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The Evolution of Water Law and Policy in Spain

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ABSTRACT *Spain has old and complex legislation with regard to water, which has recently undergone some modification (the 1999 Act). The water market has been introduced, with emphasis on environmental protection aspects, while continuing traditional management through hydro basins. The current state of evolution in water law is one of vagueness, with contrasting lines of tension; in some, the old type of focus predominates but there are others in which the so-called new water culture can be detected. The National Hydrological Plan (with its proposal for a major inter-basin transfer) and the application of European Community law (water framework directive) are going to set the trail for development over the next few years, and this will resolve the above-mentioned lines of tension.*

Introduction

It is no easy task to summarize in just a few pages the fundamental outlines of the evolution of water law and policy in a country such as Spain,[1] yet to do so from time to time seems to be essential, as an exercise of reflection which will serve to describe evolutionary trends but also, at the same time, to draw attention to successes and failures. Thus we have things to correct and lines of development to keep following. This is because it is obvious that a study like this only has meaning if it aims to go beyond the mere accumulation of regulations, figures and statistics, and focus on a field that is extremely useful, where the author's personal approach presents a logical connection with the objectivity of the information provided and will offer at all times an evaluatory, and therefore daring but creative, view. This is the author's purpose here.

With this in mind, the first thing to do is to establish some figures in order to understand fully what follows. Thus the first topic will be the evolution of water law, taking as a starting point the 1866–79 Water Act,[2] and progressing to the present day, when all talk is centred, obsessively but reasonably, on the National Hydrological Plan. With regard to this period of, approximately, a century and a quarter, the most interesting regulations will be reviewed, but especially the vectors and lines of development that they respond to. There is no intention of explaining in detail all the institutions of water law because, in that case, this work would be never-ending and probably superfluous and a waste of time. The only thing this paper is concerned with is to offer a clear view of the existing development, with its light and shade, and from time to time present some thoughts and intuitions as to the direction the evolution of our legal framework may or should be taking.

With these game rules, and to get this work under way, there can be no doubt

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that right through this work, and from the perspective of recent evolution and questions raised today with regard to Spanish water law, there are two legal references to mention and comment on: first, the 1978 Spanish Constitution (SC); and secondly, the European Community regulations.

- The SC of 27 December 1978 is in fact the text that is, legally speaking, the most relevant and is really the begetter of the most fruitful and creative period for Spanish water law. The SC's decisions on what, generically, we may call the revaluation of public property (article 132 SC), unprecedented concern for the environment (article 45 SC) and, finally, the structural influence which the new territorial organization of the state would have on the legal system as a whole (with articles 148.1.10 and 149.1.22 SC as fundamental reference points) together make up the juridical foundations on which later legislation forming the framework of the law currently in force was built, and we shall be meeting this all through this paper.
- Secondly, Spain entered the European Union on 1 January 1986,[3] and this was also the date that it took on the Community package of measures concerning water resources (basically, bathing water, drinking water destined for human consumption, water for running fish-farming activities and outflows to the sea). Spain, from this date onwards, was to be a recipient, but also a partner in the creation, of a European legal system concerning a matter that was constantly growing in complexity and ever more difficult to interpret. This European set of regulations has influenced Spain's internal law in the field of water quality,[4] and the environmental assessment of hydraulic schemes,[5] to the extent that today all internal regulations in this area are directly or indirectly offshoots of the European set of regulations. Indeed, the latest example of this creative impulse is the European Parliament and Commission Directive 2000/60/EC of 23 October, which establishes a Community framework for action in the area of water policy. This norm has been extremely complex in the making, taking nearly four years to draw up, and contains a series of principles which will govern the short-term future development of law in Spain, as well as in the rest of the European Union, basically, but not only, in the field of water quality.

Water as a Resource, Public and Private Ownership, the Almost Irresistible Pressures on the Exploitation of Certain Aquifers

The author mentioned above the relevance of article 132 SC for later regulation-forming processes, having qualified this provision as an example of the 'revaluation' of the public domain. Indeed, this is substantially how a text such as the quoted article should be understood, a provision that is significantly unique in the field of comparative law. This article declares certain commodities to be in the public domain (we might classify it as an *ex Constitutione* declaration),[6] affecting those that might be included within the generic concept of the maritime–terrestrial public domain. In addition, from our perspective, the fact that the declaration of new commodities in the public domain was contemplated by an Act of State, this was to open the way for one of the most important decisions of the subsequent Act 29/1985 concerning water resources, which in practice allowed for an overall inclusion of continental water resources in the hydraulic public domain.

Indeed, article 2 of Act 29/1985 listed what would be considered commodities of the public hydraulic domain from the time it came into force, which solely affected subterranean water in comparison with the content of the earlier 1879 Act. Thus, all continental water resources were simply qualified as belonging to the public domain.[7] This simple affirmation—as well as being an example of an extremely conscious decision, long sought for by the best doctrine—was based on the principles of a hydrological cycle (cf. 1.2); this enabled the constructive sense of the previous legislation, which explained the judicial nature of water in line with its method of presentation (rainwater and subterranean and surface water), to be left behind, and it now referred to water generically as continental waters, with no classifying adjectives.

Nevertheless, Act 29/1985 was not intended as a radical break with the previous situation. It recognized the choice open to holders of private water rights to opt, within a certain time limit, to continue under a private ownership system (albeit with some major restrictions on their actions) or to change, under advantageous conditions, to a public ownership system, which logically meant that their status changed from being owners to concessionaires of public water resources (cf. temporary provisions 2 and 3 of the Act).

These measures, which were very important with regard to the principles, were linked with other legal decisions which also represented a restriction on private owners' powers and increased potential for public intervention from various viewpoints: thus, the possibility of acquiring the right to use of private waters by positive prescription was eliminated (article 50.2) and the maximum period of usage rights was limited to 75 years, thus doing away with concessions that had previously been granted in perpetuity (cf. article 57.4 related to temporary provision 1). As a mechanism which very probably tried to go some way in 'compensating' for previous decisions, landowners were granted usage rights for rainwater (article 52.1) and water from wells or springs (article 52.2).

Constitutional Tribunal sentence 227/1988 of 29 November, which is fundamental for the development and understanding of Spain's overall public law,[8] ratified the legitimacy of the above-mentioned constitutional decisions, and by no means did it consider them to represent expropriation in content or nature, which was what some challengers alleged, by claiming that this type of decision was unconstitutional because it violated article 33.3 SC, since there was no specific mention of compensation.

The latest stage in the evolution of Spanish water law, with regard to the allotting of a type of ownership, came about in the form of a small contribution from Act 46/1999 of 13 December, which applied the status of property of the hydraulic public domain to "water resulting from desalination of sea water when, once it has left the production plant, it is incorporated into any of the elements mentioned previously" (the elements into which desalinated water is "incorporated" are continental waters and natural water flows, etc.). Thus, incorporation is the criterion which determines the status as property of the hydraulic public domain of desalinated water; prior to this incorporation this water belongs to the private domain, which enables it to be commercialized by the desalination companies. This was most likely set up in this way in order to offer sufficient economic incentive to the desalination companies, and their activity is also facilitated in a legal sense because access is gained into this 'industry' by obtaining authorizations—except for the necessary derivative concessions—and not with an administrative concession, as was the case with the

law previously in force (cf. article 12 b of the Water Act, introduced by the above-mentioned reform).

The last mention of private ownership in Spanish legislation—apart from the continuation of ownership of some subterranean and spring waters (depending on the meaning of exercise of options by previous owners referred to above)—is the private ownership of watercourses in which rain water occasionally flows (article 5) and ponds on private property forming part of these estates (article 10),[9] or even independently inscribed in the Land Registry, a situation which has been extended to lakes and tarns (additional provision 1).

Thus, the meaning of the legal regulation of this question is quite clear, and any lawsuits questioning the purely legal aspect of an apparently basic question have been consigned to history. At any event, it does not seem that the final word on this matter has been pronounced, and this is borne out by the fact that basin bodies still claim ownership rights on subterranean waters based on the situation that stood as of 1 January 1986(!),[10] which demonstrates a unique consistency in those who discover, or remember, that for no fewer than fifteen years they had been owners of private water resources without informing the water authorities. The Draft Bill of the National Hydrological Plan aims to remedy this situation by ordering the almost immediate blocking of opportunities to be included in the Catalogue of Private Basin Resources (temporary provision 4 of Act 29/1985), which is where private ownership of these water resources should be registered. At any event, what still seems to be lacking is proper management of aquifers by basin bodies, which is not happening in all cases. This is not helped by the fact that in some cases private ownership rights as well as public concessions apply to these aquifers and, in addition, these ownership rights are being proposed in such a way that they may substantially differ from public usage rights.

Indeed, the problems with some aquifers in Spain have arisen as a result of a combination of outrageous claims from private individuals, together with inadequate policing by the basin bodies. In many cases, a far from perfect Common Agricultural Policy has given almost irresistible encouragement to claims for maximum use of aquifers to irrigate land which qualifies for Community subsidies, which are handed out fairly freely without taking pre-cultivation aspects into account. It is only recently that certain solutions seem to have been adopted which have led to an improved situation as far as the controversial aquifers are concerned,[11] although it is hard to say whether the limited success that can be appreciated is due to the degree of responsibility of these policies, or to the damp period—relatively long for Spain—that we are lucky enough to be experiencing at present.

Water as a Natural Resource, the Protection of Water

The heading of this section is one of the aspects which has seen the greatest change as far as the normative situation is concerned in the last two decades and, it might be added, is most likely to change in the future, especially if we take note of the evident signs that will unmistakably serve as the guidelines for the evolution of Spanish water law in the near future.

With regard to this question, from a strictly juridical point of view, we should note the steady but growing effect of article 45 SC, which establishes the rational use of natural resources (and therefore water) with penal consequences for

breach of this principle.[12] This 'rational use' of water—seen as the need to apply saving and conservation policies, which can even come to determining preferences in claims for use—can also be found all through the text of Act 29/1985, and forms part of the European Union's environmental policy, with its specific inclusion in the Community Treaty modified in Maastricht and Amsterdam (cf. article 174.1).

Indeed, private individuals' use of water needs to be 'rational' and the public decision on allotment of use will need to be governed by the criterion of rationality, such rationality being understood as that being present in projects that involve better use of the resource from the point of view of conservation (cf. articles 58.4 and 71.2, among others that use the word 'rationality' in Act 29/1985). Without wholly rejecting a consideration of the resource as being simply productive, with regulations such as this Spanish water law shows a marked trend towards conservation, which affects water as much as the entire ecosystems of which it forms an essential part, and of course, hydro schemes, which require detailed regulations regarding the specific processes for evaluation of environmental impact in order for these technical projects to be approved.[13]

European law co-operates decisively in the carrying out of these principles with a body of directives that is growing boundlessly and, at times, out of control. Reading these directives is hard work and sometimes disheartening for any jurist who loves clarity and method (justified, one might say, by the fact that they are legislating for 15 countries with widely diverse traditions and needs), and their transposition and, specifically, putting into effective practice is normally even more so. European Community Justice Tribunal sentences have continuously penalized countries—including Spain—for non-compliance with these directives, and this is probably the best proof of the fact that European Commission authorities are closely watching the situation, eager as they are to insist on compliance with European law. Another factor contributing decisively to the application of European law is the European funding required for the carrying out of hydro works through funds specifically conceived for countries like Spain, such as the Cohesion Funds or Regional Funds, ERDF.

The first of these, the Cohesion Funds—which Spain currently only shares with Portugal, Ireland and Greece—require the hydro works or scheme to be funded to be irreproachably environmentally friendly, and this usually precludes works to regulate or channel water for agriculture (irrigation) and other works that cannot clearly demonstrate their environmental nature. Indeed, hydro works for supplying water to populated areas or providing ecological flows, or environmental improvements in general, form the main nucleus of works likely to receive European funding, in large amounts that often help to decide whether to carry out the works or not.

This European influence has been fundamental in certain specific aspects. First there is Directive 91/271 concerning urban wastewater treatment (a directive which was transposed to Spanish law by Act by Royal Decree 11/1995 of 28 December), which was the origin of a systematic policy of heavy investment in this field by the state as well as the autonomous communities (Comunidades Autónomas (CCAA)). This investment will probably ensure that the strict deadlines for compliance with this directive (the final deadline is 1 January 2006) will be met.

All this is managed largely by the CCAA, as has been said before, which for these purposes make use of legislation that, while peculiar to each community,

is basically uniform.[14] In the case of CCAA which do not have their own hydro basins, and thus do not have a specific hydro authority, this has given rise to the appearance of sectoral hydro authorities, who are exclusively responsible for hydro policy, and often for the management of a specific levy—usually known as a *canon de saneamiento* (drainage tax), with the misnomer *canon* taken from the Spanish legal tradition of titleship, thereby giving it the characteristic of a levy. It is devoted to paying for (part of the) investment, and exploitation costs (and here, the *canon* does usually finance all the exploitation costs) of sustaining these infrastructures.

Thus, to a large extent, the treatment of urban waste water is something that should be welcomed, although the treatment of agricultural waste water is something that has yet to be addressed effectively in Spain. Indeed, agriculture is an activity that increasingly gives rise to major environmental problems, and in some areas this will probably get worse unless precautionary measures, at present practically unknown,[15] are adopted while certain works are carried out to transform extensive drylands into irrigable areas.

In addition, following the critical line of the current situation, environmental protection of the aquatic ecosystems still has a long way to go. The principles of the applicable law, which establishes a zoning system aiming to protect surface waters (policing and water rights) as well as aquifers (perimeters of protection) and surface reservoirs,[16] seem satisfactory, but the execution of the law is still imperfect, and the situation is not really helped by the different types of authority granted to the various administrations. The powers of the CCAA (territorial planning, environment and town planning), the town and city councils (town planning) and the basin bodies (water resources) do not seem to be clearly laid out in practice, and co-operation between the different levels of administration should be something natural and, what is more, compulsory. This—apart from the various norms, such as article 23 of Act 29/1985, in the modification arrived at following Act 46/1999—is repeatedly encouraged by the decisions of the Constitutional Tribunal, but this co-operation is still fairly deficient in practice.

In particular, although not specifically to do with norms protecting this resource, the entire regulation concerning floodable zones (article 11 Act 29/1985) does not really address reality, in view of the damage done to lives and farms as a result of regular flooding, and especially the potential danger existing in certain places in terms of the permanent, not seasonal, population of areas which inevitably get flooded. Centring the criterion for having floodable zones legally classified around a concept as vague as extraordinary watercourse surges—which are those that have a recurrence of 500 years (as referred to in article 14.3 of the Public Hydro Domain Regulations, arising from Act 29/1985)—is an apparently objective solution, but one which is not always backed up by scientifically reliable data, in view of the step backwards in time—such a challenge for the researcher and the inquisitive and unconventional scientist—that needs to be taken. In addition, this is an area where administrative co-ordination is essential, in view of the fact that the current territorial structure of the state seems to have been, on occasions, a perfect excuse to prevent the general administration of the state from carrying out a process which, for logical reasons, it should be managing and co-ordinating.

The Use of Water, Hydrological Planning and the Concessions System

The regulation of the use of the resource—whichever forms and aims it adopts—is consubstantial with the existence of any water law. In this respect, what is most notable in the historical evolution of Spanish water law is that, after going through various phases, the regulation of use has taken on aspects of planning. This is borne out by the fact that Act 29/1985 makes hydrological planning one of its central decisions. Thus, it should be borne in mind that article 1 of the Act goes so far as to say that any action concerning the hydraulic public domain is subject to hydrological planning (article 1.3).

Today hydrological planning is, to a large extent, a concept that is perfectly describable on a legal level, and hydrological plans are complex documents which are specifically regulatory, so that Spanish water law is today a collection of acts and regulations and hydrological basin plans approved by Royal Decree 1664/1998, of 24 July, whose regulations were published in the *Official State Gazette* (and in the *Official Gazette of the Government of Cataluña* in the case of the regulations affecting the hydrological plan of the Cataluña inland basins) at various times during 1999. Currently the Draft Bill of the National Hydrological Plan is being debated: in the drawing up of the Water Resources Act this is seen as being the key element in hydrological planning and, at the same time, the quintessence of the country's water policy (cf. article 43 for its content).

The author is convinced that, for the outside observer, the conception and ups and downs of hydrological planning in Spain have to be some of the most attractive elements—for their novelty, complexity and, at the same time, success—in current Spanish water law. Act 29/1985 has marked the turning point in a tradition of water policy in which there were hydrological plans initially understood as being simply a collection of hydro works to be carried out by the administration,[17] and is now finally moving towards giving hydrological plans the nature of legal regulations,[18] with open and transparent co-operation in their formation, adopting decisions which are binding upon the hydro authorities; at the same time, user rights are decisive, in that the first condition for the granting of these rights is that they be compatible with the plan (cf. article 57.4, subsection 1), and the concessions may be reviewed when they are incompatible with the plans (article 63.1.c).

But the ambition of the technical planning in Act 29/1985 is, at the same time, one of the main obstacles for its efficiency. It should be borne in mind that the reference to hydrological planning is so obsessive in the Water Resources Act that very few articles avoid expressly contradicting aspects of hydro planning. Thus, it often happens that planning is given the role of complementing or developing a subject, or even repealing the order of uses established in the Water Resources Act (article 58.3), when it is stated that such an order may be excepted by what is included in the basin hydro planning (article 58.1), provided that the priority role is reserved for supplying inhabited areas, to be broadly understood, as the Water Resources Act does, as including low-consumption industrial users connected to the municipal supply network.

All this has meant that the process of approving the basin hydro plans has been no easy matter, in that the extensive series of possible contents according to the regulations (cf. article 40 of Act 29/1985) has required a meticulous technical process of formation, mixing questions of pure political content, closely linked to the positions of the CCAA, with the unilateral preferences of the

relevant users in this area. These political and sectoral definitions, and loyalties, are only to be expected in questions related to water, in view of the fact that its decisive value for socio-economic development situates the plane of discussion on its exploitation—and we include in this concept its conservation also, since here the word 'exploitation' may be used in its broadest sense—in the very centre of political reasoning.

And if we say this with regard to the basin plans, what can we say with regard to the National Hydrological Plan, if we take into account that the provision for the regulation of conditions governing water transfers between areas with different basin hydro plans[19] is something that Act 29/1985 reserves for this plan (cf. article 43.1.c.), which makes the task of national planning something that is highly inflammable and potentially dangerous; this has been shown by the national hydrological planning process of 1993–96—which was a failure—and the current 2000–01 process, which is still open as these lines are being written.

(Incidentally, with regard to the subject of transfers between territorial areas with different basin hydro plans, Spain boasts a relatively long tradition, the concept of which was initiated with the provision of the Tagus–Segura transfer under the 1933 National Hydro Works Plan,[20] and later continued with a series of practical actions based in some cases on a simple concession,[21] and in the most important cases on specific legal regulations.[22] The most important transfer existing is the one known as the Tagus–Segura transfer, initially planned to transport 1000 million cubic metres and subsequently limited to 600 million cubic metres, a quantity that has not been reached so far due to a lack of sufficient resources at the intake points.[23])

What is certainly not right, under any circumstances, is that hydrological planning should be conceived of in a rigid and inflexible manner. Otherwise, planning is doomed to failure, especially in the world like today's in which very few absolute truths exist and there is total scepticism—backed up by ignorance—about possible future forms of economic production and social relationships. By way of example, if we take into account the widespread crisis concerning the method of production of animal proteins—which is the most suitable interpretation of the current problem of 'mad cow disease'—and the need to replace this by a more natural form, a reassessment of the strategic value of the territory and the water linked to it may be taken as being an essential element in a new policy for the production of this protein, by providing a logical feed based on exclusively vegetable products to a class of livestock which it seems will have to be regenerated completely, and not only in Spain. The impact of this on hydrological planning processes—if reference may be made to an event which closely touches the concerns of this paper, but there are many more—is undeniable.

Finally, it should only be added that the basin hydrological plans are approved by Royal Decree issued by the government of the nation,[24] and the National Hydrological Plan is approved by an Act of Parliament, which shows the basis and transcendental nature of this type of planning for the country as a whole.

With planning as its base, the acquisition of water rights for private use is made to fall on a system of concessions. As a result of Act 29/1985 concerning water resources, concession linked *ex lege* to acquisition is the only way of acquiring this private use, with squatter's rights, contemplated in the previous

legislation, now being prohibited (cf. article 50.2). Rights granted *ex lege* are those contained in article 52 of the Water Resources Act (concerning rainwater and water originating from underground springs), which might be interpreted as 'compensating' for the restrictions placed on private ownership by the Water Resources Act, as has been pointed out earlier. On many occasions, particularly in certain transfer regulations, the legislation presents us with a certain 'mixed' form of acquisition, with an Act that establishes uses and final purposes for water resources—by way of a legal 'expectation'—and regulates the later existence of a concession in favour of any transfer users' organization that may arise in accordance with the prerequisites of the Act (cf. article 1 of Act 18/1981, of 1 July, concerning water resources in Tarragona, previously quoted in this section when referring to transfers).

Water concession is a sectoral manifestation of the typical domain concession that gives rise to a real property right (registrable[25] and transmittable[26]) for the concessionaire, usually acquired by means of a public process and by competition,[27] granted with discretion,[28] for a fixed time,[29] and for uses specifically designated in the concession document.[30]

On many occasions, the granting of a concession will determine the need to carry out works for the exploitation of the water resources, which is catered for in the Act from the point of view of a hypothetical extension of the concession granted for a maximum period of 10 years if it is not possible to amortize the works within the regulated period (article 57.6).

Hydro Works as Witnesses and Leading Players in the Often Ill-fated Evolution of Water Law

The last reference in the previous section leads us to a fundamental question regarding Spanish water law, that of hydro works, which is a question already alluded to in the previous section by way of the appeal to the interbasin transfer canals between hydrographical basins. In our country it would be difficult for advantage to be taken of the 'natural system' insofar as in the majority of cases complex and costly hydro works are necessary. This importance addressed to hydro works has been one of the distinctive signs of Spanish water law with regard to which exceptional juridical institutions have originated and apart from that we should not forget for a moment the permanent controversy accompanying many of them, especially in recent times.

In this manner the historical contemplation of Spanish law allows for the observation on this plane of an evolution towards public intervention in hydro works starting from an initial tendency to its adoption (along with the consequent risks) by private individuals, which in significant cases of works conceded during the last third of the 19th century committed the initiatives to failure, and the regenerationists' appeal (with Joaquín Costa and Lucas Mallada at their head, amongst others) to state intervention, which evolved into the Act of 7 July 1911. This legal regulation of hydro works saw the origins of the economic–financial system, which was undergoing a rather complex time from a juridical point of view, finally being integrated within the 1985 Water Act. Later on specific reference will be made to this question.

With respect to hydro works, organizing features also arise which are typical of Spanish law, possessing great expansive capacity due to their excellent conception and beneficial effects, such as the basin bodies created in 1926 under

the name of river boards in order to essentially carry out hydro works within a self-organized users' system and counting on permanent help from the central government.

The most recent juridical issues affecting hydro works lie in the different aspects which will now be summarized briefly. In the first place, the current juridical situation deals with essentially administrative powers, as either the state or the CCAA can exercise authority. State intervention takes place for the so-called 'general interest works' (cf. their justification in article 149.1.24 EU), with the state being empowered to develop them even in territory of the intercommunity hydrographical basins, just as the Constitutional Tribunal emphasized in its sentence 227/1988, following the best doctrine.

The definition of what is understood by 'general interest works' therefore appears to be decisive. For a long time no established regulations have existed which have attempted to approach this problem by showing a 'clash' between the CCAA to attain state intervention in order to carry out general interest works, or seen from another viewpoint, to 'cede' their own powers (at least hypothetically) within this area. This apparent paradox, which is minor if we take into account that it can be perfectly explained by state funding that accompanies the declaration and, in parallel, by the permanent crisis of the autonomous treasuries given the funding model followed by the CCAA up to now.

When the guideline precisions of this problem arrived through the modification of article 44 of Act 29/1985 taking effect in Act 46/1999, criteria of extension of such calibre were employed that, bar certain cases, doubts still persist.[31] This also allows the old policy to continue—insensitive to changes of government—of works applications by the CCAA or by eager users to the state and of the latter's condescending decision which, on many occasions, could be thought to pay heed only to fulfilment criteria regarding the provisions of the legal system. There is no doubt that, with regard to the works (and not only hydro works) a *clientelism* can originate and does originate that produces faithfulness in times of disturbance and guarantees support when periodically the exercise of democratic rights appears.

The latter forms part of the not strictly juridical considerations, although neither are they idle for understanding the configuration of Spanish water law and, above all, its application. However, and returning to the juridical area, in recent times the carrying out of hydro works has seen a 'privatization' as from Act 13/1996. The word 'privatization' refers to the authorization that this Act contains for creating state corporations (*sociedades estatales*) for the construction and/or operation of hydro works that, even when 100% public (state) capital funded, operate, as befitting their nature, in accordance with the point of view of private law.

The question referred to is highly interesting from both an economic and a juridical point of view as these corporations have been generously endowed but, at the same time, they develop an activity within the private law system—obviously—that has previously been 'extracted' from the initial 'natural' authority of the river boards. This means then the loss of the fundamental function which was precisely what caused in 1926 the creation of the river boards, which leaves them today with basically only the power of water planning and management.

On one important plane there currently appears a permanent concern and paradigm in the debate about Spanish water law, which is the relationship

between the environment and hydro works—a relationship which has on occasions witnessed very complex juridical battles that have even brought out the need for pronouncements by the Constitutional Tribunal once the previous judicial processes have finalized. The case of the Itoiz reservoir in Navarre is a very representative case of this, one which has required the pronouncement of the Constitutional Tribunal in order that its construction, and consequently its operation, is definitively understood as legitimized.[32]

Currently, the regulatory Draft Bill for the National Hydrological Plan foresees the construction of an extremely important number of hydro works (even when the contents do not strictly adhere to the plan according to article 43 of the Waters Act), which makes it easy to understand that in some cases—and not only in the most significant works it regulates, the interbasin transfer canal from the Ebro basin to some Mediterranean hydrographical basins—a polemical issue has reappeared regarding the opportunity of it being carried out: a polemical issue substantially environmental apart from the necessary economic consideration also.

Additionally, all this has happened when legislation reached the waters by way of Act 46/1999. This was quite a complete and technically appreciable regulation of hydro works which for a long time had been demanded by the doctrine of this sector which, strangely enough, provided a more than noteworthy regulatory deficit compared to the situation existing in other public works (roads or motorways, for example). The current regulation, apart from converting the decision into a procedure for approving the hydro works of general interest, regulates with certain detail the connection with the necessary town and land use planning approaches, introducing us for the first time to a reference to works of 'compensation' (called tailwater projects), in order to relieve the impacts on the land that is inherent on many occasions with the most significant regulation works.

The So-called Flexibilization of Concessions and its Consequence: Water Markets

The latest reform of water legislation, under Act 46/1999, which is in line with certain specific actions taken in countries such as the USA, Chile and Australia, has introduced into Spanish law a regulation which has been dubbed by the media the 'water market'. In fact, in a strictly juridical sense, it is a very complex regulation under which different institutions have a common base, such as the contracts for the assignment of the right to use water, regulations governing the use of state infrastructure in order to make such contracts a reality, the organization of public centres for the exchange of water use rights and, finally, the connection of all the foregoing with the problem of the transfer of water resources between the geographical areas covered by different hydrological basin plans. The new, complex, excessively long article 61-b of Act 29/1985 includes detailed provisions covering all of the aspects mentioned but nevertheless, despite its very wide scope, still requires further subsidiary regulations in order to make it operative.

As in other cases, there is no intention of entering here into minute details of the content of these regulations, referring readers to the text of the regulations or to the literature on the subject which, in the opinion of the author, is only a fraction of that which will be published if this water market is declared legal,

which is in itself a situation which will only occur with the corresponding subsidiary regulations. The objective here is simply to refer to the fundamental basis and the general juridical problems, adding, of course, the author's opinion on the matter.

The official doctrine accompanying the reform and which is reflected in the stated purpose of Act 46/1999 is the need to reform the system of concessions by making it more flexible. This, it was said, would be a way of helping to solve the damaging effects of the successive droughts suffered in Spain.[33] The arguments expressed in the recent past in favour of the reform claimed (in line with the arguments used in other countries) that facilitating contracts for the assignment of water use rights between private citizens would make some hydro works unnecessary, since water resources would be channelled 'naturally', simply through market forces, from the socially and economically less profitable uses towards the more profitable.

The regulation, which is a consequence of these principles, allows contracts for the assignment of water use rights between the concessionaires or holders of use rights. It is not, however, the actual concession that would be transferred (the transmission of concessions, in congruence with the real rights which they represent, are governed under article 61 of Act 29/1985) but rather the total or partial content of the rights to usage contained in those concessions, with the concessions surviving in all cases. To such end, Act 29/1985 is modified in another provision, in order to allow for the traditional principle of specialized water use for irrigation to be excluded, allowing the irrigation of land other than that which appears in the concession (cf. article 59.2) with the water whose right is transferred. This is a key legal provision, since it hypothetically allows a large volume of water to come into circulation, given that irrigation makes up 80% of the water used in Spain (with some variations, depending on the characteristics of the different hydro basins). Understandably, only if irrigation water can be used to irrigate land other than that for which it was originally destined does the introduction of this type of regulation make sense.

Article 61-b refers to the regulations for the establishment of the amount of water that can be the object of assignment contracts, imposing an upper limit which is the amount really used by the concessionaire or holder of the right being transferred. Likewise, except in justified, authorized cases, rights may only be assigned for uses which are preferential or equal to those assigned, and in all cases it is prohibited for the holders of non-consumptive use rights to assign those rights for consumptive uses.

It appears to be, then, a measured, weighted regulation in which the desire to avoid the obvious disadvantages which the regulation of the water market has had, and still has, in other countries, notably Chile, stands out. Under these regulations, there is no complete freedom to come to agreements between the parties, but the Act carefully delimits what might be agreed, making very clear the idea that there can be no supplementary consumption as a result simply of the introduction of these contracts.

Likewise, there are various types of administrative intervention in other parts of the regulations, which even include referral to the rules in order to set the maximum price which may appear in the contracts. This, though, is probably an excess of interventionism, and it is more questionable whether it is in the public interest than in other cases, even though it may be based on the need to avoid a negative image of simple passivity in the face of speculation, since the water

rights were acquired by their holders completely without cost. The regulations also contemplate an administrative authorization, whose content is governed under the appropriate regulations, of the contracts for the assignment of water use rights, but there is a system of automatic permission in the case of the non-emission of a decision by the administration ('administrative silence') within very short deadlines, which in practice can be interpreted as an abandonment of the powers which should be inherent to ownership of the domain.[34]

Also foreseen is the introduction of centres for the exchange of water use rights in the basin bodies in drought situations and others which are controlled under the regulations. It seems fairly obvious that the model for this regulation should be the Water Bank in California, on whose activities there is abundant literature from which, despite the existence of some doubts and the ever-present needs to introduce changes in the details, it is possible to form a positive judgement of said Water Bank's performance, which would justify its introduction into our legal framework.

There is another series of regulatory measures which also form part of a system of regulations which is certainly complex, and whose characteristics can be seen in the regulations, but this explanation should not be concluded without a specific opinion on the question, which is certainly both singular and attractive to the lawyer and which has provoked a controversial debate in the recent past, drawing up the classical lines of battle to be expected in these matters.

And it should be said that this opinion cannot be given radically either in favour or against, but rather that it should be accompanied by an explanation of essential nuances and reservations. Thus, the idea of allowing the assignment of the right to use water can only really be judged when it is put into practice, by observing its practical operation and its effect on the improvement of water management, for which it is essential to have official regulations, and for these then to be applied. Independently of that, the fact that new water management provisions are introduced is not bad in itself, just the contrary in fact. The water problem in Spain is so complex and full of nuances that it is no bad thing that the juridical framework should have many different forms of action available, especially for use at times when the system is in crisis, which is something that does not always happen homogeneously in our country, in terms of time and territory. The manner in which the problem has been solved juridically is highly positive, with the exception, possibly, of the incoherence of the affirmation of public property contained in the SC with a system of positive administrative silence for the authorization of contracts for the assignment of water use rights.

But, in any case, these regulations allow attention to be drawn to a certain contradiction in current water policy. This is because, without waiting for the application of the water use right assignment contracts (or for the organization of the public right exchange centres), there appears a Draft Bill to regulate the National Hydrological Plan which is presented above all as a great compendium of hydro works in our country (quantified, in economic terms, at some 4000 billion pesetas (€24 billion)). Its promoters consider this schedule of hydro works to be its most positive aspect. Among these works, and without entering (since it is not the appropriate occasion) into any criticism or evaluation of those works included in the Bill, there are examples to suit all tastes. Some may be termed environmental, others regulatory or channelling

works, and therefore connected simply with the exploitation of water resources, with an economic dimension. Among the latter, which are obviously those which probably cause the most questionable environmental effects, are there none which could have been avoided if contracts for the assignment of water use rights had been allowed? If the main virtue of this regulation was to divert water to the most relevant social and economic uses within the ideological suppositions of the proposed reform in our water law, should society not have been allowed to have sent 'signals' to the authorities about the real needs that exist in connection with water use? Or should it even have been allowed to 'prevent' some of the said works by generating indirectly the necessary water resources?

It seems that these questions have no possible answer, and that, furthermore, they can only be met by silence, since it is evident that a policy of massive construction of hydro works of all types in all parts of the country must be accompanied or preceded by all possible efforts to avoid actions that affect the natural environment, except in those cases where they are justified. The subsidiary regulations called for by the Act are therefore necessary for it to be possible to carry out all of the technical measures contained in article 61-b in order, simply, to achieve the objectives pursued through the legal innovation, all, obviously, quite apart from the discrepancies previously mentioned (and which must be corrected) with regard to the deficiency of public control over the transactions.

Administrative Organization, the State and the CCAA, Organization by Hydro Basins and Participation of Users and Inhabitants, Uncertainties Regarding the Future Development of Basin Bodies

The author now comes to a point which, apart from its objective, isolated importance, synthesizes and summarizes a good part of Spanish water law. It is now precisely 75 years since the creation of the river boards, and of the first one of all, the Ebro River Board.[35] When speaking about river boards, we are making a clear reference to a model of administrative organization based on hydro basins, and on the participation of users to the point that the term 'river board' and its inherent content seem to be something essential, and naturally linked. And something as simple as this originated in Spain in the framework of a historical evolution in which the organizational formulae previously tested under the Upper Aragon Irrigation Act (dated 7 January 1915) were highly relevant, which was also in the area later covered by the Ebro River Board. Today, the establishment of the basin body model is contemplated in all countries as the ideal formula for water administration,[36] though it is not easy (far from it) to achieve this in all cases, since it requires a situation of 'hydro maturity' and knowledge of the demands of water management, which is not always sufficiently available.

Of course, the models have to evolve over time, and the composition, internal organization and functions of the river boards today probably have little in common with the model as originally conceived in the third decade of the 20th century and with practices used over the following years. In particular, the growing concern of ordinary citizens, and not only traditional users, about water issues can be seen everywhere, not just in Spain. This makes it essential to involve them in the different organs of the river boards, to the point that some

of these authorities are inconceivable without that participation, whose percentage and forms of expression could be the subject of a debate.

But this concern felt by citizens is no more than a part of the generalized concern that they feel about the state of the environment, and it is probably for this reason that the right to information about environmental matters[37] is specifically dealt with in Act 29/1985 concerning water resources, after the reform effected under Act 46/1999, article 13-b.

In the same way, it seems appropriate to offer a place, even though in practice it may only be a token place, to the representatives of the world of science and technology, so that there might be a permanent link between water policy, which is ever more dependent on scientific aspects and advances, and the possibility of channelling those concerns directly into decision-making organs and of providing them with the necessary information.

Finally, the presence in the basin bodies of the new political entities created as a result of the 1978 SC is essential. These political entities are the CCAA, which make up the structure of the state, and whose frank, loyal co-operation with the central government within the basin bodies and, in general, in the exercise of all of the functions related to water, is the key to the success of water policy. It seems evident that there is still a lot to be done on this level, and the appropriate conclusions remain to be drawn from two undeniable facts: first, the permanent value of the river basin as the scene for the structuring of administrative competence in water matters; and secondly, the essential and primarily territorial consideration afforded to water policy, which is something much wider and more open than what might be imagined were they considered merely as water supply policies. This gives the CCAA a considerable potential for intervention, a potential which is *a priori* almost unlimited, since they have prime responsibility for spatial planning policy (cf. article 148.1.3 SC and the texts of the Statutes of Autonomy).

It must also be noted that the traditional configuration of the river boards today suffers an important 'complaint' caused by the creation of the publicly owned state companies devoted to the construction and/or exploitation of hydro works which, as has already been mentioned, are carrying out the main function for which the river boards were conceived: the execution of hydro works. This is certainly something of a paradox. Today we still do not have sufficient perspective to see the impact that the creation of these state companies has had on the river boards, but the impact is obvious, and furthermore, it will grow in the future if the state companies are as successful as their promoters expect and hope. It will not be long before a complete assessment of this impact can be made from such diverse viewpoints as staffing policy, river board budgets and, within these, the income derived from the traditional economic–financial system. Within this field, it will also be necessary to measure the validity of the permanence of the 'participation' criteria of users and bodies within what could eventually become almost exclusively the management of the hydraulic public domain, in areas in which participatory mechanisms have traditionally been less functional and where there is greater need for bureaucratic management (since the practical system for concessions, authorizations or the application of sanctions must be run under non-participatory criteria in order to be efficient, and furthermore, they must be in line with the suppositions of the legal framework applicable to these questions). Only the drafting of

hydrological plans and the periodic revision of those plans would continue to justify the traditional confederate model.

It is, in any case, necessary to acknowledge that the road that has been travelled over the past 75 years has been significant. On the one hand, we have seen the consolidation of the organizations which, fundamentally, were created as a grouping of private interests, and which later took on board the management of the hydraulic public domain and on the other hand, have borne, and have survived and kept working through, the tremendous impact of the new territorial organization of the state as a result of the 1978 SC.

To concentrate on this latter question, it should be noted that the distribution of competence between the central and autonomous governments is anything but clear in the text of the SC and of the Statutes of Autonomy, which were drafted, obviously, in the light of the SC. Article 149.1.22 SC and the corresponding articles of the Statutes of Autonomy are open to different interpretations with different consequences as regards who is responsible for water management,[38] and it required no less than a decision by the Constitutional Court (sentence 227/1988, above all, and also sentences 161/1996 and 118/1998), in order to clarify the controversy, which was bitter at times, and this has subsequently allowed further regulatory progress.

With the aim of summarizing and establishing a final judgement on the question, the positive opinion and comments which have been made do not, however, prevent the author also from indicating the obvious need for the modernization and revaluation of these institutions that, to a large extent, do not enjoy today sufficient capacity in order to fulfil the demanding requirements imposed on them by the legal framework within which they work almost alone in the management of water resources. There is no doubt that the budget available to the river boards and their staffing levels are extremely limited, and there have been numerous examples of this, which have led to intense criticism when, periodically, it turns out to be impossible to fulfil some of their functions, or if they are insufficiently fulfilled. In terms of the mere activity of vigilance, for example, the responsibility of the Civil Guard is probably much more effective than what the river boards can (or cannot) do,[39] given their paucity of resources.

In the same way, the composition of the staff of the river boards should be reoriented from the point of view of their specific technical capacities; the creation of the state companies has, to a great extent, eliminated the need for technical services devoted to the planning, direction and management of hydro works. From another angle, this implies a revaluation of the administration of the hydraulic public domain that today is more the task of biologists, hydrogeologists, chemists and geographers, than of civil engineers, at least in their traditional guise. To go further in this direction would be the best way to ensure the permanence, due to their efficiency, of the role of the river boards. Not to follow the path that is being marked out by the times we live in would be to set the date for the end of their functions, or, even worse, for them to languish on inefficiently.

But this is not all there is to be said about the organization of water management. It is especially necessary to remember the users' associations. These are another of the significant contributions of Spanish water law, which were first called irrigation associations, a name which was changed under the Water Act 29/1985 to users' associations, though the irrigation associations are still their forebears. The conception of these associations is very appropriate to

their potential and real functionality. Thus, the decision to structure collaboration in the field of the management of the domain of water and of hypothetically contradictory interests around these public law corporations (which therefore hold public powers) is completely appropriate. It can only be hoped that in those cases where users' associations should have been created but have not (especially in the case of underground water), that the hydro administration should encourage or demand their creation, and that furthermore, they should be given the powers and responsibilities necessary for the best possible exercise of their important functions. There is no doubt that the users' associations should be the hydro administration's closest collaborator, precisely because they are also an administration, and that means that they should also collaborate in furthering the general public interest through their original role as representatives and defenders of the interests of private, individual users.

Economic Aspects, Prices and Taxes for Water Use

The author would like to close this paper by looking at an aspect which is increasingly important in the field of water law, and will literally be decisive in the future, and that is the economic aspect. Both in Spain and in other countries, recent years have seen many studies of the economic aspects of water policy (or environmental policy in general) with the role of economic instruments standing out (prices and charges) as means to influence the behaviour of consumers and, therefore, of achieving an impact on the conservation of the environment by decisively 'penalizing' behaviour patterns which might go against this objective. This debate should never be forgotten when the cold data of a legal system, such as the Spanish system, are being examined, since it has still not adapted to the new directions that the debate on the question seems largely to be taking.

The author mentioned a few pages ago that an economic and financial system had been created around hydro works. This system was juridically weak in its first texts, but has today been substantially structured under article 106 of Act 29/1985 (in the text contained in Act 46/1999) and its subsidiary regulations. This does not in any way mean that all of the economic and financial system applicable to water is contained in this legal text, nor even in the Water Act. This dispersion of the regulations carries with it certain problems relating to the exact comprehension of the existing system, though it is due to understandable principles, among them the very structure of the state's territorial organization. In any case, this makes it all the more necessary, if possible, to treat systematically this complex subject, but which must be summarized, as always, by making reference to the basic questions, and briefly noting the problems and lines of evolution.

Starting with an examination of the aforementioned legal precept, article 106 of Act 29/1985 and its subsidiary regulations refer to two charges,[40] a regulation charge and water rates, that make possible the periodic payment by users of the amounts that the state administration has allotted to the construction of reservoirs for the regulation of the water supply (regulation charge) and other infrastructure (water rates).[41] The juridical system applicable to these seems to have become very finely tuned over time, with the amounts payable being shared out among the different users of the infrastructure for which they are applied in proportion to consumption and specific uses. In any case, this juridical system cannot be seen (despite external appearances) as a system for

the recuperation of the entire investment made by the state, because some of this infrastructure is subsidized, and some costs are assumed by the state. This is based on the fact that the infrastructure concerned also fulfils certain functions which are in the public interest, such as defence against flooding.

The aforementioned charges are in many cases difficult to manage, and sometimes provoke the reluctance of users to pay them, giving rise to many court appeals. This can be seen from the jurisprudence of the Contentious Administrative Division of the Supreme Court, where many of the disputes end. Also, as published statistics show, the income potential is relatively low in comparison with the investment made by the state, except in certain specific cases.[42]

The Water Act also regulates an environmental charge (called a dumping charge in the 1985 text, and a dumping control charge in Act 46/1999, with significant differences between the two[43]) which in a way is related to other environmental charges (water treatment charges) which are regulated by the CCAA, with the objective of generating income in order to finance the construction and operation of water treatment and purification facilities. These are charges of a clearly ecological nature, depending on their configuration and the specific use of the proceeds for the purposes indicated. Some CCAA, such as Catalonia (which has a hydro basin of its own, let it not be forgotten), have a more complex system of charges, under which not only is the cost of water treatment infrastructure taken into account, but also that of supply infrastructure. This should probably serve as a guideline to be followed by the rest of Spanish law in order to fulfil the principles of article 9 of Directive 2000/60 on the recuperation of the costs of public investment in the supply of water for the different beneficiaries. This must include all of the necessary nuances of the situation, and mention shall be made of this in more detail further on.

In any case, it can be seen once again how the creation of the state companies for the construction and/or operation of hydro works has laid down a line of rigorous separation as regards this economic and financial system for the works that they construct and finance. Since they are state companies (incorporated, in reality, as trading companies with limited liability), they operate under private law and their relationship with the users who benefit from their services is established under the agreements which are signed between both parties, which stipulate the obligation of the users to pay the companies certain amounts which cover the percentage of the cost of the works that are to be paid by the beneficiaries (usually 50%) and which have the status of private prices (the agreements call them 'tariffs'). The economic and financial system of the Water Act, then, is not and cannot be applied. There is instead a relationship which is purely juridical and private which is based on the assumption of 50% of the cost of the infrastructure by the state companies. As has been seen on so many occasions in the evolution of water law as described in this paper, here too there are nuances and exceptions with regard to a situation which could be thought to have been consolidated from the point of view of juridical evolution.

The evolution of the economic and financial system in the future will be marked, above all, by the real impact of Community Directive 2000/60 on internal law, and the recuperation of public costs that the supply of water to private consumers carries with it. In this matter, we must start from the basis of a clear declaration of the principle of recuperation contained in article 9, but which in reality is much more complex when the precept, which is none too

clear, is viewed in its entirety.[44] All of this allows us to think that the adequate justification by states of the motives for the exceptional nature of the cost recuperation would allow the rule to be evaded. But the key question is, precisely, that the 'adequate justification' be considered sufficient by the European Union. Reference has been made on several occasions to the close vigilance that the Union maintains over the content of European directives, and the letter and spirit of the actions of the community organs are oriented much more towards the conservation of water resources than otherwise. This means that in order to obtain special treatment, it is not enough simply to resort to the classic claim of Spain's exceptional climate (which is in fact an exceptional climate in only part of Spain), but it must be demonstrated in detail, case by case, just what that exception consists of, and to what extent, quantitatively. To think up other ways of avoiding fulfilment of the principle of passing on the costs, when the principle is fully applicable,[45] may be a pleasant pastime, but it is also to shut one's eyes to the direction in which, without a shadow of a doubt, the evolution of European environmental policy is heading.

Conclusions

Even though all that has been explained in previous sections is, due to its brevity, at the same time an explanation and a conclusion, there is, nevertheless, a need to underline a fundamental idea that is, for the author, the distinctive feature of Spanish water law today, and that is its lack of definition.

An examination of the historical evolution of Spanish water law up to the present day shows that we are clearly at a moment of transition; transition from a juridical structure which is coherent, closed and well constructed, but some of whose institutions are obviously obsolete, and we can see the first indication of a need to move towards new norms, some of which are already with us. It is the end of an era, of a way of tackling the problems of water, but the new era has not yet completely dawned, and therefore we do not fully know how to deal with it juridically.

And, as in all transition periods, it is difficult to say which is now stronger, the weight of tradition, or the wind of change. Some social and economic stakeholders are clearly oriented in the new direction that, to them, is perfectly clear, whereas others only find security in clinging on to a juridical structure that they think is changing too quickly, especially if we remember that the Water Act of 1879 was in force for a whole century. The state's hydro administration, as such, suffers terribly from the changing times, and is moving quickly in a process of slimming down which, unlike other processes of this type, will not necessarily prove to be beneficial or positive.

As at all moments of indefinition, nothing is homogeneous or territorial, either socially or in terms of time. What is seen in some territories as an inescapable necessity is seen in others as a millstone from the past. What for some social groups is a witness to their very existence, to their identity, the only guarantee of a reasonably secure economic future, for others is an unjustifiable load that leads to immobilism and inefficiency. The road that some CCAA travelled years ago with foresight, others are only just glimpsing today.

But a few force-ideas have begun to become accepted by all: the primordial value of the environment, of the conservation of resources, of demand management, of the use of economic means for the management of a scarce resource, of

training in new technologies, of the need to increase investment in research and development into water … Hydro works have come down a few rungs from the top of the altar where they have always been revered. They have not been completely banished either from thought or action, and they probably never should be, but there is no doubt that today very few people think that a mere provision of funds for hydro works will solve the water problems of this country. Or any other country.

These are very exciting times. And from the point of view of institutional change, they are genuinely hopeful for those involved. The journey that has been travelled by Spanish society in this field in the 15 years since the Water Act 1985 came into force has been simply spectacular. It is to be hoped, nevertheless, that the transition, like Spain's political transition, will be peaceful, and that the necessary changes can be achieved without throwing overboard all that, in the final analysis, seems most important to a lawyer when the historic journey comes to an end. And that, in Spain, is the value of the law, of the Water Act. The tradition of respect for the law, the value that is attached to the fact that we possess a Water Act that is accepted as a kind of structured, systematic code, which offers answers to the numerous situations and problems that might arise and around which everyone accepts that the inevitable conflicting interests must be resolved.

This respect for the law can only be perfectly understood when we go beyond the limits we sometimes see when we contemplate the Pyrenees or the Atlantic Ocean, and we look further, towards Europe or Latin America. It is not so common in other countries to find the existence of such an old Water Act as Spain's, an Act which may be questioned or debated, but which, above all, is accepted within the logic of social dialectics. On the contrary, it could be said that this is an atypical situation, since in most cases, where a Water Act exists, it is usually an ancient element, a quotable reference, but not effectively alive, and much less so is it respected by society and applied by the administration.

Respect for the law as such and, at the same time, the possibility of changing that law in order to adapt it to new needs and, once changed, to be respected just as was the previous law is a sign of distinction which must be nurtured and allowed to grow. It is the true guarantee that, in the future, we shall be able to gather together once more, and once again debate the evolution of Spanish water law.

Notes

1. The difficulty with regard to Spain lies in the fact that it has been subject to a series of relatively weighty regulations while at the same time undergoing evolution in many different aspects such as basin organization, agricultural reform and development, hydroelectric exploitations, water quality, hydro schemes and hydrological planning, etc. All this provides a wealth of legal discussion without peer, as far as is known, in the field of comparative law.
2. With mention of the 1866–79 Water Act, this is obviously referring to two different regulatory measures dating from two distinct years. The first is the 1866 Act of 3 August. The second, the 1879 Act of 13 June, was a continuation of the former, albeit without the references to maritime waters which were to be incorporated into the Ports Act of 1880. This Act was formally in force until its replacement by Act 29/1985 of 2 August, although the disorders that various regulations caused to the Act ended up by turning it, in the last years of its life, into a virtual living fossil.
3. Strangely enough, this date was also the date of the coming into force of Act 29/1985 of 2 August, concerning water resources.

4. Worthy of note is Directive 91/271/EEC of 21 May, with regard to the treatment of urban waste water.
5. Here the reference directive is General Directive 85/337, concerning hydro schemes. Later modified by Directive 97/11 and now incorporated into Spanish law.
6. This decision should be seen as a reaction against certain earlier normative decisions (the 1969 Coastlines Act) which involved transferring to private ownership—through recognition of certain specific situations—certain zones in the maritime–terrestrial public domain. Act 22/1988 of 28 July, concerning coastlines, was to be, in the ordinary normative field, the last post-constitutional reflection of reaction against this state of affairs, a reaction ratified by Constitutional Tribunal sentence 149/1991.
7. Thus, article 2 a) stated that "continental waters, both surface and subterranean, regardless of their renovation period" belonged to the state hydraulic public domain. Still to be regulated was the legal classification of non-renewable subterranean waters, classified by some as fossil waters: in principle one would have to mention the possibility of privatizing these waters, quite apart from the difficult question of how this fossil nature would be applied.
8. It should be pointed out that we have here one of the most important sentences in the history of the Constitutional Tribunal. This sentence would without any doubt be included in any hypothetical 'anthology' of sentences handed down by this tribunal that might be drawn up. Its significance for many matters, not only the public domain but also countless aspects of the theory of sources, the division of decision-making powers between the state and the CCAA, and the environment, etc., is beyond all doubt and also extremely positive.
9. However, the reform of Act 46/1999 rightly insisted that these ponds be subject to environmental legislation.
10. Cf. temporary provision 4 as against temporary provision 3.
11. Reference is being made here to subsidies granted for consuming less water than one has a right to use, arising from co-ordinated actions between the autonomous community of Castilla la Mancha and the Guadiana Hydrological Board. This especially applies to the Mancha Occidental aquifer (the former aquifer number 23).
12. And this, in the current Penal Code, has resulted in the creation of an offence in article 325 which, among other things, may be applied to drainage of waste water into surface or ground waters, as well as the action of drawing off water which may seriously upset the balance of natural systems.
13. Cf. the Act by Royal Decree 9/2000 of 6 October, modifying Royal Decree 1302/1986 of 28 June, concerning assessment of environmental impact, in which there is a marked increase of interventions regarding water resources requiring environmental impact evaluation.
14. Initiated in the cases of Catalonia and Madrid before the passing of the directive and even before Act 29/1985. Subsequently, many CCAA drew up their own or modified the original legislation, although in some cases autonomous legislation on the subject in relevant areas (Andalusia, Castilla-León and Castilla la Mancha) is still lacking or has not yet been put into force. The latest Acts passed in 2000 affect the CCAA of Murcia and La Rioja.
15. Cf. Royal Decree 261/1996 of 16 February, concerning protection of water against contamination produced by nitrates from agricultural sources, originating from a European norm (Directive 91/676), which needs to be applied by the CCAA.
16. Cf. articles 6, 54 and 88 of Act 29/1985. The first section of article 88 was annulled by Constitutional Tribunal sentence 229/1988, for being in breach of the territorial planning authority granted to the CCAA.
17. It is also worth remembering the link between hydrological planning and basin bodies when in 1926 the various river boards were set up, since their main function was the formation of a co-ordinated and methodical general exploitation plan (article 6 B of the Royal Decree of 5 March 1926, under which the boards were set up). Incidentally, it is interesting how the recent Community directive includes a certain link between hydro planning at a basin level, and the proposed organization of the administration with basins being the territorial base.
18. Part of the influence in the progressive change of orientation of the plans is due to what was called the 1933 National Plan for Hydro Works, which was not actually approved, and in which two fundamental aspects should be seen: first, its national nature with regard to references to the regulations and setting up the boards at a territorial basin level; and secondly, the link between planning and the carrying out of hydro works and a meeting of objectives and national economic policies, basically agricultural policies. It should be remembered that this plan was the origin of, and describes with a fair amount of detail, the Tagus–Segura transfer which was to be effected 40 years later.

19. Which, as can easily be seen, is not the same as the provision of transfers between different hydro basins.
20. The plan was never approved, which does not detract from its importance. It was drawn up by Manuel Lorenzo Pardo, an engineer who made his name with the Upper Aragon Irrigation Project and in the Ebro River Board.
21. Although of little importance, these actions were significant (supplying Torrelavega or Bilbao, for example) and at any event they occurred before the passing of Act 29/1985, of 2 August, concerning water resources.
22. Apart from the reference to the Tagus–Segura transfer, which appears in the following footnote, it is worth remembering here the provision for what was known as the Tagus–Guadiana transfer (Royal Decree 8/1995, of 4 August, under which urgent measures were adopted to improve the exploitation of the Tagus–Segura transfer), the Ebro–Catalonia inland basins transfer (Act 18/1981, of 1 July, concerning water resources in Tarragona), the Guadiaro–Guadalete transfer (Act 17/1995, of 1 June, concerning the transfer of water from the Guadiaro basin to the Guadalete basin) and the Guadalquivir–Sur transfer (Act 55/1999, of 29 December, concerning fiscal, administrative and social measures).
23. This is regulated by two Acts, the second of which governs the reduction mentioned in the text. See Act 21/1971, of 19 June, concerning the joint Tagus–Segura exploitation and Act 52/1980, of 16 October, concerning the economic framework governing the exploitation of the Tagus–Segura aqueduct. The National Hydrological Plan Draft Bill contains significant regulations concerning this transfer.
24. Approval by the government which governs intercommunity and intracommunity basin plans alike. The Constitutional Tribunal rejected the claim that this was unconstitutional and violated the decision-making authority of the CCAA by stating that this approval by the government was 'co-ordination'.
25. Registrable in the Water Register (article 71.2 of the Water Act) and the Property Register as any real property right. (For the latter register, see article 64 together with 31 of the regulations for the execution of the Mortgages Act approved by Decree on 14 February 1947).
26. The transmission of concessions is regulated in article 61 of Act 29/1985, and this regulation should be clearly distinguished from the transmission of usage rights by means of a contract of transfer of water use rights (article 61-b).
27. Cf. article 71.2 of the Water Act. The competition process may be waived in the case of supplying inhabited areas. In the same way, and if the National Hydrological Plan is not opposed, this procedure may be eliminated in the renewal of supply and irrigation concessions.
28. Cf. article 57.4, although it should be noted that the decision will be motivated and adopted in terms of criteria of the public interest. From other sections of the Act (cf. articles 71 and 58.4) one may deduce a certain vinculation of the authorities by the criteria of the material content of the Act.
29. A maximum of 75 years. Cf. article 57.4 of Act 29/1985.
30. What is usually known as the principle of speciality, in that the concession is granted for certain uses, with a specific flow and under very precise conditions.
31. Co-operation will take place to enclose the administrative discretionary authority area, for instance, when it is necessary that the hydro-forestry correction works are of general interest when their territorial area "affects more than one Autonomous Community" and likewise for the case of supply, making the water drinkable or desalination [cf. article 44.1 c) and d) of Act 29/1985]. Nevertheless, a little further on subtle distinctions are introduced to the aforementioned when works are also allowed to be declared of general interest "when because of their magnitude or economic cost they bear a strategic relationship to the integral management of the hydrographical basin" [article 44.3a)] in spite of non-compliance with the first territorial condition demanded.
32. Cf. Constitutional Tribunal sentence 73/2000 of 14 March, which resolves the question of the non-constitutional nature claim 2853/1998 presented by the contentious administrative section of the High Court with regard to the possible non-constitutional nature of Navarrese Act 9/1996 of 17 June, concerning Natural Protected Spaces of Navarre, inasmuch as the Itoiz reservoir is affected (cf. the supplement to the *Official State Gazette*, number 90 of 14 April 2000).
33. The following is a transcription of the relevant part of the statement of purpose: In this sense, the experience of extreme drought suffered by our country in the first half of the 1990s demands a search for alternative solutions which, notwithstanding the better distribution of the available resources through planning mechanisms, allow the production of water through the use of new technologies, embodying in law the juridical system applicable to the procedures for desalination

or reuse, and increasing water use efficiency, for which the greater flexibility of the current concessions system is necessary, through the introduction of the new contract for the assignment of water use rights, which will allow the social optimization of this limited resource, and, lastly, the introduction of water-saving policies, either by establishing the general obligation to measure water consumption by means of approved metering systems or by the establishment by the administration of reference levels for the consumption of irrigation water.

34. This has led the government of the autonomous community of Aragon to take this regulation before the Constitutional Court, in the belief that it affects the concept of public property as enshrined in the SC (article 132 SC).
35. The authorities were created under the Decree of 5 March 1926. The Syndicated Ebro River Board (as it was originally known) was created on the same date, and during the 1920s, the Segura, Duero, Guadalquivir and Western Pyrenees river boards were created, in that order.
36. The latest Community directive on water (Directive 2000/60/EEC) takes this decision on the administration of water by basin (including supranational basins) as a key principle of its content.
37. Regulated under Act 38/1995, dated 12 December 1995, which in turn must be linked to a European directive.
38. Suffice to say that the SC and the Statutes concentrate on the concept of a 'river' that flows, whether totally or otherwise, through the territory of an autonomous community as the determining criterion for the distribution of competence. The Water Act juxtaposed, however, the concept of hydro basin which it even defined (article 14) and the Constitutional Court established in sentence 227/1988 the logical reasoning from the legal point of view of the option of Act 29/1985.
39. Cf. article 12.1.B), e) of Act 2/1986, dated 13 March 1986, on the State Security Forces.
40. The juridical nature of these charges is a mixture of rate and a special contribution. The former because the cost of the vigilance and management of works by the administration is paid for, and the latter because it is a repayment of amounts paid in advance by the state which afford a special benefit to the users.
41. This means that all that is being referred to here are public hydro works. Private works are financed by the proprietors, even though this may involve some state aid, and these are not subject to this system, although they may have to repay the amount advanced by the state, if appropriate.
42. The income potential of the Tagus–Segura transfer usually stands out. It also seems evident that in some river boards (of the Ebro, for example) there is a greater degree of fulfilment of these payment obligations than in others. The White Paper on Water (1998) gives many examples.
43. The dumping control charge requires subsidiary regulations which still do not exist, and so its entry into force (as foreseen under Act 46/1999) on 1 January 2001 seems at the time of writing (early March 2001) somewhat questionable. In fact, it is even doubtful whether the previous dumping charge is currently in force (see, for example, the single transitory provision of Act 46/1999), which, furthermore, can hardly have been substituted, as has been said before, by the new dumping control charge. The situation is not, in terms of the applicable regulations, at all clear, and therefore could give rise to different problems with the charges during the current financial year.
44. Thus, without infringing their obligations under the directive, states may evade the principle of the recuperation of costs as a function of the social, environmental and economic effects "provided that this does not compromise the aims or the achievement of the objectives of this Directive". The justification of the exception must appear in the hydrological basin plans.
45. The principle of the recuperation of costs must be guaranteed no later than 2010.