The Juridical Technique - a translation into English of portions of Eduardo García Máynez’s Introducción al estudio del derecho

Robert S. Barker, Duquesne University School of Law

Available at: https://works.bepress.com/robert_barker/40/
THE JURIDICAL TECHNIQUE:

EXCERPTS FROM

INTRODUCTION TO THE STUDY OF LAW

by Eduardo García Mányez (33d ed., 1982)

TRANSLATED BY ROBERT S. BARKER*

"TRANSLATOR'S COMMENTS ..............................................................133

XXII. THE APPLICATION OF THE LAW ..............................................134

161. The Juridical Technique .......................................................134

162. Determination of the Subjects ..............................................136

163. The Juridical Syllogism .......................................................137

* Professor of Law, Duquesne University School of Law, Adjunct Professor of Law at the University of Pittsburgh School of Law, and Allocatur Advisor to the Supreme Court of Pennsylvania. He has written and lectured extensively in and about Latin America, served as a U.S. Peace Corps Volunteer in Panama (1967-69), and taught as a Fulbright Scholar at the University of Buenos Aires School of Law (1995). He is a Councilor of the Inter-American Bar Association and former Chairman of its Committee on Constitutional Law.

"This Table of Contents corresponds to Table of Contents in the original.
164. Private and Official Application of Juridical Norms ...................................... 139

165. Problems Related to the Process of Application ............................................... 139

XXIII. The Concept of Interpretation ...................................................................... 140

168. The Interpretation of Statutes, the Concept ..................................................... 140

169. The Meaning of the Statute ............................................................................... 140

170. Authors of Interpretation .................................................................................. 142

171. Interpretation of General Precepts and Individualized Norms ......................... 143

172. Methods and Schools of Interpretation ............................................................. 143

XXIV. The Exegetic Method ....................................................................................... 144

173. Interpretation as Exegesis of Statutes ............................................................... 144

174. The Exegetical Method ...................................................................................... 146

175. Unforeseen Cases .............................................................................................. 147

1. Argument to the Contrary .................................................................................... 147

2. Arguments a Pari, a Majori, a Minore ad Majus ............................................... 147

176. The Role of Custom and Equity ........................................................................ 148

XXVII. Statutes and Judicial Decisions .................................................................... 150

186. Relationships Between Statutes and Judicial Decisions ................................ 150

187. The Meaning of the Statute and the Will of the Legislator .............................. 152

188. The Hermetic Completeness of the Juridical Order ....................................... 154

XXVIII. Processes of Integration .............................................................................. 158

189. The Problem of Integration .............................................................................. 158

190. Analogy as a Method of Integration .................................................................. 159
INTRODUCTION TO THE STUDY OF LAW, as its name indicates, is the first-year course which introduces Latin American law students to the law, and establishes the conceptual framework not only for their years as students, but for their careers as lawyers. More than any other single course, it defines the terms and sets the tone for the study and the practice of law. For this very reason, **Introduction to the Study of Law** is also valuable to United States students of Latin American legal systems, as it enables them to see the law and the legal process as their Latin American counterparts see it.

The translation which follows is of major portions of six chapters of the thirty-third edition of the text most widely used in Mexico for courses in Introduction to the Study of Law: Eduardo García Maynez's *Introducción al estudio del derecho*. The chapters selected (chapters 22-24 and 27-29) are from the Fourth Part of the book, the part titled, **The Juridical Technique**, that is, the application of law to particular cases. These chapters ought to be of significance to
students of comparative law and to common-law lawyers with international practices because they deal with that area where the law makes its transition from theory to practice, and where differences between the Common Law and the Civil Law are most palpable. These chapters are devoted, respectively, to The Application of Law, The Concept of Interpretation, The Exegetic Method, Statutes and Judicial Decisions, Processes of Integration and Rules of Interpretation in Mexican Law. In order to put these chapters in context, a listing of the parts and chapters of Introducción al estudio del derecho is included as an Appendix.

Dr. García Márquez, like all other serious legal scholars, disagrees at times with the positions of other jurists, and he often identifies such disagreements in the text. The purpose of the present rendering, however, is not to highlight those controversies, much less to attempt to evaluate them. The materials which follow were selected for translation because of their representativeness and influence, as proved by their widespread use for more than fifty years in a major Latin American country, and their consequent role in shaping the outlook of tens of thousands of lawyers.

Robert S. Barker

XXII. THE APPLICATION OF THE LAW

161. The Juridical Technique

The Juridical Technique has as its object the study of the problems related to the application of objective law to concrete cases.

* * *

We will begin by referring, generally, to the notion of technique.

* * *

The word comes from the Greek...and signifies art. The arts, not only the manual and industrial, but also the
disinterested, or fine, always possess a specific technique, which consists in the employment of means for the achievement of the ends that constitute its essence. There exist not only the techniques of the smithy and the cabinetmaker, but also of the musician and the architect, because the latter, like the former, must avail themselves of suitable procedures for the attainment of the ends that they pursue. That which we call technique (lato sensu) is precisely the application of suitable means for the achievement of artistic purposes. But as the suitableness to which we refer supposes understanding of the efficacy of the procedures employed, and that understanding is of a scientific order, every genuine technique must be illuminated by the light of science.

Even the most rudimentary technique imaginable necessarily involves a minimum amount of knowledge and, in this sense, is of a scientific kind. An unscientific technique is not a technique at all, because it is incapable of fulfilling its purpose or, what is the same thing, because it does not permit the attainment of the ends to which it is dedicated.

We saw [earlier] how the rules of the arts are judgments that express a conditional necessity in that they point out the roads that must be followed in the hypothesis that seeks to arrive at a given goal.

If we apply this notion to the special case of law, we can say that the juridical technique consists in the appropriate handling of the means that permit the attainment of the ends that are being pursued. But as these ends are obtained through the formulation and application of norms, we must distinguish the technique of formulation from that of the application of legal precepts. The first, which has come to be called the legislative technique, is the art of the elaboration or formulation of statutes; the second concerns the application of objective law to individual cases. Thus, the handling of the legislative technique refers, essentially, to the realization of general juridical ends; the handling of the technique of application is directed, on the other hand, to the realization of concrete juridical ends.
We have said that juridical precepts consist of two elements, the factual hypothesis and the disposition. The first is that which, on occurring, gives rise to the normative consequence that the disposition indicate: The disposition indicates the duties and rights that the occurrence of the hypothesis generates.

The hypothesis is the enunciation of a possibility that, upon being converted into reality, causes legal consequences. The creation of these consequences depends upon the occurrence of the fact that the hypothesis foresees. Because of this it is important to distinguish the notions of juridical hypothesis and juridical fact.

When there are produced the conditions that make up the hypothesis, *ipso facto*, there arise specified normative consequences, namely: duties and rights.

The consequences of which we speak are necessarily attributed to specified subjects, because mere things cannot have rights or assume obligations. The realization of the juridical hypotheses determines, always and necessarily, a change in the legal world, because it implies the creation, or the transmission, or the modification or the extinction of rights and obligations. In this sense, to apply a norm is to formulate a *judgment of attribution* in relation to the subjects who, in consequence of the realization of the hypothesis, acquire obligations or rights.

162. Determination of the Subjects

[1]f, for example, Juan and Pedro have entered into a bilateral contract, it is evident that the juridical consequences of the transaction will necessarily rest upon Pedro and Juan. But...the attribution of rights and obligations is not always so simple. Recall the rule of Roman law according to which, if a tile is thrown from a house and, fal-
ling, kills a passerby, the owner of the building is obligated to indemnify the [victim’s] relatives.3 The disposition in the case is very clear: There is no doubt that the person obligated by the realization of the hypothesis is the owner of the house. But the application of this precept to a concrete case requires the individualization or determination of the obligor, and this requires, in turn, the examination of another juridical fact, concerning the ownership of the real property. This juridical fact can be the making of a contract of purchase and sale, or a gift, etc.

The example reveals that the application of a juridical precept to a concrete case does not involve merely proving that the hypothetical situation has in fact occurred, thus producing certain juridical results; rather, it requires, in addition, the attribution of the normative consequences to determined, or at least determinable, subjects.

In the act of application, we can distinguish two distinct steps:

1. The proof that an act brings about the realization of the hypothesis of a legal norm; and

2. The attribution or imputation of the consequences of that norm to determined persons.

* * *

163. The Juridical Syllogism

The reasoning involved in the application of the rules of law is syllogistic. The major premise is the [juridical] norm; the minor premise is the judgment that declares that the hypothesis has been realized; and, the conclusion is the application of the legal consequences to the subjects involved. Let us look at two examples:

[First Example:]

Major premise: One who commits the crime of counterfeiting shall be sentenced to between six months and five

3. Citation omitted by translator.
years of imprisonment, and a fine of between one hundred and three thousand pesos, Criminal Code of the Federal District, art. 234.

Minor premise: X has committed the crime of counterfeiting.

Conclusion: X shall be sentenced to a term of imprisonment of between six months and five years and fined between one hundred and three thousand pesos.

Second example:

Major premise: He who sows, plants, or builds on his own land, with seeds, plants, or materials of another, acquires ownership of the same, but has the obligation to pay for them and, if he has acted in bad faith he must pay damages [danos y perjuicios], Civil Code of the Federal District, art. 897.

Minor premise: Z has sown his farm with seeds belonging to Y, but not in bad faith;

Conclusion: Z is obligated to pay to Y the value of the seeds, but Y may not require indemnification for Y's losses.

We have intentionally chosen the example of article 234 of the current Criminal Code in order to demonstrate that the process of application is not always reducible to a single syllogism. The syllogistic application of the norm contained in the article leads to the conclusion that the counterfeiter should be sentenced to prison for a period of between six months and five years, and be made to pay a fine of between one hundred and three thousand pesos; but that does not entirely resolve the concrete case of X, because the statute obligates the judge to fix the punishment within certain limits, according to particular factual circumstances, as enumerated in article 52 of the same Code (footnote omitted). The judgment of sentence entered against X cannot, therefore, be based simply on article 234; rather, it must also be based on other provisions of the same body of law, such as the previously mentioned article 52.

* * *
164. Private and Official Application of Juridical Norms

The application of the law to concrete cases can be private or public. In the first situation, its object is simply knowledge; in the second (i.e., application, properly speaking), it is the official determination of the consequences that are derived from a normative hypothesis, for the purpose of carrying out the consequences.

* * *

In both situations, the process of application is the same. The difference is not in the method employed. . .but in the effect to be given to those two types of application. Even when, scientifically and technically, the private or doctrinal application is correct, only the official one binds the parties. This is what is meant by saying that res judicata is the legal truth. In the face of the legal truth (that is, the official definitive application of the law to a concrete case), the doctrinal application has only the value of a non-binding opinion, which may be correct or incorrect. We use the term definitive (emphasis added) official application because, as is well known, there are many occasions in which the first official application can be modified by higher authority (as by appeal, revision, etc.). Only when use is not made of opportunities for review within the prescribed time, or when the question is resolved in the last instance, does the official application have a non-modifiable character.

165. Problems Related to the Process of Application

The fundamental questions that can arise in the application of objective law to concrete cases involve. . .the following:

1. Determination of effectiveness
2. Interpretation
3. Integration
4. Retroactivity
5. Territorial conflicts of law

[We have already spoken], in our discussion of the legislative process, of the way in which a statute comes to have effect, and [we have discussed in another chapter] the rules by which a statute may cease to have effect. . . . We therefore commend those discussions to our reader, as we now turn to a consideration of the four other problems.

**XXIII. THE CONCEPT OF INTERPRETATION**

* * *

168. The Interpretation of Statutes, the Concept

If we apply the foregoing ideas [about interpretation in general] to the special case of the interpretation of statutes, we will be able to say that to interpret a statute is to discover the meaning that it contains.

* * *

169. The Meaning of the Statute

The first problem with the theory of interpretation is knowing what is meant by the meaning of the statute (emphasis added).

One of the solutions proposed is the assertion that the meaning of the statute can be nothing other than the will of the legislator. The defenders of this position argue as follows: The statute is the work of the legislative branch; the legislature makes use of the statute in order to establish law; consequently, the meaning of the statute should be that meaning that the legislator wanted to state, since the statute is the legislator's statement.4

---

4. Citation omitted by translator.
This thesis is based on the hypothesis that legislation, as an expressive act, should be attributed to the will of the legislators, or, what is the same thing: Law is what the legislator wishes. This thesis does not take into account the fact that the wish of the legislator does not always coincide with that which is expressed in the statute.

What needs to be interpreted is not the will of the legislator, but rather the text of the statute. This does not mean that the interpretation must be purely grammatical, because the significance of the words that the legislator uses is not exhausted by its linguistic meaning. Many words have equivocal meanings and many terms have a precise juridical meaning used throughout the same legal system.

Against the first type of interpretation, which Radbruch calls philological-historical, there exists the logical-systematic, which does not seek to discover the (purely subjective) intention of the legislator, but rather seeks the logical objective meaning of the statute, as an expression of the law. According to this second approach, legal texts have a meaning of their own, implicit in the signs of which they are composed, and independent of the actual or presumed will of their authors. That meaning depends not only on the words in which the statute is expressed, but also in the systematic connections that necessarily exist between the meaning of a text and the meaning of other texts that are part of the same body of law. The statute is thus not considered as an expression of a wish (a fortiori subjective), but rather as a formulation of objective law.

Between these two antithetical positions there exists an enormous range of intermediate doctrines, that emphasize one or the other of the extreme positions. We will discuss some of them later.

5. Citation omitted by translator.
170. Authors of Interpretation

Interpretation is not exclusively the work of the judge. Any person who inquires into the meaning of a legal disposition can engage in interpretation. But the capacity in which one interprets is not a matter of indifference, at least from a practical point of view, because not all interpretation is binding. Thus, for example, if the legislator, by means of a statute, establishes in what way a legal precept is to be understood, the legislative exegesis binds the whole world, precisely because its author, by means of a secondary, interpretative norm, has so ordained. If it is the judge who interprets a precept for the purpose of applying it to a concrete case, that interpretation does not have binding force generally, but rather serves as the basis of an individualized norm: The order of court that is dictated. If, finally, a lawyer or any other private individual interprets a legislative disposition, his interpretation (whether correct or incorrect) has merely doctrinal value and, hence, binds no one.

In the first case, we are speaking of authentic interpretation; in the second, judicial or jurisprudential interpretation and, in the third, doctrinal or private interpretation.

In the case of obligatory jurisprudence, speaking of certain tribunals such as our own [Mexican] Supreme Court, the theses established by them are obligatory for inferior authorities and, in this sense, can be considered norms of interpretation of certain statutes. One must carefully distinguish between the judicial decisions which, through their repetition, cause the jurisprudence to be formed, and the theses contained in those resolutions. . . . The thesis contained in them, that is, the obligatory jurisprudence, has a different scope than the five orders individually considered. For while the orders are individualized norms, referring concretely to the respective cases that they resolve, the obligatory jurisprudence is equivalent to a general norm of

6. Footnote omitted by translator.
interpretation or of integration, which obligates the judicial tribunals.

* * *

171. Interpretation of General Precepts and Individualized Norms

Hermeneutic work does not refer only to legal precepts of general application; it also may be directed toward individual norms. This happens, for example, when one interprets a contract, a will, or an administrative resolution. To interpret a contract is to inquire into the meaning or sense of its clauses, for the purpose of discovering the contractual norm. As in the case of statutes, in the case of contracts, wills, administrative resolutions, etc., one must distinguish the expression of the norm from the norm that is expressed. The difference is that in the case of the statute the norm expressed is general and abstract, while in the other cases the norms obligate only certain persons.

172. Methods and Schools of Interpretation

Until now we have limited ourselves to defining the task of interpretation and pointing out the goal, but we have said nothing of the methods that the interpreter should use.

Interpretation is an art and, consequently, has its own special technique. But as every technique supposes the correct use of a series of methods for the achievement of certain goals, it is necessary to study the methods of interpretation, because the success of the interpreter's activity will depend on the suitability of the procedures that he utilizes.

With respect to the question of the methodology to be employed, the differences among the writers are as profound as are their differences over the concept of interpretation and the definition of the meaning of the law. If, for example, one believes that the goal of interpretation is the
discovery of the intention of the legislator, the study of preparatory drafts and statements of purpose will acquire an importance incomparably greater than that given by one who follows the logical-systematic conception of the legal order.

The methods of interpretation are numerous. The differences among them derive fundamentally from the differing conceptions that their defenders have concerning the significance of the legal texts and from the doctrines that they profess about law in general.

The various schools of interpretation divide on the basis of completely different conceptions of the juridical order and the meaning of the task of interpretation. It is not surprising, therefore, that the methods that they propose differ so profoundly.7

In the pages that follow we shall study the principal schools of interpretation and, after reviewing each of them, we shall try to establish its value, in order to be able, later on, to knowledgeably expound our own point of view.

XXIV. THE EXEGETIC METHOD

173. Interpretation as Exegesis of Statutes

We will begin our study of the principal hermeneutic methods with a brief discussion of the traditional, or exegetic, method. We will do this by proceeding to review, step by step, as faithfully as possible, the doctrine of the Exegetic School set forth in the first volume of the magisterial work of François Gény, *Méthode d'interprétation et sources en droit privé positif*.

The inspirational thought of the aforementioned school was first formulated in the paper *L'autorité de la loi*, presented by the French jurist Blondeau to the Academy of Moral and Political Sciences in 1841. According to Blon-

7. Footnote omitted by translator.
deau, judicial decisions must be based only on the statute. This jurisconsult acknowledges the legitimacy of interpretation, but only in the sense of exegesis of the texts. Consequently, from that point of departure, he rejects "the false sources of decision, according to which one purports to substitute for the will of the legislator." Precedents, usages not authorized by statute, considerations of general utility, equity, maxims, doctrines, etc. And he goes to the extreme of contending that if the judge is faced with two contradictory statutes, making it impossible to discover the will of the legislator, the judge should refrain from judging, treat both [statutory] precepts as nonexistent and dismiss the complaint.

The idea that every interpretation is always the exegesis of the texts dominates and directs the teachings of the most illustrious French jurisconsults of the second half of the last [i.e., 19th] century: Demante, Marcadé, Demolombe, Aubry et Rau, Laurent and Baudry-Lacantinerie.

Among the arguments advanced in support of this thesis, the first is that the wealth of legislation, beginning with the epoch of the great codifications, and, especially since the promulgation of the Napoleonic Code, makes almost impossible the existence of unforeseen cases. "Those [cases] with respect to which the statutory law is truly omisive are extremely rare, and their resolution can almost always be found by recourse to analogy." Since, for the defenders of this doctrine, the statute is the expression of the will of the legislator, the interpretation of statutory precepts must be limited to the search for the thinking of their author. This task, whose ultimate end is the discovery of the intention of the legislators, is precisely what is called exegesis. One must follow the texts, step by step, said Demolombe, until one encounters the thinking of those who formulated them.

Thus, interpretation, from that point of view, is the clarification of the texts, not interpretation of the law. "I know nothing of the civil law," exclaimed Bugnet, "I know only the Code Napoleón."

174. The Exegetical Method

The work of exegesis is not always difficult. The legal text may be clear, so clear that it raises no doubt about the thinking of its drafters. In such a situation, it should be applied according to its terms. "When a statute is clear, it is not legitimate to avoid its letter under the pretext of reaching its spirit."10 In this situation, the resulting interpretation is purely grammatical.

Sometimes, nevertheless, the expression [of the statute] is obscure or incomplete. Then a grammatical examination is not enough, and it is necessary to employ what is called logical interpretation. Its goal is to discover the spirit of the statute, "in order to control, complete, restrict, or extend its letter."11 It is necesary to search for the thought of the legislator in the totality of circumstances extrinsic to the [grammatical] formulation and, above all, in those circumstances which governed its appearance. The subsidiary methods which the interpreter should utilize to achieve this are the following:

1. Examination of the preparatory works, statements of purpose, and parliamentary debates.

2. Analysis of historical tradition and custom, in order to learn the conditions which prevailed in the epoch in which the statute was drafted as well as the motives which led the legislator to adopt it.

3. If the foregoing methods prove fruitless, one must make use of indirect procedures. Among these, in the first

11. R. VON JHERING, GEIST DES RÖMISCHES RECHTS, as quoted in GÉNY, supra note 8, at 32.
rank, are recourse to equity and the application of general principles of law. Equity must not be for the interpreter the immediate and direct source of inspiration, but rather a criterion which permits discovery of considerations of utility and justice which must have inspired the legislator. That which is sought is thus the will—actual or presumed—of the drafters of the statute. General principles of law are conceived of as the body of ideals of reason and justice which the legislator must have had in mind in any event. From this it is inferred that they may serve to complete the [written] expression of [the legislator's] thought.

175. Unforeseen Cases

Unfortunately, the processes which we have described above do not always permit us to discover the meaning of the statute, because there are situations which the legislator could not foresee. But even in this situation, the legal method is able to achieve the solution that is sought. One must then utilize the resources which formal logic offers the interpreter. We shall enumerate the most important of these:

1. Argument to the Contrary

When a legal text contains a restrictive provision. . . one may infer that those things not included within it should be objects of a contrary result. For example: Article 8 of the [Mexican] Federal Constitution provides that, in political matters, “only citizens of the Republic may make use of the right of petition.” Interpreting to the contrary the foregoing precept, one arrives logically at the conclusion that those who are not citizens, a foreigner, for instance, or a minor, may not make use, in a political matter, of that right.

2. Arguments a Pari, a Majori, a Minore ad Majus

These arguments constitute, together and in combination, what is called reasoning by analogy. Arguments of
this type are based on the idea that in all those cases involving the same juridical principle [razón jurídica], the result should be the same. (Ubi eadem ratio, idem jus). In order that analogical reasoning be applied correctly, it is not enough that there be factual similarity between the two situations, the one foreseen and the one not foreseen by the statute; it is also necessary that the principle [razón] on which the statutory rule is based, exist as well with respect to the unforeseen case. That which may justify the application of analogy is, thus, "substantial juridical identity." The application [of analogy] is undertaken because there exists an identity or parity of purposes (argument a pari), or because there is a larger principle [involved] (argument a minori ad majus). "All of these arguments are different applications of the same scientific process, and they always entail profound analysis of the provisions of the statute, with a view to discovering the fundamental principle which has inspired it (ratio juris). The ratio juris having been discovered, extensive application is possible, unless the legal provision contains an exception [to such extension] (exceptio est strictissimae interpretationis)."

In the aforementioned cases one always presumes the existence of a legislative will. "When we permit ourselves to extend by analogy a legal formula to cases not foreseen by it, we do so convinced that the legislator logically would have desired that solution, if he had been aware of the situation."

176. The Role of Custom and Equity

What should one do when logic is not sufficient to enable one to discover the thought of the legislator? Is it proper to pay attention to custom or to take into account standards of equity?

* * *

12. GENY, supra note 8, at 35.
13. Id.
On this point the opinions of the jurists of the Exegetical School are not in agreement.

With respect to custom, almost all of them deny that it is a true source of law. Using as their point of departure the doctrine of the division of powers, eulogized by Montesquieu, they maintain that the formulation of law belongs exclusively to the legislative power. It would be appropriate to have recourse to custom only when the statute so provides, or when, in case of doubt, the examination of custom will enable one to discover the thinking of the legislator. Nevertheless, this position is not defended by all of the French jurists of the nineteenth century. Among those who oppose it one must mention Demante;14 A. Boistel15 and Ch. Beudant.16 “Making use of examples taken from legal history, Ch. Beudant demonstrated the falsity of the opinion which, by ignoring the creative force of this primordial source of law, and in spite of the dialectical efforts of its adherents, clashes with overwhelming and unavoidable practical experience.”17

The attitude of the followers of the Exegetical School is not very different with respect to general principles of law. What must the interpreter do in those cases—rare but within the realm of possibility—in which the statutory law presents gaps that cannot be filled-in with the aid of analogy? Some authors, such as Blondeau, Huc, and Demolombe18 maintain that in such a situation, the judge should dismiss the complaint since the plaintiff cannot invoke, as the basis of his claim, a positive law. But this extreme solution is not in accord with the principle set forth in article 4 of the French Civil Code, according to which no judge may refrain from judging on the pretext of the silence, obscurity or insufficiency of the statutes. For this reason almost all exegetes distance themselves on this

14. 20 & 30 Cours Analitique, t., 11, 15.
15. 518 Cours de Philosophie du Droit, t. II, 413-415 (1899).
16. 54-56 Cours de Droit Civil Francais, Introduction, 61-65 (1896); 105 Cours de Droit Civil Francais 110-112.
17. Geny, supra note 8, at 38.
18. Geny, supra note 8, at 39.
point from the position of Blondeau, and maintain that the judges should fill the gaps in the statutes in accordance with the principles of justice and equity which, it is assumed, always inspire the work of the legislator. But—as Gény says—"this concession is made unwillingly, as something hopelessly unavoidable, whose reach they seek to restrict with the statement, made more or less sincerely, that equity can be found in the statute itself, at least in germinal form, thanks to inductive reasoning."¹⁹

* * *

XXVII. STATUTES AND JUDICIAL DECISIONS

186. Relationships Between Statutes and Judicial Decisions

If we examine the relationships that can exist between judicial decisions and statutes, we will find that they are of three classes: (a) decisions based on a statute, (b) decisions in the absence of a statute, and (c) decisions contrary to statute (secundum legem, praeter legem and contra legem).

In the present chapter we will deal with the first group, that is, decisions based on a statute. This group is of interest primarily from the point of view of interpretation, since, as we have already said, interpretation presupposes the existence of a precept to be interpreted. When there is no statute relating to a concrete question, one does not speak of interpretation, but rather of integration.

Our point of departure is, then, the following question: When a concrete case is foreseen by statute, how should the judicial tribunal proceed?

* * *

The foregoing question is answered by saying that the judge is subject to the statute. The reasons for this subject-}

¹⁹. *Id.*
a) The mission of the judges and the tribunals consists of the application of objective law to individual cases. Now then: If the formulation and determination of the law in modern States is done fundamentally by statute, it is obvious that, when the statute exists, the judicial organs must subject themselves to it.

b) As the proximate end of law is order (footnote omitted), and the best way of assuring order is by giving to legal precepts the clarity, steadiness, and permanence of written statutes, then those statutes should be faithfully respected by the tribunals.

c) The idea of order is closely tied to publicity of the law. Insofar as possible, the law should be known by everyone, and the best method of making it known is to put it in writing. But it would be useless to write down the law if its official formulation (contained in the statute) were not respected by the organs charged with applying it.

d) The law must be the same for everyone. This same-ness is achieved most easily when the law is formulated by means of written precepts, so that everyone may know it and it may be applied without distinction as to persons.

e) Another postulate of the law is unity. But customary law tends to change from region to region. On the other hand, the existence of general statutes, to which the judge is subject, favors the unity of the legal order. The requirement of unity is another of the reasons that justify the submission of the judge to duly-promulgated statutes.

f) Respect for the statutes on the part of the judges is, in the final analysis, the best guarantee of true liberty. The citizen should not be exposed to caprice and arbitrariness, but rather subject to a fixed justice that is administered in accordance with principles that are officially established and clearly identifiable. Such a desirable state of affairs could not be achieved if the judge were given the power to separate himself from the statute when it foresees the case submitted to him for decision.20

20. HANS REICHEl, LA LEY Y LA SENTENCIA (Emilio Miñana Villagrasa,
187. The Meaning of the Statute and the Will of the Legislator

We have said in the foregoing section that when there is a statute applicable to a concrete case, the judges and the tribunals must subject themselves to it. But it must not be forgotten that the statement that the law foresees a juridical situation, presupposes a prior exegesis of the text. From this point of view, interpretation is a task anterior to the act by which objective law is applied. He who ignores that fact falls victim to the false belief that there are statutes that do not require interpretation.

In section [III.(B), supra] we said that the central problem of the theory of interpretation lies in knowing what is to be understood by the meaning [sentido] of the texts. Separating ourselves at this point from the road followed by Gény and the Exegetical School, we think that the meaning of the statute is not the will of the legislator. If the doctrine referred to were correct, one would have to admit that in all those cases in which it is not possible to discover the will of the legislator, there is no juridical interpretation.

Wanting (in the psychological sense) is something of which only a conscient and thinking being is capable; but the legislator, as a mere personification, does not meet those requirements. That which might be considered his will, in the psychological sphere, is at most a product of the conflicting forces of those individuals who incidentally take part in the legislative task.

The problem here presented and the investigation in pursuit of the will of the legislator lead, in reality, to all kinds of absurdities. One would have to follow the trail of bills, preliminary drafts of bills, counterproposals, working drafts, preliminary discussions, presentations to committees, minutes of legislative sessions, reports, etc. One would even have to interpret carefully the smile or tilt of the head of a member of a Government...
Commission, the improvised argument of an affable but uninformed representative, and thereafter distill all of this into the will of the legislator. Even if one obtained the testimony of every member of the legislature about what they thought, planned, and proposed, the legislator's will would still be missing. All of this [theory of the wish of the legislator] is fundamentally erroneous from a psychological point of view. The statute is the general will, not the will of a governing group, imperial or national. What Franz Klein thought when he prepared his draft law of civil procedure, or Eugene Huber thought upon editing the civil law, are jurisprudentially irrelevant.21

The foregoing does not mean that preparatory works lack importance. Consulting them is often very useful, not because they may permit one to learn the will of those who drafted the statute, but because they are helpful in discovering its objective meaning.

It is also important to distinguish between the purpose of the legislator in expressing something legally and that which is expressed through the formula employed. Let us suppose that the [legislative] chambers propose to enact a law providing that, if before the delivery of a thing sold, that thing is accidentally destroyed, the seller is obligated to indemnify the buyer. What the legislator wants is to formulate a norm; but the meaning should not be confused with that purpose. The rule of law is not an expression of a will, but of a duty, whose birth is conditioned upon the realization of a juridical hypothesis. Perhaps one can say that the legislator wishes that if the item sold is destroyed accidentally before it is delivered to the buyer, the seller indemnify the buyer; but, even so, the juridical rule, once formulated, does not involve a desire, but rather an obligation, because, were the contrary true, it would not be an authentic norm. In other words: The mission of the legislators is not to give expression to what they want, but rather to what juridically must be.

21. REICHEL, supra note 20, at 60.
Moreover, the texts of the laws constitute the official expression of the law. If this principle is admitted, one will have to accept that elements extraneous to the formula may be taken into account only as aids in the interpretative task, for the purpose of discovering the meaning of the law, but never as data capable of bringing about a correction or modification of the law. Nevertheless, interpretation does not make reference to statutory precepts considered in isolation, but rather as elements or parts of a systematic whole, free of contradictions.

To interpret the statutes is, therefore, to look for the law applicable to concrete cases, by means of an official formula. This interpretation should not be limited to the single formula itself, but rather must be carried out in a systematic connection to the entire body of statutory law in effect. In order to achieve this end, the interpreter may avail himself of elements extraneous to the text, but those elements should be seen simply as means of clarifying the meaning of the statute.

188. The Hermetic Completeness of the Juridical Order

When one speaks of the hermetic completeness of the juridical order, one means that there is no situation that cannot be resolved juridically, that is, in accordance with legal principles. It has been argued that in all of those cases in which there is no statutory precept that foresees the concrete situation, the situation can be resolved according to the rule that all that is not regulated is permitted. Such a doctrine leads in a straight line to the negation of "gaps." In light of the transcendency of this assertion, we do not want to proceed without reviewing, however briefly, the arguments on which it rests. We will base our review on the famous study by Zitelmann.

22. The correct statement is: All that is not prohibited, is permitted.
23. Ernst Zitelmann, Las Lagunas en el Derecho, available in 12 ANALES DE JURISPRUDENCIA.
Every controversy submitted to a tribunal for decision, says Zitelmann, must be resolved, and resolved juridically. From this point of view one always arrives at the conclusion that the law lacks gaps, because the gaps in legislation must be filled in by the judge, not in an arbitrary manner, but rather by the application of juridical principles. The most accurate way to say this is that before the deficiencies of legislation are filled in, the law appears before us full of gaps, and that, when these gaps are filled in, the law presents itself as a perfect totality. Or, in other words, if in the statutes there are gaps, in the law there cannot be.

The best demonstration of the foregoing is that, in dealing with those situations not foreseen by the legislator, the judge may properly decide that the facts produce no legal effects, since a fact produces juridical consequences only when a statute so provides.

For greater clarity, we will examine some of the examples offered by Zitelmann.

According to the former German Commercial Code, an offer made to one who is present is considered rejected unless it is accepted immediately, whereas an offeree who is absent is allowed a certain amount of time within which to respond. With the advent of the telephone, jurists began to ask themselves whether acceptance of an offer should be subject to the rules governing the formation of contracts between absent persons. It was thought that there was a gap in the Code, and so the new Code contained a provision that an acceptance by telephone should be governed by the same rule as applies to contracts between persons who are in each other's presence.

But, in the opinion of Zitelmann, there was no real gap in the old Code, because a contract between a person in Berlin and a person in Bonn is unquestionably a contract between absent persons and the old Code contained rules governing that type of transaction. What really happened here is that [the drafters of the new Code] considered it inappropriate, in the special case of acceptance by telephone,
to apply the rules that govern an offer made to an absent person.

Another example: The German Civil Code provides that the risk of loss of goods passes to the buyer only upon delivery, unless the goods are sent from one city to another, in which case the buyer bears the risks of shipment.

Let us suppose that a person buys a mirror in North Bonn, and asks that it be sent to his home, which is in South Bonn. On the road the mirror is broken by a boy who throws a stone and then disappears. As the statute does not foresee the case of shipment within the same city, who must bear the loss?

In the case of a shipment from South Bonn to Godesberg (a town close to Bonn), the risk would be on the buyer. Should this not also be so on an equally long road within Bonn?... [The] Supreme Hanseatic Tribunal of Hamburg has recently decided the case by analogy, placing the risk on the buyer. I myself participated in the decision.24

But the rule given by the Code is different: It deals with the shipment from one city to another. It means that if the mirror is sent from one point to another in the city of Bonn, and on the way it is broken accidentally, the loss shall be borne by the seller. Here, when a judge declares that there is a gap which should be filled by applying the norm that governs shipment from one city to another, he is not really filling a void; he is failing to apply positive law and is formulating a new norm, one that he considers more just.

There are situations in which the statute establishes a general rule and leaves some points undetermined, thus obligating the judge to make those determinations, without which the rule could not be applied at all.

Let us suppose that a statute provides that, under such-and-such circumstances, an association must elect a certain officer, but the statute says nothing about the man-

24. Id. at 740.
ner of election. In such a situation, any electoral procedure would be valid because the absence of rules about the form of the election does not destroy the duty to conduct it.

* * *

The foregoing review requires us to ask again if there really are gaps. We believe that the answer must be: The law has none; but legislation necessarily does have them. But a new question arises: Which are the real gaps? In order to proceed methodically, we will try to respond to this question in relation to the two cases of which Zitelmann speaks.

We refer first to that example in which the statute provides a general solution that is not well-adapted to all that it embraces, so that its application to one or another such situation strikes the judge as unjust (the example of the mirror). The question is reduced, in this hypothetical, to one of determining whether the general rule (the seller bears the risk until the moment of delivery) should or should not be applied in the special case of an accident occurring during the transfer of an item from one point to another within the same city. If the general rule is considered by itself, unquestionably the hypothetical case is resolved by it. But if one considers not only this rule, but rather the system established by the legislation and, particularly, the principle that the buyer must bear the risk when he causes the goods to be sent from one city to another, then there is no doubt that we are faced with a gap, because the sense of the legislation on this subject can be nothing other than that the seller bears risk until the moment of delivery, provided that the buyer does not ask that the item be sent from one point to another, thereby creating a greater risk. The sense of the legislation is clarified by the special rule, which reveals the true extent of the general rule. The general rule should be applied only if the buyer does not request the shipment of the item from one point to another, because then the buyer will have created a new risk, which he should bear. Now then: Since the law foresaw only the case of the shipment of the item from one city to another
and not from one location to another within the same city, the existence of a gap cannot be doubted.

Turning to the second example, the existence of a gap is even clearer. The statute imposes a duty or grants a right, but does not specify the methods of carrying out the duty or exercising the right. This means that the statute leaves a margin of liberty and authorizes a number of possibilities among which there is room for valid options.

* * *

XXVIII. Processes of Integration

189. The Problem of Integration

The exercises carried out in the preceding chapter lead us to the conclusion that legislation has gaps, while the law cannot have them. The existence of these gaps marks the boundary of the task of interpretation as such. When a judge called upon to resolve a controversy discovers that the rules of interpretation are unable to provide him with the rule of decision that he seeks, he must, in order to carry out his specific mission, formulate the norm applicable to the case or, what is the same thing, he must cease being an interpreter and assume a role much like that of a legislator.

How should the judge proceed to fill up the voids? Often, the legislation foresees the possibility of gaps, and indicates to the judges the methods that they must use in order to fill them. In civil matters, for example, it refers them to the general principles of law, or requires that the judge resolve the case in the same way that the legislator would have resolved it.

The first thing that the judge must investigate is whether there are within the legal system general rules of integration. If there are, he is subject to them; if there are none, he must apply the principles that juridical science offers. This means that it is not indispensable that the legal system contain such rules in order that the judicial function
be performed. Since the judge has in each case the duty to resolve the dispute, within the scope of his powers, the insufficiency of the legislation does not relieve him of that obligation.\(^{25}\)

In the present [section] we will examine the most important methods of integration, along with some of the theories that have been developed around them. We shall speak first of analogy, and thereafter of equity and general principles of law.

The study of analogy belongs in this chapter because, as Gény's arguments reveal, the process of analogy is not a hermeneutic method. If analogy consists in applying to an unforeseen situation a rule concerning a situation that is foreseen, when there is similarity between the two situations and there exists the same juridical reason to resolve the two situations in the same manner, that process is outside the ambit of interpretation, since there is interpretation only when there is a precept with which the interpreter may work.

**190. Analogy as a Method of Integration**

Modern studies of the role that analogy plays in law demonstrate that analogy is not a purely logical process, since judgments of value are always part of the process.

\* \* \*

[T]he application of analogy supposes the existence of two juridically analogous situations, one foreseen by statute and the other not foreseen.

---

25. "The judge must always judge, because the norm that determines that he shall judge is a knowable assumption of the law, independent of the action of the legislator, with logical, a priori validity for the positive law itself and, therefore, for the legislator who is, in turn, also an organ of the law." CARLOS COSSIO, THE COMPLETENESS OF THE JURIDICAL ORDER AND THE JUDICIAL INTERPRETATION OF STATUTES 56 (1939).
For example:

_Supposition:_

_Legal precept:_ a, b, c, d

_Case foreseen:_ a. b. c. d

_Case not foreseen:_ a. b. c. e

Let us suppose that the legal precept states the following: _If a, b, c, and d are, then X shall be._ This means that upon the realization of the hypothetical a, b, c, d, _ipso facto_ there is realized the juridical consequence X, expressed in the precept. Let us imagine now that a tribunal must decide the case a, b, c, e, not foreseen by statute, and the tribunal finds that the same juridical reason exists for resolving the case in the same way as the case a, b, c, d, the analogue of the actual case. The judge then reasons analogously and attributes to the unforeseen case the juridical consequences that the statute produces in the foreseen case.

It is commonly said that the norm that governs the foreseen case is applied analogically to the unforeseen one. However, this form of expression is inaccurate, because that which is applied to the unforeseen case is not the legal precept that resolves the analogous case, but rather a new norm, which has a different supposition. The result formulated analogically is identical to that of the precept that foresaw the similar case, but the suppositions are different. Returning to the example we may say that the case a, b, c, d is foreseen by the legal precept that links the result _then X shall be_ to the realization of the supposition a, b, c, d; insofar as the unforeseen case (a, b, c, e) is resolved by the application of a norm whose supposition is that realized by conditions a, b, c, e, then the result coincides with that of the statutory rule.

Analogy consists, then, in attributing to partially identical situations (one foreseen by statute and the other not foreseen), the legal consequences indicated by the rule applicable to the situation that was foreseen. This is equivalent to formulating a new norm whose supposition ex-
presses abstractly the characteristics of the unforeseen case, and attributes to that case the consequences that the foreseen supposition would have produced, although there is only a partial identity between the two. The conclusion to be drawn from this is that one should not speak of the analogical application of a precept to an unforeseen case, but rather of the creation or analogical formulation of a new norm, whose result is identical to that of the other precept, but whose suppositions are only similar.

Up to this point we have discussed the logical mechanism of reasoning by analogy. But we have already indicated that the juridical analogy or, more accurately, juridical reasoning by analogy, supposes a prior value judgment about two fact situations, the one foreseen and the one not foreseen. What justifies the application of a result provided for in one statute to a case not foreseen in the hypothesis of the statute is not the simple analogy of situations, but rather the same reasons for deciding the one and the other in the same way. Now then, to decide if the two fact situations should produce the same legal consequences is not a logical problem, but rather an axiological one, since it presupposes a value judgment about the two.26

In order to conclude the study of the processes of integration we need only consider equity and general principles of law. We will now speak of them.

191. General Principles of Law

Almost all modern codes provide that, in those cases in which it is not possible to resolve a juridical situation in accordance with analogy, one should have recourse to the general principles of law. Among us [Mexicans,] article 14 of the Federal Constitution and article 19 of the Civil Code make those principles the last recourse of which the judge may avail himself in order to decide questions presented to him.

26. See also C. Cossio, La Plenitud del orden jurídico 34 (1939).
Determining what is meant by *general principles of law* (emphasis added) is one of the most controversial subjects in legal literature. Some writers take the position that the way to discover the general principles is to ascend, by ever increasing generalization, from statutory provisions to rules ever more broad, until one arrives at the point where the doubtful case comes within the scope of one of those rules.27

* * *

For some scholars, general principles of law are the principles of Roman law; some argue that general principles are those acknowledged by science; and, finally, others identify them with the principles of first, or natural, law. In an admirable monograph, Del Vecchio has demonstrated that this last opinion is the only correct one.28

When one asserts that the general principles of law are the principles of natural law, one means that, in the absence of a formally valid provision, the decision-maker must formulate a principle endowed with intrinsic validity, in order to resolve the concrete question submitted to him. This

27. "All legislation being a totality of norms that have an intimate connection with each other, even though the connection is not always apparent, given the unity of the goal which is the ordered human utility, and the unity of the fundamental idea, which is that of justice, legislation can be considered an organism that has its own power, however latent, of expansion and adaptation...." General principles of law are "the fundamental principles of positive legislation, which are not found written in any statute, but which are the logical presuppositions necessary to the various legislative norms, from which [norms] by the power of abstraction the general principles may be deduced. These principles may in fact be higher rational principles, or principles of social ethics, or principles of Roman law, universally acknowledged by doctrine; but they have value not because they are purely rational, ethical, or Roman and scientific, but rather because they have effectively informed the positive system of our law and have in this way come to be operating principles of positive law." Leonardo Coviello, *General Doctrine of Civil Law* 96 (1938). The same opinion is given by Francesco Carnelutti. General principles of law, says this author, "are not something that exist outside, but rather inside the written law itself, since they derive from the established norms. They are found within the written law as alcohol is found within the wine; they are the spirit or the essence of the written law." Francesco Carnelutti, *The System of Civil Procedural Law: Function and Composition of Procedure* 120 (1936).

precludes, therefore, the legal possibility of his deciding on
the basis of his personal opinions.

Another limitation must be accepted as well: The gen-
eral principles that serve as the basis for filling in the gaps
in statutory law must never be in opposition to the precepts
contained in the statutes. This requirement

is based essentially on the nature of the legal system,
which must constitute a singular and homogeneous
whole, a true logical organism, capable of supplying a
norm that is certain—not ambiguous and certainly not
contradictory—for every possible relationship. The in-
trinsic congruency of the various parts that make up the
system must be shown and confirmed, at all times, in
the relationship of particular norms to each other and to
the general principles with which they are related; only
in this way will the jurist be able to master the internal
spirit of the system and proceed in accordance with that
system in particular applications, avoiding the errors
that could easily arise from the isolated consideration of
one norm or another.29

One must not lose sight of the fact that in all those
cases in which the formal sources [of law] fail to provide the
judge with a criterion for solving the matter, the judge is
placed in a position similar to that of the legislator. For,
just as the legislator, in carrying out his activity, is con-
cerned with transforming into formally valid precepts the
general principles of law or, better said, the demands of jus-
tice, the judge is obligated to establish the norms of deci-
sion for the unforeseen cases, not arbitrarily, but in the
same form in which the legislator would have done if he
had had the unforeseen cases before him. The only differ-
ence between the two situations is that the legislator must
formulate rules of an abstract kind, applicable to an indefi-
nite number of cases, while the judge must discover the
norm of decision for a single situation.

29. Id.
If one acknowledges that the legislator must never lose sight of the general principles [of law], one would have to accept as well that the juridical order is, to a greater or lesser extent, the realization of those principles, and that returning to them when the legislator maintains silence, is equivalent to completing, in a harmonious and coherent manner, the legislative task.

* * *

Therefore, we believe that the most felicitous formula of integration that has been coined is that set forth in article 1 of the Swiss Civil Code, which states:

The statute governs all matters referred to by the letter or the spirit of any of its provisions. In the absence of an applicable statutory provision, the judge shall resolve the matter in accordance with customary law and, in the absence of custom, in accordance with the rules that he would establish if he had to proceed as a legislator. He shall be informed by the solutions provided by doctrine and jurisprudence.

192. The Classical Concept of Equity

What is meant by equity, and what function does it perform in the juridical life of a country, are questions whose difficulty, as theoretical problems, are directly related to their importance as practical problems.

The classical concept of equity was stated, with inimitable precision and clarity, by Aristotle. The definition given by the Master of Estagera remains the one most widely accepted by jurists. Equity, according to Alexander's preceptor performs the function of a corrective. It is a remedy that the decisionmaker applies in order to repair the defects caused by the generality of the written law. Statutes are, by their nature, general statements. Because of their breadth, they cannot embrace all cases. There are a multiplicity of situations that escape the foresight of even the most sagacious legislator. The faithful application of a
norm to a given situation may sometimes be unsuitable or unjust. In such circumstances, the judge may call upon equity to temper the rigorousness of a formula that is too general. Equity is, therefore, in the Aristotelian conception, a virtue of the decisionmaker.

Note how the philosopher distinguishes the notions of equity and justice:

That which is equitable and that which is just are one and the same thing; and, both being good, the only difference between them is that the equitable is even better. The difficulty is that the equitable, being just, is not legal justice, but rather a happy rectification of rigorously legal justice. The cause of this difference is that the statute is necessarily always general, and there are some matters about which one cannot properly legislate by means of general provisions. In those cases, then, in which it is necessary to speak universally, but it is not possible to do so well, the legislator bases the statute on the usual situation, though not because of ignorance or oversight. The statute is not for this reason any less good: the shortcoming is not in the statute; neither is it in the legislator who dictated the law; it is entirely in the nature of things, because this is precisely the situation with all practical things. It follows that when the statute provides a general rule, and in particular cases there is something exceptional, then, seeing that the legislator is silent or was mistaken in speaking in general terms, it is necessary to correct him and make up for his silence, and to speak in his place, as he would have done if he had been aware of the particular cases being dealt with. The essence of the equitable is that it consists precisely in the reestablishment of the law in those areas which the law has overlooked because of the general terms in which it speaks. When the thing is indefinite, the rule also must be indefinite, like the leaden rule used in the architecture of Lesbos, the rule adapts itself to the shape of the stone and is not rigid, and so too the judgment is adapted to the facts.30

30. ARISTOTLE, NICHOMACHEAN ETHICS, Book V, Chapter X.
Recourse to equity, according to Aristotle, permits the correction of the generality of the statute, and the replacement of abstract legal justice by the absolute justice of the concrete case. Does this mean that the role of equity is necessarily that of a corrective of the law? Might equity not also perform a supplementary function, when there are no precepts applicable to a specific situation, and the judge has exhausted the resources that legal interpretation offers him?

* * *

193. Equity and General Principles of Law

On the relationship between equity and general principles of law the literature is abundant. For those who wish to gain an appreciation of the importance which the writers give this problem, it will be enough to read Mario Rotondi's *Equity and General Principles of Law*...or the short compendious treatise of Professor Del Vecchio, *General Principles of Law*.

There are two principal positions taken by contemporary jurists on the question before us. Some, such as Pacchioni31 and Rotondi32, deny the possibility of identifying equity with the general principles of law. Others, such as Osilia33 and Maggiore,34 make equity a general principle of law.

[The author here reviews the opinions of a number of scholars on the subject.]

* * *

[W]e believe that in any case equity must be considered a general principle of law, and, indeed, the first or supreme principle of law, since it serves as the basis for all

32. See Mario Rotondi, Equidad y principios generales de derecho.
33. See Elio Osilia, L'equità nel diritto privato (1923).
34. See Giuseppe Maggiore, L'equità e il suo valore nel diritto.
others. Because if one makes a positive interpretation of the term, "general principles of law," and maintains that, in order to ascertain them, the judge must raise himself by induction to the most abstract norms that can possibly be obtained, leaving behind the rich multiplicity of provisions of positive law, one must admit that behind all of this there pulsates a longing—achieved or not—by all of the authors to make their precepts just. All positive law represents, as Gustave Radbruch says very well, "an experiment, unfortunate or happy, to achieve justice."36 If this is so, if the norm that commands the legislator to make good and just laws is the expression of the first of his duties, it cannot be said that equity differs radically from general principles of law. Such principles must be just: But to be just is for the legislator a principle, the first principle of action.

The fact that the norm which commands one to make just laws and give equitable judgments is the supreme norm, the highest principle, does not authorize us to deny that that norm is itself a general principle.

If one interpreted in the light of the doctrine of natural law the matter we have just discussed, the conclusion would have to be the same. In both situations, his evaluative conscience would indicate to the judge that, without forgetting the demands of juridical security, or opposing the provisions of legislation in effect, he must acknowledge the principle that commands him to be just in the individual case; and that, in substance, does not differ at all from the principle that commands the legislator to be just when he legislate.

* * *

But the principle of equity is, like every norm, general and abstract, since it applies to an infinite series of cases. Consequently, it is important not to confuse...the act of application with the norm applied. By calling equity a norm, we do not mean a positive juridical norm, a precept written in legislation, but a principle of natural law that

35. Citation omitted by author.
commands the judge to resolve equitably the conflicts submitted to him. The basis of the validity of the norm must be looked for in the value of what is just and in the demands that justice makes. Equity signifies nothing other than the just solution of individual cases.

Juridical security demands that judges called upon to resolve a controversy fulfill their task by applying with the greatest possible fidelity the provisions of the written law; but when in a particular case there is no applicable statute and the resources of interpretation have been exhausted, justice demands, and positive law permits, the judge to be inspired by criteria of equity, since he is not authorized to abstain from resolving the dispute. Juridical security is not diminished by this, because the harmony that must exist in every system prevents the judge from making a decision contrary to the legal texts. The juridical order is not exhausted or concluded in a series of generally observed norms, and it is useful to keep in mind that beside the statutes, subordinate to them and conditioned by them, appear juridical acts in their infinite variety and multiplicity. Judicial decisions being the application of norms of a general character, and having at the same time, relative to their consequences, the status of authentic norms (individualized or special, in the terminology of the jurists of the Vienna School), they should be in harmony with general precepts. The application of the criterion of equity, in cases in which there exists a gap in the legislated law, permits a reconciliation of the demands of justice with those of juridical security, and, thanks to the restriction which we pointed out above, it makes possible the full realization of the other of the capital postulates of the life of the law, that is: The coherence and harmonic unity of each system.
XXIX. **Rules of Interpretation and Integration in Mexican Law**

**194. Article 14 of the Constitution**

The third and fourth paragraphs of article 14 of the Constitution contain the fundamental rules of interpretation and integration in Mexican law. The third paragraph refers to the application of criminal statutes; the fourth formulates the rules of interpretation and integration in civil matters, but only in relation to judgments. The text of those provisions is as follows:

In criminal proceedings one may not impose, by simple analogy or by any other reasoning, any penalty that is not decreed by a statute exactly applicable to the offense with which it deals.

In proceedings of a civil nature, the final judgment shall be in conformity with the letter or the juridical interpretation of the statutory law and, in the absence of that, shall be based on general principles of law.

We shall first speak of the interpretation of criminal statutes.

**195. Criminal Statutes and Their Interpretation**

The third paragraph of article 14 is not, properly speaking, a rule of interpretation, but rather a norm that prohibits the application by analogy of penalties to acts not considered criminal.

---

The principle formulated in that paragraph is the most important postulate of criminal law. It states that there is no crime without a statute, and no punishment without a statute (nullum crimen, nulla peona sine lege). This is to say, there are no more criminal acts than those that the criminal statutes define and punish. Neither are there more penalties than those that the statutes establish.

No one may be punished other than for acts that the statutes have defined as criminal, nor with penalties other than those established statutorily.

Thus in this maxim is contained a double individual guarantee: one may not be punished other than for acts previously defined by statute as crimes, the criminal guarantee (nullum crimen sine praevia lege poenali), nor punished in any ways other than those previously established by statute for the act in question, the penal guarantee (nulla poena sine praevia lege poenali).

The same idea may be expressed by saying that statutes are the only source of criminal law, and that criminal law has no gaps. It prohibits the imposition of punishments by simple analogy or by other reasoning.

Criminal statutes must be applied exactly; but this of course does not mean that they cannot be interpreted. A statute is always a way of expressing the law, which means that it always must be interpreted. What article 14 prohibits is not interpretation, but integration of criminal statutes, since criminal statutes, by definition, have no gaps.

* * *

In addition to the prohibition of analogical argument, one must always remember that the application of criminal statutes is subject to two other principles, namely: (1) When the statute is obscure, that is, when there is doubt

37. EUGENIO CUELO CALÓN, DERECHO PENAL, PT. GEN., 166 (1935).
38. See id.
about its meaning, it should be interpreted in the manner most favorable to the accused, and (2) Broad interpretation of a criminal statute is permissible only when it favors the accused.

196. Interpretation and Integration of Civil Statutes

The fourth paragraph of article 14 of the Constitution is a rule not only of interpretation, but also of integration. It undoubtedly has the defect of referring only to the act by which a matter is reduced to judgment, as if problems could arise only when the judge enters judgment. Questions of interpretation arise not only at the stage of adjudication, but in every act of application of statutes, at every stage of the proceedings, from the formulation of the complaint until execution. The rule contained in Article 19 of the Civil Code is more complete, since it refers generally to the interpretation and integration of civil statutes.

The fourth paragraph of article 14 of the Federal Constitution says in its first part that in matters in the civil order the judgment shall conform to the letter of the law. Does this mean that civil statutes must be interpreted in a manner that is purely literal or grammatical? In our opinion, the first part of the fourth paragraph should be understood thus: The civil judge must resolve, in accordance with the statute, the controversies before him, when the statute foresees the juridical situation in question. Expressing it in other words: The judge is bound to the statutory texts, if they provide the solution to the controversy.

When the meaning of the statute is doubtful, the interpreter may make use of all of the resources that the art of interpretation offers; that is, historical interpretation, logical interpretation, and systematic interpretation. This is what the words, "or the juridical interpretation," mean. But one must not forget that we are dealing with the search for the meaning of the statute, and that this must not be identified with the will of the legislator. If the judge's interpretation reveals to him that the case submitted to him for de-
cision is not foreseen, then he has the obligation to fill in the gap.

The first problem that now presents itself consists in determining whether, in dealing with a case not foreseen by statute, it is possible to resort to custom. The rules contained in the Civil Code of the Federal District show that custom may be taken into account as a guide to the solution of conflicts only when expressly authorized by statute. It is a matter of delegated custom.\textsuperscript{39}

Among us, custom may not repeal a statute. "A statute may be repealed or abrogated only by another, later statute that either contains an express declaration of repeal, or contains provisions wholly or partially incompatible with the earlier statute," Civil Code of the Federal District, article 9.\textsuperscript{40} Article 10 provides: "Against the observance of a statute one may not allege disuse, custom, or practice to the contrary."\textsuperscript{41}

The statement that we made above to the effect that in civil matters custom is applicable only if a statute so provides, is based on the following considerations: First, article 14 of the Constitution clearly establishes that in the absence of a statute, the case shall be resolved in accordance with general principles of law, which means that recourse to those principles is the only process of integration authorized by our basic law; second, in the civil codes of the country, there is a series of provisions that refer to custom or usage for the resolution of certain specified conflicts. This manner of delegation coincides perfectly with the system established in article 14.

[The author here quotes from a number of statutes that expressly authorize the application of custom.]

\* \* \*

Another problem presented by the fourth paragraph of article 14 of the Constitution is that of determining

\textsuperscript{39} Footnote omitted by translator.

\textsuperscript{40} CÓDIGO CIVIL PARA EL DISTRITO FEDERAL [C.C.D.F.], art. 9.

\textsuperscript{41} C.C.D.F., art 10.
whether the gaps in the statute law maybe filled by analogy. In the codes of some countries the judge is directed to use analogical reasoning and, when that is not sufficient, to apply general principles. On the other hand, we have already demonstrated that analogy is not a method of interpretation but of integration, and that it must not be confused with general principles. We believe that the problem, in regard to civil matters, must be resolved in the following way: Gaps in civil legislation may be filled analogically insofar as the basis of the analogical reasoning is the general principle of law that says that justice requires that like cases be treated alike. But inasmuch as article 14 does not expressively speak of analogy as a method of integration, but alludes to it by referring to "general principles of law," it may be inferred that the civil judge [in Mexico] is not obligated to use analogy, but may instead resolve the unforeseen case according to some other general principle of law. In Italy, on the other hand, the civil judge may seek an analogical solution and, only as a last resort may he have recourse to general principles.42

With regard to general principles of law, it is interesting to examine some cases in which the Supreme Court of Justice has tried to fix the meaning of that expression. In the judgments dictated in the amparo proceedings brought by María Angelina López de Chávez43 and Otilia Razgado,44 it is said that by general principles of law is not meant the tradition of the tribunals, which in the final analysis is nothing more than a group of practices and customs without the force of law; nor the doctrines of the jurisconsults, which also have no legal force; nor the personal opinions of the judge; but rather "the principles deposited in some of our statutes, not only Mexican statutes that have been promulgated under the Federal Constitution of the country, but also earlier ones."

42. See Nicola Coiello, Doctrino General del Derecho Civil 95 (1924).
43. 43 Semanario Judicial de la Federación 858.
44. 50 Semanario Judicial de la Federación 293.
In a judgment entered March 15, 1938, in an amparo action brought by Catalina Meza de Díaz and others the thesis is advanced that general principles of law are

notorious juridical truths, indisputable, of general character, as their very name indicates, developed or selected by legal science, in such manner that the judge is able to give the solution that the legislator would have given if he had been present, or would have established if he had foreseen the case; provided that these principles are not in disharmony with or contradiction to the group of statutory norms whose gaps must be filled.

In the first of these theses the Court adopts the criterion that general principles must be inferred from legislation, meaning by that not only the totality of statutory provisions now in force, but all of those that have ever been in force in the country. In the second thesis, the Court attempts to make a synthesis of different opinions, even though they are not compatible with each other. On the one hand, the thesis asserts that general principles are juridical truths that are “notorious, indisputable, [and] of general character, as their very name indicates, developed or selected by legal science.” On the other hand, it is said that in applying these principles, the judge must be in a position “to give the solution that the legislator would have given if he had been present, or would have established if he had foreseen the case,” the rule of the Swiss Code, and, finally, following the opinion of Del Vecchio, the thesis asserts that general principles must be congruent with the group of statutory norms whose gaps or omissions are to be filled.

With respect to the first thesis, we have already indicated why it is not acceptable. Concerning the second, it is useful to remember that doctrine does not have, for us, the character of a formal source of law, which is the same as saying that the principles formulated by the scholars can-

45. 55 Semanario Judicial de la Federación 2641.
46. Id.
not, by themselves, serve as the basis of a judgment when the particular case has not been foreseen [by statute]. We agree with the last portions, because both the judge and the legislator must be inspired by the same principles, the judge in order to fill in the gaps, and the legislator in order to formulate the statute; and because the principles adopted by the judges in order to supplement the deficiencies of legislation should harmonize with legislative precepts.

197. The Role that Equity Plays in Mexican Law

Article 14 of the Constitution, in its last paragraph, says that “in proceedings in the civil order, the final judgment shall conform to the letter or the juridical interpretation of the statute, and in the absence of that, shall be based on general principles of law.” If one accepts that equity is a general principle, the most general of the principles of law, one would have to admit that it performs for us a supplemental role, and that, in those cases in which there is no statute applicable to the particular situation, and the judge has exhausted the resources of juridical interpretation hereinabove discussed, he may and should be inspired, in entering judgment, by principles of equity.

The only restriction that in our opinion should be indicated is the one indicated very effectively by Professor Del Vecchio, when he speaks of general principles:

If, then, one sees, the legislator has established only one requisite with respect to the relationship that must exist between the general principles and the particular norms of law: that between the one and the other there be no disharmony or incongruency. The possibility of applying a general principle in contradiction of a particular principle is precluded a priori.47

47. Citation omitted by author.
Therefore, a judgment based on standards of equity may never be in opposition to existing statutory provisions. For the same reason, the judge is not authorized to correct, under the pretext that its generality is a source of injustice in a concrete situation, the norms of positive law.

In our country, equity is referred to expressly in article 17 of the Labor Law, cited [earlier] in this work, and article 31, part IV of the Federal Constitution, which says:

Art. 31.—The obligations of Mexicans are [inter alia] . . .

IV. To contribute to public expenses of the Federation, as well as of the State and the Municipality in which they reside, in such proportional and equitable manner as may be provided by statute.

But in our law there are other norms that tacitly make reference to equity, thus making equity a resource of which the judge may avail himself when there is no applicable statute and he has been unsuccessful in utilizing the procedures of juridical interpretation. We shall cite . . .articles 18, 19, 20, and 1857 of the current Civil Code:

Art. 18. The silence, obscurity, or insufficiency of the statutes does not authorize the judges to decline to resolve a controversy.

Art. 19. Judicial controversies of a civil nature shall be resolved according to the letter of the statute or its juridical interpretation. In the absence of a statute they shall be resolved according to the general principles of law.

Art. 20. When there is a conflict of rights, and there is no statute expressly applicable, the controversy shall be resolved in favor of the litigant who tries to avoid injury, and not in favor of him who tries to enrich himself.
If the conflict is between the same rights or rights of the same kind, it shall be decided in such a way that the judge maintains the greatest possible equality between the parties.

Art. 1857. When it is absolutely impossible to resolve doubts through the application of the rules established in the preceding articles, if those doubts have to do with the accidental circumstances of the contract, if the contract was gratuitous, then the doubts shall be resolved in favor of the slightest transfer of rights and interests; if the contract was onerous, the doubt shall be resolved in favor of the greatest reciprocity of interests. If the doubts have to do with the principal object of the contract, such that one cannot come to know what was the intention or the will of the contracting parties, the contract shall be null.

The references to equity are perfectly clear in the two last precepts. To say that a conflict of rights should be resolved by maintaining the greatest possible equality between the persons involved, and saying that a matter should be resolved by observing the dictates of equity, is the same thing.

* * *

With respect to equity, the Supreme Court of Justice of the Nation has maintained the following thesis:

Insofar as there are statutory norms applicable to the case, there is no reason to try to correct them by substituting a subjective criterion. Insofar as the written law has not positively recognized the dictates of equity, they do not constitute law, and judges would be committing a grave error if they wished to modify the statute in deference to equity or, to put it more accurately, what they consider to be equity, since it would create the danger of arbitrariness. Therefore, in our law, equity does not
have the juridical force of a corrective of or supplement to statutory norms.\footnote{Citation omitted by author.}

We are in complete agreement with the Supreme Court when it states that equity does not have in our law the juridical force of a corrective of statutory norms; we believe, accordingly, that when there is a statute applicable to a particular case, the judge is not authorized to correct it on the pretext that its strict application would work an injustice. But we do not accept [the Court's] other thesis, that is, that in Mexican law equity has no supplemental force. Even when one does not accept equity as the most general of the principles of law, one must acknowledge that there are many provisions which, expressly or tacitly, directly or indirectly, make reference to equity, thereby making equity a resource to which the judge may refer when there is no applicable norm and the rules of juridical interpretation have been unable to provide a solution.
APPENDIX:

TABLE OF CONTENTS TO

INTRODUCTION TO THE STUDY OF LAW

BY EDUARDO GARCÍA MÁYNEZ

FIRST PART: THE NOTION OF LAW

Chapter I: Concepts of Norm and Natural Law
Chapter II: Morality and Law
Chapter III: Law and Social Conventions
Chapter IV: Principal Meanings of the Word Law
Chapter V: Formal Sources of the Juridical Order
Chapter VI: Classification of Judicial Norms
Chapter VII: Law and the State

SECOND PART: THE JURIDICAL DISCIPLINES

Chapter I: Concepts of Norm and Natural Law
Chapter II: Morality and Law
Chapter III: Law and Social Conventions
Chapter IV: Principal Meanings of the Word Law
Chapter V: Formal Sources of the Juridical Order
Chapter VI: Classification of Judicial Norms
Chapter VII: Law and the State
THIRD PART: FUNDAMENTAL JURIDICAL CONCEPTS

Chapter XII: Judicial Assumptions and Juridical Facts
Chapter XIII: Principal Theories Concerning Subjective Rights
Chapter XIV: Classification of Subjective Rights
Chapter XV: Real Rights and Personal Rights
Chapter XVI: The Right of Liberty
Chapter XVII: The Right of Action
Chapter XVIII: The Right of Petition and Political Rights
Chapter XIX: The Notion of Legal Duty
Chapter XX: The Juridical Concept of the Person
Chapter XXI: Sanction and Coercion

FOURTH PART: THE JURIDICAL TECHNIQUE

Chapter XXII: The Application of the Law

161. The Juridical Technique
162. Determination of the Subjects
163. The Juridical Syllogism
164. Private and Official Application of Juridical Norms
165. Problems Related to the Process of Application

Chapter XXIII: The Concept of Interpretation

166. Interpretation in General and the Interpretation of Statutes
167. The Concept of Interpretation
168. The Concept of Interpretation of Statutes
169. The Meaning of the Statute
170. Authors of Interpretation
171. Interpretation of General Precepts and Interpretation of Individualized Norms

172. Methods and Schools of Interpretation

Chapter XXIV: The Exegetic Method

173. Interpretation as Exegesis of Statutes

174. The Exegetic Method

175. Unforeseen Cases

176. The Role of Custom and Equity

177. Gény's Critique of the Traditional Method

Chapter XXV: Interpretation and Integration, According to Gény

Chapter XXVI: The School of Free Law and the Doctrines of Radbuck and Kelsen

Chapter XXVII: Statutes and Judicial Decisions

186. Relationships Between Statutes and Judicial Decisions

187. The Meaning of the Statute and the Will of the Legislator

188. The Hermetic Completeness of the Juridical Order

Chapter XXVIII: Processes of Integration

189. The Problem of Integration

190. Analogy as a Method of Integration

191. General Principles of Law

192. The Classical Concept of Equity

193. Equity and General Principles of Law

Chapter XXIX: Rules of Interpretation and Integration in Mexican Law

194. Article 14 of the Constitution

195. Criminal Statutes and Their Interpretation

196. Interpretation and Integration in Civil Matters
197. Role Played by Equity in Mexican Law

Chapter XXX: The Conflicts of Law in Time

Chapter XXXI: Territorial Conflicts of Law