Chapter 10

Equity in the Different Branches of the Legal Order

1. Equity in Civil Law

1.1. Equity in the Preliminary Heading (Título Preliminar) of the Spanish Civil Code of 1889, before the 1974 Reform

Equity has its function as much in private as in public Continental law, more especially, in public international law. Taking Spanish law as our example, in private law equity was included in the old Article 6 of the Preliminary Heading of the Civil Code, before the 1974 Reform.

The 1851 Civil Code blueprint did not carefully regulate sources of law. In Article 2, it limited itself to stating that “the judge who refuses to sentence, using as excuse the silence, obscurity or insufficiency of the laws, shall fail in his responsibility”, and, in Article 13, that “judges are forbidden, in the carrying-out of their duties, to have recourse to general and reglamentary legal provisions”. The 1889 Civil Code kept this ruling, in its Article 6, Paragraph 1º, Article 12 of the 1851 text, which dealt with the inexcusability of a refusal to sentence. This refusal has a long tradition in Spanish law.


There are other references to the use of equity in the Civil Code. They may also be found in special laws. In regional law, equity is clearly alluded to in the Regional Codes (Estatutos de Autonomía) governing Catalonia and Aragon.

1.2. Equity after the May 31, 1974 Reform of the Preliminary Heading of the Spanish Civil Code

The 17th March, 1973, Base Law, drawn up to bring the Preliminary Heading modification to a close, in its Base II, Section Two, established that “within what is necessary with respect to legal security, equity shall preside over norm application, but Courts may only found their decisions on it when the law expressly allows it”. Still, when writing out Article 3, Section 2 of the Heading of the Code, all mention of the “necessary” respect for legal security was cut out.

In current Spanish civil law, equity appears, included in Article 3.2 of the Civil Code, according to the wording which was given by Decree, the 31st May, 1974. It is to be located within the Chapter given over to legal norm application—immediately after the regulation of interpretation criteria for norms. In line with the precept “equity must be considered in the application of norms, even if Court findings may only—and in an exclusive manner—rest on equity when the law expressly allows it”. Before this Reform, no similar, generic regulation on equity had existed in the Spanish Code. This, however, had been no obstacle for its legal textual consideration and for its application by the Courts.

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