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Equity as a Fundamental Criterion in Jurisprudence of Values

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ABSTRACT: *Suits in equity involve powers of discretion but not of the arbitrary kind. Equity affects statute law, insofar as it can serve as a benchmark for assessing good rules.While, for its part,the law pursues equity, insofar asit marks the limits within which it can be applied.As an assessment criterion, equity involves surmounting legal conceptualism, substituting it with more flexible methods. In this paper, I analyse how inlegal doctrine, efforts are currently being madeto determine in which wayjudges, in their role as law enforcers, have to adapt legal rules to specific cases following equitable criteria, considering, always, that their rulings should never leave the law enforced.*
KEYWORDS*: equity, jurisprudence, law, assessment.*

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I. EQUITY IN THE JUDICIAL APPLICATION OF LAW

(i)Some clarifications on the concept of equity and its historical-doctrinal configuration

The aim of equity, the criterion employed to determine and assess law, is to adapt legal rules and judicial decisions to the imperatives of natural law and justice, so as tojudge specific real-life cases in a flexible and humane (rather than rigid and formalist) manner, more in keeping with their nature and circumstances.[1]

Equity, as it is currently understood, is the result of different historical and doctrinal contributions. Many ambiguities and uncertainties have arisen from such a subtle concept, which is very difficult to separate from others like law and justice.

Etymologically speaking, equity, as aequitas, entails the Roman and classical idea that the purpose of law is to grant equal protection to identical or similar interests that deserve it, and that law should be equal for all members of society.[2]This signification of equity has survived many doctrinal definitions and,according to the English maxim, 'equality is equity'.

The word 'equity' has also been etymologically related to the Aristotelian epiqueya. In this respect, equity as equality can also be understood as justice in a specific case. Thus, the concept of equity would contain two elements: equality of treatment and its individualisation, whereby equity is both equal and individualising justice. Accordingly, equity can lead to equality and inequality, alike. It entails treating equal cases equally and unequal cases unequally.

Broadly speaking, it is clear that there is an ideological and historical relationship between the Aristotelian epiqueyaand the Romanaequitas. The modern concept of equity is the result of combining those two notions, at the heart of which there are a fair number of conspicuous coincidences. Epiqueya basically means something that is advisable and adapted to something else, a rule that adjusts to a relationship owing to the fact that it corresponds to its intimate nature.This same idea of adjustment, adaptation, harmony and unity can be found in equity.

The rest of the significations of equity are also interwoven. The idea of flexibility and individualisation is very closely associated with that of benignity and also with that of equity as a subjective or emotional criterion.

Etymological research highlighting these aspects of equality, righteousness and pairing has shown that the concept of equity isinseparable from that of justice. Doctrinal research has also arrived at the same conclusion.

Besides its etymology, equity is a term open to many interpretations. On the one hand, as a popular term equity is an expression of the fair rule of law in the sense of social ethos, despite the fact that it has often been regarded as a dangerous type of discretion. On the other, as to its technical-legal meaning, equity is understood as that which adapts to the specific characteristicsof legal life; for example, a sales and purchase contract would be regarded as equitable if there were a correspondence between the object and the price. Equity is thus a criterion rationalising the economic forces operating in a system. Another technical-legal rendering of

[1]Castán Tobeñas, *Laformulación judicial delDerecho* (n 10).
[2]Ursicino Álvarez, *Curso elemental de derecho Romano, fasc 1º* (Madrid 1948) 64.

the term considers that equity is synonymous with natural justice or natural law, in contrast to positive justice and strict law. In this sense, fairness would be compatible with positive law and the equitable would fulfil the axiological requirement of natural law.

Stammler, one of the modern philosophers of law, notes three different meanings for the word 'equity'. The term can refer to the fundamentally fair (identifying with the notion of justice), to the rule chosen as fair for judging a specific contentious case or to the rule that is adopted in those cases in which the intention is to establish a limit between the litigants in totally indefinite terms (discretion of equity).[3] As can be observed, the idea of equity, as it is currently conceived, has resulted from diverse historical and doctrinal contributions.

Whatever stance is currently taken on the philosophical and sociological dilemmas of law,provided thatpositivism and legal formalism is dispensed with, it should be recognised that, together with statutory law, emanating from the formal source of law (primarily law and custom), there is an unformulated, non-statutory kind going by different names—natural law, discretionary law, unofficial law, living law, social law, intuitive law, free law, scientific law, etc. What is involved is an extrajudicial law in which, in a contentious case, the parties, their advisers and the judge have to follow their own conscience, moral conceptions or the direct appreciation of social facts, without any officialintermediation. The criterion or principle of equity belongs to this sphere, rather than to that of formulated law.

In light of the foregoing, equity affects legislated law, inasmuch as it can be a comparison criterion for assessing positive rules. And, for its part, the law influences equity, insofar as it establishes the limits within which it can be applied. Inlegal doctrine, efforts are currently being madeto determine the essential aspects of this living law, whichintervenes in the resolution of legal issues. And all this in the context of thefactual relationship between the performance of judges and that ofsociety.

From this perspective, American legal realism, with Karl N. Llewellyn and Jerome Frank at the fore,[4] has offered jurists a new way of conceiving law, previously noted by Roscoe Pound in his sociological jurisprudence.[5]

The shaping of the term 'equity' has occurred in parallel to thehistorical evolution of its application. The major and far-reaching advances in Roman law were largely due to the application of the iusaequum. Proof of this is the appreciation of human freedom, the acknowledgement and gradual predominance of blood ties over civil kinship and the condemnation of unjust enrichment, among other issues. In Byzantine and Justinian law, the conception of equity was fine-tuned with the incorporation of new elements. The first of the nuances that the concept of equity took on in this period, as a consequence of the dual influence of Greek and Christian culture, can be summarised in the following three aspects: equity as natural justice; equity as a criterion guiding the capacity of the judge and a flexible interpretation of law, unlike the ius strictum; and equity as a benign and humanelegal criterion.

From then until the eighteenth century, equity went through two different stages: the first,characterised by legal spontaneity and naturalness, during which common law predominated; and the second marked by a revival of Roman law and, subsequently, the dogmatic spirit of Justinian law. In the first stage, the enormous importance placed on legal equity should be noted. Customs and judicial decisions were supposed toserve as sources for the creation of law. With regard to the second stage, there was a progressive shift from common law to the binding and scientific kind.

In reality, the revival of Roman law had very different implications. In some countries and at certain moments, it was widely accepted. But, during the long Middle Ages, there were many places in which law was completely spontaneous and equity developed freely.This was furthered by the development of theories of natural law. In short, it can be claimed that, in the legal sphere, equity was particularly important during this historical period; for instance, commercial law was the product of equity.

In continental Europe, during the sixteenth century, a doctrinal current emerged and progressively gained ground. This current was concerned about the excessive scope given to equity, the dangers inherent to the discretion that it involved and its subversion ofblack letter law. Thus commenced a period of criticism against the so-called 'cerebrineequity' and, in general, against the system of equity as a whole.

The process was brought to a closeatthe end of the eighteenth century.Subsequently, during following one, there was a period of notable legal maturity and stability, accompanied by a rigid legalism. Butthe legal treatises written before the nineteenth century had already cast doubt on judicial discretion and equity. The use of equity was frequently restricted to cases in which the law authorised it. In this respect, Juan Francisco de

[3] Rudolf Stammler,*Tratado de Filosofía del Derecho* (Wenceslao Roces tr, 2nd edn, Reus 1930) 383.

[4] Especially important for understanding legal realism is Karl N Llewellyn's paper entitled, 'A Realistic Jurisprudence – The Next Step' [1930] 30 4 CLR 431.

[5] Pound claims that it is necessary to 'measure legal rules and doctrines and institutions by the extent to which they further or achieve the ends for which law exists': Roscoe Pound,*An introduction to the Philosophy of Law* (Yale Univ. Press 1959) 91.

Castro observes that 'the ancient doctors often restricted the use of equity by judges to strict equity, depriving them of the power to extend it beyond those cases and circumstances envisaged by the law per se',[6]a tendencythat would become more pronounced in the age of codification.

Under modern civil codes, equity was not generally recognised as a rule of law that could perform beyond the principles of law and, even less so, against them. French civil law jurists seldom referred to equity. The so-called 'School of Exegesis' could not be favourably disposed towards accepting the application of sources or elements of law differing from the law per se and which might be in contradiction with it. However, there were commentators who acknowledged the value of equity as a necessary counterpart to the law and custom. In this vein, Gényremarked, 'It must be confessed that this concession has been made not without distasteand as an inevitable consequence which an attempt has been made to mitigate in the more or less sincere conviction that equity is always to be found, at least in the bud and by means of induction, in the law itself.'[7]

And it should be stressed that Laurent himself—whose work marked the heyday of the school—did not only accept the doctrine that contracts should be interpreted in the spirit of equity, despite the fact that judges were not allowed to break the agreements of the parties or to substitute them with others that they believedto be more equitable.[8]Healso endorsed the doctrine according to which 'in the silence of the law, the obligation to rule imposed on the judge grants him, in a way, part of the exercise of legislative power, making him, according to the expression coined by Portalis, minister of equity'.[9]Thus, the interpretative and creative value of equity was accepted as a key element for applying law in a specific case.

With respect to Anglo-Saxon equity, its contrast with formal and strict law, so characteristic of Rome, also qualifiedEnglish law, whose development was very similar to that of Roman law. In both legal systems, the rigid and formal rules were gradually tempered by a system of equity jurisprudence.[10] According to its historical definition, equity was 'a corpus of legal rules whose primary origin was not to be found in customs or black letter law, but in the imperative of conscience, exceptionally obtained rules developed by certain courts, especially that of the chancellery'.[11] The Roman-canonicalaequitasserved as a basis for the origin and function that this jurisdiction of equity developed as a system supplementing essentially formal, traditional and empirical common law. The Anglo-Saxon 'Twelve Tables of Equity' are evident proof of this.These formulations have since been converted into principles of law and, moreover, into rules, given that they are binding because of the precedents in play. Additionally, as from the nineteenth century the two sources of English law, common law and equity, tended to consolidate their position in a sole substantive and jurisdictional system, albeit giving precedence to equity in the case of contradiction.[12]

(ii) The suit in equity: formal content and factors intervening in its configuration

In principle, equity is not a legal rule, but rather a property or quality that each rule of law can possess if it meets the demands of justice when applied to specific relationships. On many occasions, however, equity does indeed result in rules through legislative,customary or judicial means.[13]

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[6] Juan Francisco de Castro, *Discurso crítico sobre las leyes y sus intérpretesI* (2nd edn, Imprenta de E. Aguado1829) 186. This work highlights the uncertainty of the interpreters and the need for a new, systematic legal corpus for the proper administration of justice.

[7] François Gény, *Méthoded'interprétationet sources en Droit privépositif: essai critique* (Librairie Générale de Droit et de Jurisprudence 1995); see also the Spanish translation (Hijos de Reus 1902) 34, n 19; additionally, José Luis Monereo Pérez, *Método de interpretación y fuentesen el Derecho privado positivo* (Comares 2000), with a prologue by Raimundo Saleilles and a preliminary study of the legal scientific thought of Gény by José Luis Monereo Pérez.

[8]Francois Laurent, *Principles de Droit Civile FrançaisXXV* 220 (Paris–Bruxelles 1877) 247.

[9]Francois Laurent, *Principles de Droit Civile FrançaisI* 256ff (Paris–Bruxelles 1869) 328ff.

[10] Edgar Bodenheimer, *Teoría del Derecho* (Vicente Herrerotr, 1stedn,Fondo de Cultura Económica 1942) 289.

[11] Henri Lévy-Ullmann, *Éléments d'Introduction Générale à l'étude des sciences juridiques-II, le système juridique de l'Anglaterre*;*I*: *le sistème traditionnel* (Recueil Sirey 1928) 431.

[12] The laws of the judiciary of 1873, 1875 and 1925 created the Supreme Court whose rulings are based on both sources of law, supplemented by the laws laid down by the king and the parliament. Be this as it may, as Vicente Torralba Soriano indicates, it can be concluded that, despite the fact that equity is very similar to common law owing to the technique of precedent, both have several unique characteristics. Equity gives good faith more leeway than common law and, moreover, allows for going further than common law, thus making law more flexible. SeeVicente Torralba Soriano,'Comentario de las arts. 242 a 244'in Manuel Albadalejo and Silvia Díaz Alabart (eds), *Comentarios al código civil y compilaciones forales*,*tomo I*(Revista de Derecho privado 1992) 536.

[13]José Castán Tobeñas, *La idea de equidad y su relación con otras ideas, morales y jurídicas afines* (Reus 1950) 57.

In the same vein, the suit in equity implies a discretionary but not arbitrary power of appreciation. When it is said that judges or amiable compositeursshould decide according to equity, it is as if they were being required to rule according to their own conscience or discretionary criterion. But this discretionary power cannot be equated with arbitrariness. The actions of judges authorised to decide according to equity are free in the sense that they are not constrained by any law established in formal sources, although not in the effect that they may abide by purely subjective criteria and appreciations. In such an event, we yet again encounter what has traditionally been called 'aequitascerebrina', the most disturbing type of discretion of the principle of legal certainty. As Del Vecchio[14]observes, 'The work of the interpreter, insofar as he embraces and integrates a historically determined system, cannot be cerebrine, to wit, arbitrary or individual.'

As Timothy Endicott comments in his paper, 'Legal Interpretation',[15] English and American lawyers speak of 'purposive' interpretation to refer to what was known before as 'equitable interpretation'. 'But,' as Endicott[16] asserts,'purposive interpretationis only interpretation if there is something about the object that supports it.' What is the consideration underpinning the point of view that it is lawful for an ambulance to enter a park where vehicles are banned? Apparently, this is not envisaged in the regulations, but is based on principles that justify such an action and explain why it does matter that it is prohibited in the regulations. Therefore, it is not an issue pertaining to the law or its enforcement, but to justice.

Modern scientific doctrine tirelessly proclaims that the application of equity by judges cannot involve purely personal discretion. The criterion by which they decide in accordance with equity should be grounded in objective reasons. In reality, this doctrine is very old, for not even in Roman bona fide cases, when judges were expected to find a solution to issues in the principles of aequum et bonuum, did they have the power to decide purely on their own discretion.Their discretion was boniviri: they were obliged to rule in good faith.[17]

When considering the application of equity, judges should determine whetherthis would support the law, be outside it or clearly go against it. Equity can play an interpretative role, helping judges to probe into the real meaning of a legal rule; iesecundumlegem equity. This type of equity embodies its hermeneutic dimension. It is a form of dialectic reasoning in which cases are interpreted on the basis of credible and necessary premises. Secondly, equity can serve as a criterion for law enforcement, regardless of the positive order; iepraeterlegem equity. This type of equity comes into play when there is neither arule of law directly regulating a particular relationship nor a reason to extract it from the positive system by analogy or its informing principles. It seems reasonable that, in the absence of other sources, equity can and should intervene, enabling judges to establish that rule deriving from the highest principles of natural law, adapted to the circumstances of a particular case. Most authors acknowledge this. References to equity are often concealed under more or less acceptable modernised formulas. In this regard, when there is no law and, consequently, no possible interpretation, it is held that judges should establish the rule deriving from their direct intuition of the case or from the demands arising from the very nature of things, or take a leaf out of the legislator's book: to search scientifically in the law emanating from social life for the rule that should be applied in a specific case. Lastly, it offers the possibility of employing criteria of equity in the application of law, even in opposition to the provisions laid down in the positive rule. This is contra legem equity.

In any case, irrespective of the type of equity that judges apply, only the formal content of a suit in equity can be determined precisely; predetermining the principal elements of equity is apparently an impossible task. This is owing to the nuances thatthe concept and its individualising function have. It is impossible to assign equity any material content, for, as already noted, itis not a rule per se, but a guiding principle that affects positive law. In other words, equity goes beyond the positive order. Furthermore, given the variability of the circumstance of time, place and actuality that have to be considered in a fair trial, it is impossible to formulate absolute principles of equity. In sum, 'depending essentially on the equity of the particular circumstances of

[14] Giorgio del Vecchio, *Les principes généraux du Droit, en el Recueil d'Etudes sur le Sources du Droit en l'honneur de Francois Gény, vol II* (Recueil Sirey 1977) 76;seealso Juan Ossorio Morales tr, *Los principiosgeneralesdel Derecho* (Bosch 1933).

[15] Endicott, 'Legal Interpretation' (n 2) 118.

[16]ibid 120.

[17]Clemente de Diego, 'Derecho judicial' (inaugural speech delivered at the Spanish Royal Academy of Jurisprudence and Legislation on 11 February 1942) 19; cited in José CastánTobeñas, *Teoría de la aplicación e investigación del Derecho: metodología y técnicaoperativaenderecho privado positivo* (Instituto Editorial Reus 1947) 311–312: 'In no case does the judge actually create law, nor should he supplant rigorously objective law with purely subjective interventions or arbitrary judgements, but should always conjugate real objective elements and combine ingredients, since the law specifies in a technical sense or as regards the legislation as a whole, either of custom (…), or of the informative principles of the legal system (…).'

each case considered individually, no established rule or fixed precept of equity can be applied without destroying its true essence and reducing it to nothing more than positive law.'[18]

Notwithstanding the foregoing, the analysis of the different factors influencing a judgement based on equity[19] helps to establish some material criteria that judges employ when considering its application. Some are intuitive or rational factors (of huge importance in the German school of free law and very widespread in North America); although it should be borne in mind that the possible intuitive assessment of judges is, by and large, no more than the application of their legal science and professional experience. There are also sociological factors (by which empiricists and positivists set great store). According to Windscheid, the content of equity derives from the legal conscience of whoever considers a specific law, although he recognises that not only a legal sentiment and an individual legal conscience can exist, but also a legal sentiment of the people as a whole, in which case equity embodies the ideal that the law of those people should fulfil.[20] Suits in equity can also be determined by political factors (fully understood by sociologists and carrying a lot of weight in North American realism), for, as with law, the ethical element of equity goes hand in glovewith a political one. Already in the Middle Ages, references to politics were often a sort of carte blanche granted to judges so as to enable them to apply Roman and canonical law.It is precisely in this concurrence of political elements in which one of the great dangers of equity lurks.[21] Undoubtedly, it is the rational factor that has the greatest bearing on suits in equity. It involves considering the principles of natural law and the general principles of the legal system. Stammler frames this rational factor of suits in equity in his theory of justice:

When the law forgoes to regulate certain issues, to lay down precise and strictly determined articles, choosing instead to urgethe parties, their advisors and the judge intervening in the litigation to resort to their own discretion or to equity, this basically means that in each case the legal rule that reflects the fundamentally fair solution should be chosen (…). It is not enough to entrust the resolution either to the natural legal sentiment of whoever is called upon to pass judgement or to the independent discretion of the judge. When referring to judicial discretion, we forget that the judge can never freely pass sentence, carried away by his subjective whims, but should objectively justify his resolutions.[22]

The formulas of the general principles of law and equity, which can organically group together many different elements and to which current scientific doctrine gives a wide scope of action and great importance, were already glimpsed by classical authors. Suárez drew a distinction between both criteria, conceiving the suit in equity as a prudent act of judgement, subordinated not to the word of the law, but to the general principles of natural law and also even to human law, inasmuch as it depends on them in particular.[23]What stands out here are the subjective elements, intrinsic to prudence as a virtue, together with the objective ones, contained in the general principles of law.

In principle, action should be taken to support the possibility, and even the need, of judges to resort to equity, even when they are not authorised to do so by law.

However that may be, the aforementioned general principle is limited by the legislative sources of each legal system, because they are the ones predominating in modern political organisation. In this respect, Legaz y Lacambra contends,

The judge is bound by the law, which can refuse him any freedom of action, legally deny him access to equity, but in the long run this is practically impossible; the law is less powerful, less efficient than it believes itself to be, and the judge legally possesses more power than he himself assumes when interpreting too restrictively the rules of which he can avail himself.[24]

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[18] William Blackstone, *Commentaries on the Laws of England in Four Books* (15thedn, A. Strahan 1809); cited by Lévy-Ullmann, *Élémentsd'Introduction Générale* (n 41) 443.

[19] An analysis of these factors is performed by CastánTobeñas, *La idea de equidad*(n 42) 65ff.

[20] Bernhard Joseph Herbert Windscheid, *Diritto delle Pandette. Note e referimenti al diritto civile italianoIV* (Utet 1930) 33.

[21] When referring to this political factor, Harold Cooke Gutteridge states the following: 'To some extent these principles are of a fluid nature and are susceptible to influences which lie outside the law, such as current ideas of morality, political ideologies and economic and political changes in the structure of human society, so that their application calls for the exercise of caution to prevent them from being utilised in such a manner as to undermine or supersede the ordinary rules and bring about radical changes in the law by indirect means,' in *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (Cambridge University Press 1946) 95.

[22] Stammler, *Tratado de Filosofía del Derecho* (n 32) 17ff.

[23]Francisco Suárez, *Tractatus de Legibus ac Deo Legislatore, lib. VI* (Jaime Torrubianotr, Hijos de Reus 1918). WehavealsohadrecoursetotheSpanishversion, *Tratado de las leyes y de Dios legislador* (Eguillor Muniozgurentr, Instituto de Estudios Políticos 1968) 95.

[24]Legaz y Lacambra,*Filosofía del Derecho* (n 4) 465.

In order to remedy the possible discrepancy between the rational consideration of the sources of positive law and the activity of judges, it is necessary to ponder on the character of each legal rule. In the words of Puig Brutau, 'The judge is free to decide within certain limits established by the rules and it is necessary to perform a detailed analysis on their diverse nature, namely, their different levels of abstraction or generality, to perceive the extent of those limits.'[25] Logically, whilepliable and flexible rules allowfor the application of equity,strict rules of law dispense with it in the interest of safeguarding legal certainty.

The social ethic is perfectly capable of establishing hic et nuncprinciples, that is, social ethics guidelines, but not all-encompassing regulatory schemes under which a particular factual situation can be subsumed by means of analytical judgements. Good faith and morality are not finished moulds that judges simply trace on the material that they have placed below them, but an extraordinary task that they themselves must undertake according tothe specific circumstances of each legal case. In this sense, Hans Welzel does not accept the possibility that judges may pass all-encompassing social-ethical judgements.[26] Current doctrine on the judicial application of law—going beyond the theory of subsumption and accepting the judge's task of individualising rules, plus the significance of his volitional act of decision-making, when delivering judgement[27]—obliges us to consider the presence and complexity of the many legal elements that manifest themselves when applying rules to a specific case.

In short, the application of law is not limited to the implementation of a finished logical figure, ie an analytical judgement, but is always an interpretation, a fact accepted by the majority of jurists. The general configuration of a legal rule seldom offers a conclusion that makes simple analytical judgements sufficient on their own. The judicial application of law is, as with any interpretation, avalue judgement, to wit, a choice between several possible assessments towards whose principles it is orientated.

In this connection, each decision is an element contributing to the new creation of law. And this is even more the case the vaguer the legislator's remedy is, and especially so as regards the criterion of equity to which express or implicit reference is often made, for example, in general clauses. For this reason, the application of this criterion contributes to create future law, plotting a line whose course cannot be previously established.

In essence, those decisionsare guidelines that, as such, refer in turn to a signification yet to be discovered, namely, they pertain to a specific case. Conceived in this way, equity is a principle of fairness that encourages judgesto follow currenttrends.

(iii) Equity in jurisprudence of values

One of the key questions that jurists have posedin recent years is whether or not there are rational methods for creating law (regardless of the law), which judges employ, perhaps unconsciously, it then being down to legal methodology to make them aware that they are doing so. These methods include topical reasoning, proposed by Theodor Viehweg in the 1970s, andMartin Kriele's so-called 'legal-rational considerations'.[28]In modern legal jargon, both refer to the application of equity as justice in specific cases.

According to Viehweg, in jurisprudence this does not involve the realisation of general legal principles that have been expressed in laws and which should be clarified in their 'rational' sense by means of interpretation and then developed, but only to the fair resolution, always adapted to the issue in question, of a particular case. Jurisprudence—according to the basic summary provided by Viehweg—can only fulfil its particular purpose: to determine what is fair in each case here and now; the procedure is not 'deductive-systematic' but 'topical'.

Viehweg defines topical (following Aristotle, the rhetoricians and, above all, Cicero) as 'a special procedure for discussing problems', which is characterised by the use of certain points of view, approaches and general arguments, accepted as stable: specificallytopoi. Topoi are multifaceted points of view, acceptable in all parts, which are employed for and against whatever opinion has been expressed and which lead to the truth. They are used to commence the discussion of a problem and, in a way, to address it from different perspectives, as well as to discover the perceptive connection already made in which the problem is to be found. But while systematic deductive reasoning attempts to understand this perceptive connection as a global, logical system, topical reasoning focuses solely on the problem itself. This reasoning does not lead to a global system, but to a plurality of systems, without demonstrating their compatibility with such a global system.

Specifically, Viehweg distinguishes between two degrees of topicality. With the first, only the positive or causal points of view of a problem are registered. This is practically always the case in daily life. The aim of the second degree is to encounter points of view and to classify them in the so-called 'catalogues of

[25] José Puig Brutau, *La jurisprudencia como fuente del derecho*: *interpretación creadora y arbitrio judicial* (Bosch 1951) 38.

[26] Hans Welzel, *Introducción a la Filosofía del Derecho, Derecho Natural y Justicia Material* (Felipe González Vicéntr, 2nd edn, Aguilar 1971).

[27] Joaquín Almoguera,*Lecciones de Teoría del Derecho*(Reus 1995) 278ff.

[28]Larenz,*Metodología* (n 16)151–160.

topic',whichseem to adapt to specific problems,its essential role beingto contribute to the discussion of a problem. Legal topoi are, according to these 'catalogues', arguments that are deployed to resolve legal problems and which can be generally accepted.

It is impossible to pinpoint exactly what Viehweg means by legal topoi. Apparently, for him a topos is any idea or point of view that may play a role, whatever this may be, in legal discussions. But he perhaps disregards the fact that jurists tread the path of positive law to achieve fair resolutions, except in those borderline cases in which they are encouraged to rely on their own assessments. Here, positive law assumes the function of mediation—between the immediately evident principal demands of justice and the regulation of particular sectors of life or conflictive situations—and makes certain pre-resolutions binding. Thus, except in borderline cases, judges do not have to do justice immediately, but should find a resolution that, first and foremost, is in accordance with the rules of positive law and the valuation principles underlying them, as well as with the guidelines recognised by positive law and their materialisation in comparable court judgements.

Faced with the danger of shattering the systematic construction of the legal system as a whole, it should be underscored that a legal science that seeks to give visibility to the connections of meaning, structural idiosyncrasies and spiritual composition of that system, must proceed systematically. This does not mean to say that this legal science is logically and separately derived from legal rules or concepts. For 'systematic reasoning' and 'problematic reasoning' should not be excluded.[29]

In line with the above, forKriele a legal-rational method of argumentation is that which makes it possible to substantiate judicial decisions in another way when these cannot only be based on the law or legal precedents. He does not understand the expression 'rational law' in the sense of a legal-natural or legal-rational system of timelessly valid legal rules or principles, for this would imply abandoning the historical discussion. Rather, Kriele is of the opinion that all judicial decisions, both those of legislators and judges, need to be (internally) justified on a rational basis.[30]

In relation to the legal-rational considerations, Kriele observes that, first of all, it is necessary to take into account that the structure of legal-rational argumentation is identified with the legal-political kind. In turn, this consists of a 'discussion for and against', pondering in this regard on the consequences of the rules proposed and their relevance. The solution to a problem can only be fair if specific issues are resolved fairly, namely, in a justified fashion. To this effect, legal-rational considerations are always indispensable. These would involve predicting the foreseeable consequences that the drawing up of a normative proposal may have, plus the discussion on the accuracyof the prediction and on the relevance of the interest in question. So, it would seem that legal-rational considerations are an authentic assessment of interests (performed case by case in the topical sense).[31] However, it is not always clear what interest is more essential in each case. Indeed, Kriele does not always manage to avoid judicial subjectivism in his thesis.

Jurisprudence of values has not had the last word as regards the scope of the judicial application of law. We concur with Friedrich Müller[32]when cautioning that the topical proposal of going beyond the rules and then riding roughshod over them, as they do not seem to offer any other solution to a problem, is not applicable in this respect to constitutional law because of the peculiarity of constitutions as fundamental sets of regulations. Likewise, we believe that some of the current attempts to entrust the normative framework of constitutions to a dynamics of flowing historicity,which judges should take into account when applying rules, also pose a risk to legal certainty.

There is no doubt that jurisprudence of values is immensely attractive in pursuance of a more humane justice adapted to the circumstances of each specific case. Before its introduction, nevertheless, it would necessary to ensure the high professional qualifications and integrity of judges, something that should cease to be a pipedream.

As with Ernst Forsthoff and Carl Schmitt,[33] we contend that accepting the premises of jurisprudence of values without further ado leads to constitutional uncertainty, thus affecting the very foundations of the political edifice. We run the risk of reducing the constitutional fabric to mere casuistry. Specifically, the issue of a possible tyranny of values cannot be overlooked as one of the main dangers currently facing the rule of law, when it is in the difficult position of having to defend itself against the attacks of those who vindicate rights that are not granted by the state—such as the right to self-determination.

However, this should not be taken to the extreme.For the idea that law enforcement does not end in subsumption but requiresappraisals on the part of those enforcing it, plus the need to obtain the assessment guidelines from the constitution, make the implementation of 'scientific-spiritual' methods essential.

[29] TheodorViehweg,*Tópicayjurisprudencia* (LuisDíez Picazotr,Taurus 1986) 146–151.
[30] Martin Kriele,*Introducciónala teoríadelEstado* (EugenioBulygintr, Depalma 1980)147.
[31]Larenz,*Metodología* (n 16)157–160.
[32] Friedrich Müller,*Métodosde trabajo delderechoconstitucional* (MarcialPons 2006) 68.
[33] Francisco SosaWagner,*CarlSchmitty Ernst Forsthoffcoincidenciasyconfidencias* (MarcialPons2008)37–68.

Experience has shownthat it is impossible to create a code that has an answer to all the questions that may arise. Laws inevitably have lacunas that can only be filledby taking into account many different considerations and assessments, including value judgements.

This broadening of the scope of the creative and interpretative work of judges is not incompatible with the principles of the primacy of the law and their subjection to it. Above all if we assume that the assessment performed by a judge is, in reality, a quest for equity as justice in a specific case. As anassessment criterion, equity rather involves surmounting legal conceptualism, substituting it with more flexible methods. As Legaz y Lacambraobserves, 'The judge, who neither creates legal rules of a general character, nor has the power to do so while acting as such, is, however, an authentic creator of law, another collaborator—like the legislator and the administrator—in the dynamic process of creating the legal system.'[34]In conclusion: laws contain general provisions and should not encroach on casuistry or regulatory matters.It is uptojudges, in their role as law enforcers, toadapt these rules to specific cases following equitable criteria, although their rulings should never leave the law enforced.

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[34]Legaz y Lacambra,*Filosofía del Derecho* (n 4) 423.