly consists of a content which can be appreciated. [25]

« Equidad » as content is identified with the justice of the specific. It is not an extra-juridical factor or even an « extra-positive » one, but rather « transpositive ». « *Equidad* » is not identified with natural law, either — rather it is *law* (natural or positive), *made concrete* and made effective, in the same manner as the legal norm is potential and generalized law. [26] That is why its content can never be exhaustively made objective — it is the result of play between subject and object necessarily entailed in the hermeneutic realization of law. Does this imply the recognition of the uselessness of « equidad » as a control on judicial arbitration?

We feel that such a conclusion would be hasty. If, in its material dimension, it always appears as an objective to be reached and not as content given *a priori* which makes it possible to have an effective control, « equidad » rises, at the same time, to a formal, procedural dimension which can contribute valuable elements to the control of judicial subjectivity. And in Spanish law there seems to be no lack of support for its recognition.

From the doctrinal point of view it would be possible to find the foundation in the reception of the investigations of German origin on the topical core of law. [27] Although there has been no unanimous agreement as to its value as an instrument for rationalizing law, it offers an interesting middle ground between

[24] J. CORTS GRAU, *Curso de Derecho natural*, Madrid, 1970 (4th ed.), p. 299.

[25] This explains why article 1960 allows the rejection of the decision of a third party concerning partition between partners « when it is obvious that 'equidad' was lacking ».

[26] Of interest in this respect, A. KAUFMANN, *Gesetz und Recht*, in : *Existenz und Ordnung*, Frankfurt, 1962, p. 381. Thus « equidad » does not oppose the generality of the laws but guides it to its practical implementation : « When the typical predominates over the individual there is no other possible means, nor surer way of being just, and even equitable, than putting into practice the egalitarian criterion pre-set in the legal scheme ». — L. LEGAZ LACAMBRA, *Filosofia del derecho*, Barcelona, 1961, p. 343.

[27] Above all, *Topik und Jurisprudenz* of TH. VIEHWEG, München, 1963 (2nd ed.), which has given rise to a fruitful discussion. Its main echo in the Spanish area is found in E. GARCIA ENTERRIA who, apart from writing the prologue to the Spanish version, proposed a topical framing of the general principles of law as « a condensation of the great juridical-material values and of repeated experience of juridical life », *La lucha contra las inmunidades del poder en el Derecho administrativo*, in : *RAP*, 1962 (38), p. 176.

the utopia of a closed systematization and a resigned acceptance of possible judicial arbitrary authority. Jurisprudence principally handles juridical principles inserted in specific cases, gaining in vital wealth that which it loses in purity of logic. [28] Its contribution is that of particularizing and making specific and this, to the degree that it allows a moderately generalizing re-elaboration, will help to palliate the considerable gap between general proposition and solution of the specific case.

We also feel that it is possible to find an open path to this possibility in recent sentences of the Supreme Court, which has consecrated in administrative matters the principle that in similar circumstances a similar resolution should be given [29], using it as an effective means to limit the scope of discretion of the administrative body. Precisely because discretionary is not the same as arbitrary, its decision becomes the precedent for its conduct in comparable cases. [30] Discretion does not exempt from « maintaining the same generic criterion which, the circumstances being equal, means identical treatment for those whose interests are being administered ». [31]

If this happens in the case of administrative discretion, in which a « free » decision is given within a precise juridical (not merely legal) framework, there is even more reason for it to enter into play in the case of judicial subjectivity, which, in theory, enjoys no « freedom » at all, but rather has to be fully mediated by law (and very especially when it transcends the legal norm). It would therefore be very interesting to re-elaborate judicial decisions on the basis of « an analogy which would easily lead to the establishment of a doctrine of equivalent acts which would determine an equal juridical valuation of them through connection with the defining maxim that 'where there is the same legal reason there should be the same rule of law' ». [32] This, for example, would allow the elaboration of constants in the evaluation of motives to be considered as « just cause » for excusing from conditions that make marriages illegal (article 85

[28] This is meaningful only in sofar as it expresses objective contents. — N. M. Lopez Calera, *La estructura lógico-real de la norma jurídica*, Madrid, 1969, p. 177.

[29] On this, R. Entrena, *El principio de igualdad ante la ley y su aplicación en el Derecho administrativo*, in : *RAP*, 1962 (37), p. 63, concerning a sentence of VII.6.1959.

[30] Sentence of III-10-1969.

[31] Sentence of XI-18-1967.

[32] Sentence of XI-20-1961.

of the Civil Code), « justified cause » for marking a period of time (article 1707) and, in general, the contribution of elements of judgment so that the remission — explicit or demanded by indefiniteness of the legal concepts — to an equitable intervention of the judge will not mean opening the door to his arbitrariness, but rather to a reasoned expectancy of « concretized » justice.

This task of re-elaboration primarily falls to theoreticians in law whose doctrines influence the resolutions of the Spanish Supreme Court more than the judges themselves, pressed by the multiplication of cases to be decided. As effective attention to this topic of judicial activity appears, the judge can count on valuable elements which will guarantee, at least formally, the « equidad » of his decision, since egalitarian treatment is the basic requirement for specific justice. It will thus be easier for the judge to decide with a clear awareness of the responsibility of his task [33], in the knowledge that his decision goes beyond the specific case to convert itself into a guide to the solution of other, later cases.

* * *

We are to conclude, then, that in the Spanish area as well the need for transcending legal norms in order to attain an effective implementation of law is becoming clear. Thus new limits on individual autonomy arise, as does a more precise demarcation of administrative discretion. But the judicial task which serves as an instrument for these achievements is not the definitive solution of the search for specific justice but, to the contrary, it jointly feeds the fire of its principal obstacle : the inevitable judicial subjectivity. The search for an effective « State of Law » imposes not only a more effective demarcation of the scope of action of the executive power, but it demands at the same time a decisive doctrinal contribution which would provide greater objectivity in judicial decisions. The very jurisprudence of the Spanish Supreme Court has made manifest the need for this contribution which would make possible a more

[33] In our study *Derecho y ciencias sociales*, included in *Derecho y sociedad : dos reflexiones en torno a la filosofia juridica alemana actual*, Madrid 1973, we have referred to this responsibility as one of the consequences of a theoretical-practical articulation of juridical knowledge.

effective fulfillment of the principle of equality before the law and would strengthen, in the judge, the awareness of the responsibility of his function.

If law is not identified with legal norms, then the « equidad » which is to serve as a supplement to the latter is needed to aid in the progressive objectivisation of judicial activity.

REPRINT FROM

EQUITY IN THE WORLD'S LEGAL SYSTEMS

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A COMPARATIVE STUDY

DEDICATED TO
RENÉ CASSIN
whose life has been consecrated to the illumination of The Fundamental Principles of Justice

■

Editor
Ralph A. NEWMAN

■

This book constitutes the first volume of a series to be called « California Western School of Law, U.S.I.U. Studies in Jurisprudence »

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