On the Interpretation of Law and Legal Gaps: A Comparative Overview of the Delicate Trade-Off Between Legal Rules and Judicial Creativity in Louisiana and Italy

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I. THE ITALIAN APPROACH TO LEGAL INTERPRETATION IN ART. 12 OF THE *DISPOSITIONS ON LAW IN GENERAL* (*DISPOSIZIONI SULLA LEGGE IN GENERALE*)

In this writer's opinion, how law has to be interpreted and how gaps have to be filled is an important clue in understanding legal systems. Louisiana and Italy have been chosen as case studies because it would seem their legislatures grant those who interpret the law quite a different amount of space for discretion in filling possible gaps.[1]

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1. The persons involved in this task may belong to different groups: courts, academics, lawyers and those who have to interpret law for professional purposes, as well as common citizens. In Italian, one word exists to gather them into one group—'interprete'—but English

The Italian legal system at art. 12 of the *Dispositions on Law in General* (*Disposizioni sulla legge in generale*) gives detailed directions to courts in order to decide cases either as to the ways law has to be interpreted or as to the ways gaps have to be filled. Art. 4 of the Louisiana civil code provides that "when no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages." On the basis of these texts, therefore, there would be a sharp difference between the approaches to the topic of gaps followed by the legislature in the two legal systems: in Louisiana (at first sight, at least) legal criteria are singled out which may enable courts to go beyond the code, but the Italian legislature seems to foreclose this possibility to courts.

Let's start with the Italian law, by recalling the contents of art. 12.[2] The provision is made up of two parts which delve into distinct issues. In the first paragraph, it provides judges with compelling criteria for the interpretation of laws. The second paragraph deals with the absence of any express provision, and directions are given to judges on how to fill such gaps in the law according to guidelines provided by law.

The issues posed by the text of art. 12 in the first paragraph include how to capture the meaning of the words; what is meant by (and how might be ascertained) the intention of the legislature; what is the relationship between the literal interpretation and the intention of the legislature. As to the second paragraph, they include the scope of analogy and the issues connected to it, such as the distinction between analogy and extensive interpretation and the meaning of 'exceptional laws'.

As to the meaning of words, those used at the time of the enforcement of the provision should be chosen, and not those at the time

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does not seem to have a single word to refer to the above mentioned categories. This explains why in the text , recourse is made to periphrasis which may seem (or, worse, are) rather awkward.

2. Art. 12 provides:

> nell'applicare la legge non si può ad essa attribuire altro senso che quello fatto palese dal significato proprio delle parole, secondo la connessione di esse, e dall'intenzione del legislatore. Se una controversia non può essere decisa con una precisa disposizione, si ha riguardo alle disposizioni che regolano casi simili o materie analoghe; se il caso rimane ancora dubbio, si decide secondo i principi generali dell'ordinamento giuridico dello Stato' [In the application of law, attention has to be paid at the same time to the meaning of the single words, to the overall text, and to the legislature's intention. If a case cannot be adjudicated on the basis of a specific provision, regard has to be paid to provisions ruling similar cases or matters; if the solution to the case is still dubious, this latter has to be adjudicated according to the principles of legal order of the state].

of interpretation should be chosen. The meaning of the words is not the 'terminus' of the activity of interpretation, given that that the intention of the legislature has to be considered as well. The crucial role of this intention[3] in the interpretative process suggests the postponement of in-depth analysis to par. 2.

Analogy is the device used by the legislature to fill legal gaps. The use of analogy is governed by arts. 13 and 14 of *Disposizioni sulla legge in generale*. It is subject to three requirements: the silence of the legislature, a gap in the written law (resulting in a lack of a legal regulation governing the case to be adjudicated), and the unexceptional nature of the provision to be extended by analogy to fill the gap (as provided in above-quoted art. 14).

Two kinds of analogy are singled out in art. 12. The first operates when the gap may be filled by provisions ruling similar cases or subjects ('analogia legis'). When such provisions cannot be found the court has to adjudicate by having regard to the 'general principles of the legal order of the state' ('analogia iuris'). This expression replaced the one in art. 3 of the civil code of 1865, providing that, as *extrema ratio* in order to fill gaps in law, reference has to be made to general legal principles. This last expression made reference to something which may even be found outside the Italian legal order and was therefore much wider than present art. 12.

The different approach followed in art. 12 reveals the clear intention of closing the boundaries of the legal order, barring the possibility of penetration from rules and principles of foreign law.[4]

Analogy is of the highest importance in two cases: first, when the court faces issues which the legislature ignored because they were unknown at the time of codification/legislation and, second, when the issues, despite being covered by provisions, show a new physiognomy

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3. E.g., in order to choose the meaning of a provision among several—all plausible—interpretations.

4. The claim of an absolute foreclosure of the possibility for the Italian jurist to draw from outside solutions to interpretive issues concerning the Italian law is challenged by P.G. Monateri-A. Somma, *'Alien in Rome'. L'uso del diritto comparato come interpretazione analogica ex art.12 preleggi*, (1999) Foro it., V, cc.47 ff., who deem that recourse to foreign law would be possible as to analogia 'legis'; they base their opinion on a literal interpretation of the second paragraph of art. 12, according to which the reference to 'the legal order of the state' would concern only general principles, affecting therefore only the recourse to 'analogia juris'. In these writers' opinion, foreign law identified with the help of comparative law is devoted to cope with and solve issues concerning the interpretation of the Italian law. Despite the originality of the solution proposed by these authors, this author thinks that it cannot be accepted in light of the criterion of the intention of the legislature (this statement will be clearer to the reader if linked with the remarks developed under par. 2).

due to socio-economic changes.[5] In these two cases, the silence of the legislature cannot be interpreted as a deliberate technique to regulate a case or a given set of cases (i.e., it cannot be taken as a decision not *to apply a specific rule to such cases*).

Through analogy, courts may introduce a new legal rule into the legal system but not a new value, it being possible for them only to re-define the ambit of values outlined by the system of legal rules in force.[6]

Broad interpretation of law, therefore, is different from analogy: though the former jurists find the meaning of a provision by going beyond its letter, analogy requires a vacuum, the absence of a legal rule which has to be filled by those who have the task of applying the rule. While broad interpretation stresses a flaw in the wording of the text, analogy emphasizes the deficiency of the legislature as a 'regulator', i.e., as an institution creating legal rules.[7]

The extent to which Italian courts did or did not[8] keep themselves within the boundaries of art. 12 second paragraph and art. 14 will be assessed with reference to cases drawn from the area of personal injury damages in tort[9] under the heading of non-pecuniary damage.[10]

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5. As in the case of non-pecuniary damage: see *infra*.

6. This statement underlies a really thorny issue—that of discretion of those who are involved in the activity of interpretation of the law: see, for example, the assumptions made by C.M. Bianca, *infra* note 9.

7. This distinction involves the application of art. 14 of *Disposizioni sulla legge in generale*, which bars recourse to analogy in the case of 'exceptional laws', but does not hinder a broad interpretation of such laws.

8. The overcoming of the above-mentioned boundaries may occur through overt or covert acknowledgement (this latter case may occur when assuming respect for art. 12, while at same time, in practice, not keeping to it), or simply by disregarding the restraints of art. 12 second paragraph and art. 14, i.e., not dealing with them (this seems to be the approach followed in the issue of the recovery of non-pecuniary damages).

9. Because of the comparative approach underlying this survey, this writer will not assess the merit of the solutions proposed by courts, trying to look at them simply from the viewpoint of the outsider who is interested in knowing laws different from his own and the qualifications and taxonomies used by scholars and courts of the system analysed, not delving into their inherent consistency or into interpretive issues aimed at the enforcement of laws: this distinction is clearly drawn by T. Ascarelli, *Prefazione*, *Studi di diritto comparato e in tema di interpretazione*, Giuffrè, 1952, IX-X and, previously, E. Betti, *Teoria generale della interpretazione*, Giuffré, 1955, who distinguishes the '*hermeneutica iuris*' of the legal historian from the '*interpretazione in funzione normativa o direttiva della condotta*' [interpretation aimed at the enforcement of law] driving the activity of the jurist delving into the solution of practical issues. According to Tullio Ascarelli, the jurist dealing with the task of interpretation would have a proactive role; as provisions do not speak alone, the interpreter 'creates' law *within* the framework of the system (what that author expresses through the concept of 'incessancy of the legal order', consisting in the specific identity of the legal system built on choices and values which are typical of it). This identity would trigger a dialectic relationship between the legal system and jurists that would affect the evolution and development of the system in a way which is consistent with its values. A different point of view seems to be expressed by C.M. Bianca, *Interpretazione e fedeltà*

II. THE ISSUE OF GAPS AND THE NORMATIVE TREATMENT OF NON-PECUNIARY DAMAGE

This case is significant as to the patterns followed by courts attempting to bypass the limits set by art. 2059 of the civil code concerning the award non-pecuniary damages. Art. 2059 declares that non-pecuniary damage is only recoverable in those cases provided by statute (*legge*).

This instance is also significant in that it offers an insight into the typical methodology of Italian courts,[11] because it sheds light on the ways courts manage interpretative questions concerning a specific provision and, as a result, reshapes the whole 'building' of tort law.[12] In fact, they deal with the specific issue of the requirements for the recoverability of non-pecuniary damage, framing it, on the one hand, within the wider area of damage to the person and, on the other hand, remolding the overall

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alla norma, in *Scritti in onore di Salvatore Pugliatti*, I, 1, 147-51, Giuffré, 1978, who writes that among the many possible meanings of a rule, 'the rule is vested with the meaning prevailing in the real world underlying its enforcement, and this is its real meaning . . . . The ongoing passage from text to the actual norm occurs through the mediation of interpretation'. *Id.* at 149 (this author's translation). That author continues remarking that the jurist has not to be bound by the original or the historical meaning of the rule to be interpreted: this approach—ignoring the real substance and the operational value of the legal rule at stake—would end in a misleading interpretation. What one may expect from these premises is, however, that the identification of the meaning of legal rules should be made having regard to something, beyond the realm of written law, which has not a merely subjective substance. Yet, Bianca seems to admit an absolutely free approach on behalf of the jurist, who might even disregard the 'coscienza sociale' (expression approximately corresponding to the 'deeply embedded social beliefs'). He assumes that 'even when there is correspondence between legal rule and the set of deeply embedded social beliefs, the task of the one who is interpreting the law cannot be reduced to the finding of the provision fitting the case, if the former is outmoded in comparison with a more elevated system of values' (at 151, this writer's translation). Bianca's thought seems to give rise to a conundrum: how and where this more elevated system of values has to be found? The only possible answer would be that its repository would be . . . the same jurist who delved into the task of interpretation, who would be in this way relieved from the weight and the responsibility of grounding rationally the solution proposed, with the consequent risk of arbitrariness. This approach represents—and this is the reason for its assessment—an *interpretatio abrogans* of art. 12, because this latter clearly does not allow the jurist to decide discretionally on the criteria of interpretation of law!

10. Art. 2059 provides that '*il danno non patrimoniale deve essere risarcito solo nei casi determinati dalla legge*' [the non-pecuniary damage can be recovered only when provided by law].

11. Far from having the purpose of giving a complete survey of the issue of non-pecuniary damage which should involve accurate references to the courts' judgments as well as to doctrinal works written on the topic), this case is looked at as a litmus test to shed light on the activity of judges as 'system-builders', i.e., as actors who contribute to the incremental development of the norms enforced within the legal system.

12. The remarks devoted to the issue are deeply influenced by the extensive and accurate survey made by M. Barcellona, *Trattato della responsabilità civile*, Utet, 2011, 745-868.

rules and principles governing the conditions for the recoverability of damage in tort.[13]

The rethinking of the award of non-pecuniary damages was marked by two hurdles barring recognition of such damage: on the one hand, the above-quoted art. 2059 which admitted the award of non-pecuniary damages only in exceptional cases allowed by statute, such as that provided by art. 185 of the criminal code (which admits the recovery of non-pecuniary damages arising from a crime), and on the other hand, a deep culturally entrenched view that damage means a loss of an economic value (which tends of course to sweep away from the realm of tort law all those inherent personal interests which cannot be reduced to economic terms). According to this traditional view, damage to person was recoverable only when the victim could show it had pecuniary repercussions, either because of medical expenses incurred as the result of the wrongful conduct or because of the reduction of working capacity.

The first step leading to a new approach to the topic was made at the beginning of the 1980s. It was based on a joint reading of art. 2043[14] and 2059. In several judgments,[15] the Corte di cassazione acknowledged the recoverability of so called 'danno biologico' [biological damage], i.e., the damage to physical integrity and health under the heading of the tort law general provision of art. 2043, as a feature of damage significant *per se*, regardless of economic repercussions in the sphere of the damaged, at the same time construing art. 2059 as a provision whose scope is narrowed to the case of moral damage—meaning anguish, a condition of internal distress, and more generally the whole array of intimate feelings relating to temporary suffering. The avowal of biological damage does not challenge once and for all the view that damages are of an intrinsically economic nature; yet it entails a partial erosion of the 'pecuniary' understanding of damage, creating an area in which non pecuniary damage is generally recoverable and not subject to the bounds of art. 2059.[16]

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13. Tort law has been in the last forty years the area within the field of Italian private law most exposed to change, due to increasingly pressing requests—coming from society—for the acknowledgement of interests and rights other than those traditionally acknowledged and protected by the legal system.

14. Art. 2043 provides: '*Qualunque fatto doloso o colposo che cagiona ad altri un danno ingiusto obbliga colui che ha commesso il fatto a risarcire il danno*' [Any intentional or negligent act that causes an unjust damage to another obliges the person who has committed the act to pay damages].

15. Cass. 1983/2396; Cass. 1984/2422.

16. In one judgment—Cass. 1130/1985—the court made a *revirement* vis-à-vis the trend expressed in its judgments of 1983 and 1984 and reaffirmed on all fours the crucial role of the

The second step was made by emphasizing the immediate enforceability of constitutional provisions such as art. 32, which makes health a fundamental right of the individual. In a judgment of 1986,[17] the Corte Costituzionale stated that art. 2043, and notably its reference to the 'unjustness' of damage, has to be understood in the light of art. 32 of the Constitution.[18] According to this reading, biological damage would be relevant at law, because it involves the infringement of a value of constitutional rank. The infringement of this interest requires a reaction by the legal order through the award of damages.[19]

The third phase represented a further expansion of the ambit of damage to the person, giving rise to the recoverability of damages through the acknowledgement of 'danno esistenziale' [existential damage], meaning damage resulting from injury to those personal values that concern the relational sphere of the individual. This relational damage refers to damage suffered by persons close to the victim for injury to his or her life or physical integrity,[20] and this expansion was supported by invoking the protection of health at the constitutional level (and other than that protected under art. 32),[21] resulting in a possible specification of the broad concept of 'unjust damage' in art. 2043. This development marked a turning point for contemporary tort law, because its boundaries—and notably, its distinction from biological and moral damages—were not clearly fixed. Further rethinking about the meaning of damage to the person occurred in 2003, through two judgments often referred to as twins, because they were rendered on the same day.[22] The characteristic trend of the treatment of damage to person since the

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'economistic' approach to damage, stating that the notion of property of an individual includes economic assets as well as personal qualities, such as the psycho-physical integrity of a person.

17. Corte cost. 184/1986.

18. This trend pioneered by the Constitutional court—even though with some distinctions too fine to be considered important for the present discourse—is also followed from Cass. 357/1993.

19. The judgment of the constitutional court is also worth being mentioned for its distinction, within the normative notion of damage, between damage—'event' (this category encompasses the interests protected at law)—and damage—'consequence'. This distinction, not easy for a not Italian lawyer, aims at distinguishing between two different issues—notably that of interests relevant at law, falling under the notion of damage-event, and that of the measure of damage, dealt with under the taxonomy damage-consequence. This distinction has also consequences as to the respective ambits of application of arts. 2043 and 2059, because the 'bottlenecks' of this latter concerning the recovery of non-pecuniary damages may be—according to this distinction—understood as referring only to the level of 'damage-consequence', not affecting therefore the level of damage-event.

20. Cass. 645/1990.

21. Cass. 9009/2001.

22. Cass. 8827/2003; cass. 8828/2003. In the wake of these judgments, Corte Cost. 233/2003.

1980s—that of eroding the scope of application of art. 2059, carving out cases of recoverable damages to person (such as biological and existential damages)—was reversed. It was now considered that the whole matter of non-pecuniary damages fell under the realm of the art. 2059. The limits posed by this latter provision, read in the light of the constitution, are not applicable to personal values that have a constitutional status. Recovery has to be admitted in every instance of infringement of the inviolable rights of the person, because the protection afforded by the award of damages is considered fundamental. Art. 2059 is the *sedes materiae*, therefore, not only for moral, but also for biological and existential, damages.[23]

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23. An example of existential damage seems to be the so called '*danno da nascita indesiderata*' [damage for wrongful birth], as framed from Cass. 20 October 2012 n.16754 (an accurate commentary of the decision is made in a paper by D. La Rocca, '*Scelte di vita. Autonomia e responsabilità nelle decisioni intorno al bios*' presented at the Conference '*Chiamati al mondo. Vite nascenti e autodeterminazione procreativa*', Dipartimento dell' Università di Genova, May 24th 2013 [read by courtesy of the author]).

The case is about a medical failure in diagnosing a malformation. The claim against the doctor was not based on the fact that the malformation was the direct effect of his negligent performance (as in the case dealt with from cass. 10741/2009), but rather that the lack of a timely diagnosis barred the possibility of interrupting the pregnancy, ending in detrimental consequences for several persons (the parents of the child born with malformation and the child itself). The crucial and complicated issue at stake is whether the interest of a child born with a malformation can or cannot be protected in tort. There are two hurdles encountered by courts: on the one hand, the well-established construction of the Italian Act ruling abortion (L.194/1978, *Norme per la tutela sociale della maternità e sull'interruzione volontaria della gravidanza*); on the other, the difficulties as to the definition of the interest of the child whose infringement would be relevant at tort law.

As to the former aspect, the Act has always been understood as a set of rules protecting the interest of mothers to a conscious procreation. Interests other than those of mothers are not considered to be protected from this Act (a crucial role in this regard is played by art. 4 and 6, ruling cases of voluntary interruption of pregnancy, where an exclusive reference is made to situations only concerning mothers).

As to the latter, the reason for the traditional resistance of courts to acknowledge such a damage has to be found in the uncertainties concerning the right whose infringement is complained of by the child born with a malformation: is that the 'right not to be born', or not to be born if not sound'? Such a right has been opposed by courts on the basis of logic and normative arguments. Because the possibility of having rights is subject—according to art. 1 of the Italian civil code—to the fact of the birth, a right cannot be argued setting aside the birth; this would be the case of the above mentioned 'right not be born'.

The court overcame the conceptual hurdles, stressing the importance that what is claimed by the individual born with malformation, is the infringement of her right to health grounded on arts. 2, 3, and 32 of the Italian Constitution. According to judges, this birth infringed the right to physical and moral development, interests which have high value, grounded as they are on the Constitution.

The 2012 judgment is significant, as it involves some issues discussed in the first paragraph of this Article. The boundaries within which courts have to fulfil their duties; the silence of the law as to the possibility (and the extent) of protecting individuals born with malformation, and the necessity for judges to ground a solution which, even if it respects the principle of separation of powers, is undoubtedly innovative, because it shows a notable degree of creativity by the court.

The guidelines concerning judge-led development of the subject of non-pecuniary damages are summarized here, not in order to understand in depth the patterns of development of a vital (and confused) area of private law—tort law—but because they exemplify the way in which courts deal with an interpretive problem when—in spite of the absence of a real gap—courts feel the legal solution to an issue and the current interpretative trends flowing from it to be inadequate to effectively deal with that matter.

We may thus summarize the situation as follows: (a) a gap has been created by courts through a strict construction of art. 2059 and the judges managed by means of a broad interpretation of art. 2043, under whose cloak some instances of non-pecuniary damages have been recognized, thereafter returning those cases to the realm of the provision—art. 2059—from which they had been separated; (b) through a renewed interpretation of art. 2059, in light of the Constitution, the cases initially brought outside the scope of application of art. 2059 were again brought under its cloak. In none of the judgments considered was the 'problem' of non-pecuniary damages expressly considered by judges as a typical problem falling under arts. 12 and 14 of *Disposizioni della legge in generale*.

In the last stage, they claimed to follow an interpretation of art. 2059 which respected the Constitution, disguising the recourse to analogy, however, under the veil of a broad interpretation of a provision whose nature is exceptional, i.e., art. 14. The bar of art. 14 was thus avoided, and in fact art. 2059 has been 'rewritten' by courts.

III. SPECIFICALLY, THE CRITERION OF THE INTENTION OF THE LEGISLATURE FROM A HISTORICAL PERSPECTIVE

Art. 12 lays down the criteria for the interpretation of law. Thus it has to be used for the interpretation of other legal provisions, but in turn art. 12 has to be interpreted according to the same criteria. Among these, the criterion of the intention of the legislature is more important than the others.

This approach thus makes it necessary to shed light on the historical roots of art. 12.

According to a prominent Italian comparative law scholar—Gino Gorla[24]—art. 12's *rationale* may be reconstructed only by having regard to the change that occurred in the role played by courts in the nation state

24. *See* G. Gorla, *Diritto comparato e diritto comune europeo*, Giuffré, 1981, esp. 543-873: Gorla's analysis looks at the European context, with a focus on Italy.

in the eighteenth century. If till the eighteenth century the courts were vested, to a certain extent (see *infra*), with the power of making law, in the modern State they became 'law appliers'; they could not anymore *create* law. These assumptions were developed in a seminal essay in the late 1960s.[25]

The shift is embodied in a parallel semantic change in the word 'interpretation'. Gorla singles out two ways in which this word has been used throughout history. As seen above, in the usual meaning attached nowadays to this word, legal interpretation consists in the intellectual process aimed at understanding the meaning of a legal rule in order to make it applicable to a case. Interpretation, however, had an older meaning. It hinted at the possibility for courts and scholars to create a legal rule when the case was not decided from the law posited by the political power. When a law 'in puncto' posited by the political power could not be found, i.e., when the case to be adjudicated was not expressly provided by a law, then courts and scholars could exercise the role of law-makers, drawing their solution from the repository of *jus commune*.

They contributed to the *jus commune*, through the so called '*communis opinio*'. This '*communis opinio*' consisted in the understanding and the integration (in this latter, the properly creative character of this activity) of the legal sources of that time—Roman texts, customs, local statutes, etc.—in order to decide a specific legal issue. The force of this *communis opinio* depended on how much it was agreed upon.[26] This activity of *interpretatio* had to be implemented through (and was grounded on) the authority of reason, i.e., on arguments that were not legally binding, having only a merely persuasive force whose effects were restricted to the case addressed. 'Reason' did not refer to what was right/rational on a merely subjective footing; rather, it was understood on an objective ground, and it consisted in general legal principles and authoritative (in the sense of persuasive) judicial precedents. These principles were of a historical character, for their existence depended on a particular socio-historical context.

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25. *Id.*, *I precedenti storici dell'art.12 disposizioni preliminari del codice civile del 1942*, which has been republished in *Diritto comparato, cit.*, 450 ff.

26. *See* G. Gorla, La «communis opinio totius orbis» et la réception jurisprudentielle du droit au cours des XVI, XVII et XVIII siècles dans la «civil law» et la «common law», *in* M. Cappelletti (ed.), New Perspectives for a Common Law in Europe, Sithoff-Bruylant-Ketti-Cotta-Le Monnier, 1978, 45-71, who distinguished between a majority '*communis opinio*' and an uniform one, existing when the same solution is adopted from jurists of the diverse European nations. This latter has the status of legal source, i.e., it is considered 'binding'.

The older meaning of interpretation has its cultural roots in the work of the glossators on the *Corpus Juris*. A controversial issue was in fact whether or not they were vested with a power of *interpretatio*. An answer was that there was no *interpretatio generalis et necessaria* (which had binding effects and was reserved to the political power), but at most *generalis et probabilis* (only persuasive).[27] The *interpretatio* made by *doctores* therefore affected the solution of the case. Judges used to receive the opinions of *doctores* in their judgments.[28] The golden age of *doctores* corresponds to the thirteenth to fifteenth centuries. During this period, they had cultural hegemony over the courts; after that period, the 'creative' role of courts gained importance over that of the *doctores*.

With the creation of courts called 'grandi Tribunali' between the sixteenth and eighteenth centuries, the role of *doctores* started to decline in favour of the courts. The interpretation of the courts was not binding at a general level. It could be binding if the same solution had been adopted from several judgments. The reiteration of the same solution witnessed the existence of a *communis opinio* about the legal issue at stake.

The appearance of codifications based on the French model put an end to the law-making activity of courts. Under the French model, when judgments started to take the form of an 'act of will', in the sense that the decision had to be deduced from a legal text, the 'discursive' part of the judgment lost some weight, its role becoming subservient compared to the decision.

Art. 12 was the historical result of the eclipse of a supra-national tradition based on *jus commune*—which, as said above, in the European context dated back many centuries to the glossators—in favour of an opposite view which considers laws posited by the state as self-sufficient entities, making possible a wider number of solutions to the same issue and therefore causing uncertainty as to the law in regard to a specific issue. Gorla's historical survey of European legal history, with a particular focus on Italy, recalled seminal events and legal acts: the establishment of 'Grandi Tribunali', the Piedmontese Constitutions of 1723 and 1729, the Neapolitan Dispatch of 1774, the Este code of 1771, the establishment in France of a *tribunal de cassation* and of *référé*

27. *See* G. Gorla, I precedenti storici dell'art. 12, cit.

28. This experience gave rise to a specific style of judgments (G. Gorla, I motivi delle sentenze, *in* Diritto comparato, cit., 706 ff.). This method of reasoning was casuistic, and argumentative, in the sense that it consisted of learned opinions 'given to the parties in order to convince them of the rightness of solution by discussing . . . all the pros and cons as evidenced by the use of reason and authorities' (at 709).

legislative of 1790, art. 7 of the Austrian civil code, art. 15 of the code Albertino, and art. 3 of the preliminary title of the Italian civil code of 1865. All of these showed an unequivocal direction marked by the progressive dismissal of a system composed of multifarious sources and, correlatively, the progressive restraint of the possibility for scholars and courts to create law.

The heading 'interpretation of law' in art. 12 is misleading because it is too general. In fact, this provision, if correctly interpreted, does not seem to address the interpretation of law *tout court*, but the more specific question of the role of courts in the task of interpretation. Their freedom is *ex professo* restrained by criteria indicating that the function of courts is not that of law makers, but of law finders. Therefore, the real addressees of art. 12 are judges who are instructed in the way they must adjudicate cases.[29] The issues underlying art. 12, if correctly considered from a historical point of view, have therefore an intrinsically political nature, even if at first sight they may seem of a merely technical nature.

IV. A GLANCE AT THE JUDICIAL APPROACH TO THE INTERPRETATION OF LAW IN LOUISIANA: THE ISSUE OF GAPS IN LAW IN THE TEXTS OF ARTS. 21 AND 4 OF THE CIVIL CODE THROUGH THE WORK OF TWO SCHOLARS: FRANKLIN AND PALMER

It would seem that the legislatures of Louisiana and Italy approach the issue of legal gaps quite differently. In Louisiana there is more room for judicial discretion. Courts have to make recourse to equity, the essence of which is beyond positive law. Art. 4 of the Louisiana civil code now in force in fact states that 'when no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages'.

This provision confirms (with slight differences) the rule formerly provided by its predecessor—art. 21—which stated that 'in all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent'.[30]

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29. An argument in support of this conclusion may be found in the first part of art. 12, which makes clear reference to the 'application' of law and to the 'decision' of cases.

30. This rule is present in the versions of the civil codes of 1808, 1825, and 1870.

The main difference between the two texts is that in the provision now in force, no reference to natural law can be found as a ground of equity. Yet, in both, equity plays prima facie a key role.

Equity may be considered important, from a legal-historical point of view, in understanding which cultures and values—notably certainty[31] and flexibility—affected the development of the legal system.

Attention will be focused on two seminal doctrinal works and some judgments interpreting a codal provision in the field of property law in which equity has played a role.

In particular, the seminal work of two scholars, Mitchell Franklin and Vernon Palmer—the former writing about equity during the 1930s, the latter about the present day—makes it possible to conduct a diachronic survey of the concept of equity, assessing the possible evolutionary patterns of both its function and meanings. Franklin's article[32] is particularly important in order to realize that the issue of equity is not a merely theoretical one which may be assessed 'in vitro', but is intimately connected to the historical effectiveness of the Louisiana legal system, lying at the crossroads of social, political, economic and legal orders. Furthermore, Franklin portrays the operation of equity in Louisiana within the broader U.S. legal and political framework. Franklin sheds light on the aims the codifiers wanted to pursue through equity, though legal scholars after Franklin were not aware they were interpreting equity in a way which was different than the codifiers.

Its roots could be found in the French civil code's arts. 4[33] and 5,[34] whose scope and meaning have to be traced back to Portalis' work.

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31. Legal certainty is understood in the sense put forth in J.A. Lovett, *On the Principle of Legal Certainty in the Louisiana Civil Law Tradition from the Manifesto to the Great Repealing Act and Beyond*, 63 LA. L. REV. 1397, 1426 (2003) ('predictability of legal rules upon which persons can order their juridical acts'). The claim for legal certainty was felt to be a primary value from the very inception of Louisiana's legal system, yet further details have to be given as to the elements or situations which may jeopardize that predictability.

Legal certainty may be pursued by promoting the preservation of the integrity of the civilian imprint of the legal system, put at risk by the 'infiltration' of civil code provision from common law doctrines. In the past, the 1812 Constitution provided a good example on this ground, to the extent that it prohibited the Legislature from adopting 'any system or code of laws, by general reference to the said system or code of laws', and forced the courts to make reference to the statutory source upon which their judgment was based. The aim was to avoid or at least reduce the risk of an uncontrolled penetration of common law rules. The claim for legal certainty may be made on a different ground, which will be considered in the next paragraph.

32. M. Franklin, *Equity in Louisiana: The Role of Article 21*, 9 TUL. L. REV. 485 (1935).

33. Art. 4 reads: 'Le juge qui refusera de juger sous prétexte de silence, de la obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice' [The judge who shall refuse to pass judgements under the pretext of silence and obscurity, or insufficiency of the law, may be prosecuted as guilty of denial of justice].

Far from being merely a text on juridical method, art. 21 was, in Franklin's opinion, a device that operated between the ideology of the code—the view underlying it, and the apparatus of concepts supporting it—and the socio-economic system to which codal rules were addressed. It was a text confessing 'historical materialism'.[35] What the author means by 'historical materialism' can be gauged only by paying attention to the hiatus between the ideological layer of the civil code (the code was a typical bourgeois by-product) and the 'material' (social) conditions of Louisiana's slave-based society at the time of codification. The ideology of the code reflected a more 'evolved' community than that formed by the inhabitants of Louisiana. Equity had to be understood as a device by which courts adapted the codified law to the community needs of that time through the remedy of analogy.[36] The 'prolongation of existing texts'[37]—which is closely linked to the philosophy expressed by the code—was possible only for provisions not intended as 'ius singulare', i.e., not intended as exceptional. The reference to natural law was understood as a cross-reference to the expectations of the bourgeois middle class. Equity was intended in the legislature's plan to guide the evolution of the system along civilian legal-cultural patterns. However, the Franco-Roman substance of equity[38] was subverted in consequence of the pressure of movements occurring at a national scale (involving U.S. states at a more general level).

A turning point in the meaning of equity in Louisiana occurred in the mid-nineteenth century, when under the pressure of some United States Supreme Court judgments, natural law underwent a change in substance. This concept was no longer understood as a link to the values and needs of the Creole community, but as a bridge between the Louisianan and common law cultures. This shift was made possible via the following syllogism: 'natural law' was considered a synonym of 'universal law'; the common law was deemed to be 'universal law'; therefore, common law was to be taken as natural law. In this way, the

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34. 'Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises' [Judges are forbidden to pronounce by way of general and regulatory disposition upon the causes which are submitted to them].

35. Franklin, *supra* note 32, at 497.

36. The functioning of equity through the remedy of analogy was not expressly provided by art. 21, nor is it by present art. 4.

37. Franklin, *supra* note 32, at 499.

38. Whose traces could be found—according to Franklin—in the provision of equitable actions under art. 35 of the code of practice. These actions would be the 'offspring' of Roman law's *actiones utiles* which were ways in which Roman legislation was prolonged to comprehend situations not within the very text itself'. *Id.* at 500.

Franco-Romanist substance of equity was subverted and turned into something quite different from the codifiers' purposes.

Palmer seems to support a different view of equity, one in which two kinds of equity would be at stake. The first, grounded in art. 21 and its successors,[39] consists in the development of private law through the civil code, as when the unprovided-for case is ruled through the application of provisions governing similar cases.

The operation of the second type of equity, however, does not depend on the presence of a legal gap. Rather this equity consists in the judicial discretion to disregard those provisions which would produce an unfair solution if applied to the case before the court.[40] This case would show some peculiarities involving the addition or subtraction of some elements to the written law in order to remedy any inconvenience flowing from the bare application of a legal provision. This second field of equity would occur outside the realm of the code and would be an expression 'of inherent praetorian powers, an attitude bolstered by constitutional considerations and American assumptions about the propriety of judicial activism'.[41] In this way, the process of detaching equity from its 'Franco-Roman' essence and its landing on the shores of rules and principles rooted in the common law legal culture are accomplished.

While Franklin takes for granted that this provision has Franco-Roman roots, and that its primary function has been to foster the development of the legal system in a way consistent with its internal logic, paved with analogy and leading to the 'self-integration' of the legal system, Palmer—observing this use of inherent judicial powers in a mixed legal system and acknowledging the possibility of a 'free search of

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39. *See* V.V. Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: Functional View of Equity in Louisiana*, 69 TUL. L. REV. 7 (1994). Palmer remarks that art. 4 is not the exclusive source of equity in the civil code; the code lays down many other rules involving the exercise of equitable discretion.

40. *Id.* Palmer remarks that 'equity consists not only in gap-filling. It has now become . . . the exercise of discretion in the pursuit of greater fairness'. *Id.* at 11. He adds, in fact, that 'it is a popular mistake to read the Directory Provision as if the judge's role cannot arise unless there is a verbal gap in the coverage of the Code'. *Id.* at 36. He qualifies his thesis in the following pages: '[T]his is no equity discreetly intercalated in the blank spaces of the Code, for Louisiana equity is not primarily based upon verbal gaps in the law, rather it is an equity based around injustice or inconvenience in the law'. *Id.* at 19. According to Palmer, therefore, equity would bar the literal interpretation of some rules when it can be shown that the Legislature did not intend to regulate the case to be adjudicated through that rule.

41. *Id.* at 20.

law'[42]—sees in equitable development the 'hetero-integration' of the legal system.[43]

Other scholars adopt views midway between Franklin's and Palmer's.

Judge Albert Tate may be considered to be travelling in Franklin's wake with his reference to analogy as a way towards the incremental development of the legal system.[44] He argues in favour of a faithful approach to the legal text, but at the same time he recognizes the necessity for its adaptation when new situations and social needs arise.

He pleads for the mechanical application of statutes when the case at stake clearly falls within the scope of a given provision.[45] When a different situation occurs, the way is paved for a 'functional' application of the statutes, i.e., for the assessment of the legislative purposes underlying those laws. The judge would have to apply the rule that the legislature would have enforced if he had foreseen the case at hand. In this event, 'the judge must be careful not to confuse what he thinks is the intended general purpose of the enactment with what is merely his conception of how the statute should have been worded'.[46]

Tate therefore does not argue for an absolute freedom of judges to articulate the values by which they adjudicate. They cannot substitute their personal assessment for that of the social context of which they are the expression.

William Tête[47] focuses on the cultural molds of art. 21. Tête shows that equity not only governs the case of silence, but also cases lacking a

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42. *Id.* at 33.

43. Palmer observes:

> It is traditionally asserted that a civilian judge should resort to textual analogy, but the Code is silent on this point . . . . Nothing in the Directory Provision expressly prevents filling a lacuna with a fair rule which cannot be analogized from a text within the Code. It happens frequently that a rule is drawn from English Equity, from the common Law, or from 'a purely judicial choice of values or improvisation'. Theoretically, there is equally no barrier in the quest for equity to resort to Roman sources, French sources, custom, or whatever sources the Court has at its command.

Id. at 32-33.

44. *See* A. Tate, *The Law-Making Function of the Judge*, 28 LA. L. REV. 211 (1968). As examples of the judicial application of analogy, he makes references to the ways courts have developed mineral law through the codal categories of servitude and lease of land.

45. He considers in this regard the Uniform Commercial Code as a case in which the courts cannot and should not weigh policy considerations or use creative interpretation in the application of the statutory command. *Id.* at 218.

46. A. Tate, *Techniques of Judicial Interpretation in Louisiana*, 22 LA. L. REV. 727, 737 (1962).

47. W.T. Tête, *The Code, Custom and the Courts: Notes Towards a Louisiana Theory of Precedent*, 48 TUL. L. REV. 1 (1973).

precise provision, i.e., a legal rule governing that very case. The lack of a 'precise provision' opens the way to an assessment of the solution which can be considered 'fair' in order to adjudicate the case.

Têtе goes further, by grounding the so-called theory of 'jurisprudence constante' on a combined reading of arts. 21 and 3 of the civil code of 1870.[48] A stream of judgments reaching the same solution to an issue would produce a custom which has the status of a legal source in the system. Therefore, the practice constitutes the bulk of this custom and has to be seen as a legal rule. The system would acknowledge an equity in 'French dress' because Louisianan equity is rooted in Portalis' thought. It is, however, combined with a 'Spanish' custom, in the sense that the function that custom displays in Louisiana would be a by-product of a Spanish legal culture.[49] The judicial approach as described by Têtе consists of diverse steps: (a) If there is no precise text applicable, it is necessary to 'plumb the depths' of the disposition of written law. This has to be done through the 'formulation of a general principle whose implications are consistent with the specific rules of the legislation.' (b) The judge formulates several hypotheses (drawn from this general principle) and tests their consistency in the light of written law as well as of the legislative purpose. (c) When there are only a few possible interpretations of the same provision, 'he interprets the law by selecting that principle most consistent with the general concept of justice.'[50]

The custom developed in the way described above would be *secundum legem*. It may be *praeter legem*, when the system cannot be of any help on the issue to be adjudicated and the judge has to supplement the law. In general, custom and written law coexist. The acknowledgement of custom as a source of law would be an important factor of dynamism, allowing the recognition of social practices—through judicial decisions—with the effect of their 'juridification', their acceptance into the realm of the legal system properly speaking, while they would be discarded when the elements giving rise to a custom decayed.

The vicissitudes of the interpretative approaches to the legal rule of art. 21 concerning the recourse to equity—summarized through two positions that clearly state the two main options to be followed—show

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48. It provided that 'customs result from a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent'.

49. According to Têtе, *supra* note 47, at 22, '[d]espite Thomas Jefferson and Edward Livingston, the medieval Spanish concept that the judge may participate in the creation of law has not been expelled from Louisiana. The existence of a true civil code circumscribes the judge's power to promote the creation of law, but it does not eliminate it entirely'.

50. *See id.* at 5-6.

that this rule does not speak *per se*. Its content is 'neutral',[51] its reconstruction depends on the lenses through which it is viewed. It mirrors the cultural attitudes of those who make recourse to it and therefore lends itself as a useful litmus test through which to assess the heterogeneous cultural factors affecting the shape of the legal system.

What is sure is that the doctrine of binding precedent is not considered to have taken root in Louisiana. The rejection of a strong version of *stare decisis* and at the same time the acceptance of the doctrine of *jurisprudence constante* is not only the result of a precise cultural ascendant that can be traced back to French legal culture, but also of the influence of the first codifiers' view of the role of equity—and notably Edward Livingston's.[52]

Têtе has a more doubtful approach to the custom *contra legem*. He remarks that 'there is a tendency to give effect to practices that people consider binding, whatever the statute may say. But courts do not generally characterize a practice that they sanction as a custom contra legem, because . . . [r]ecognizing the validity of custom contra legem would be tantamount to recognizing the effective power of the courts to repeal statutory law'.[53]

A case of custom *contra legem* seems linked to the operation of the maxim '*contra non valentem agere non currit praescriptio*'. In spite of the clear text of art. 3467 of the civil code,[54] a crystal-clear rule which would seem to bar every attempt to establish on a judicial basis instances in which prescription does not run, courts have applied the unenacted

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51. This view of equity clearly inspires Palmer's remarks:

> Equity under the Directory provision of the Civil Code appeals to interior and aspirational values—to reason, justice, and prevailing usages—but, functionally speaking, those lofty concepts are completely undefined and abstract and offer little guidance. . . . These ideas may only be the higher sentiments, emotions, or feelings that may be aroused or offended by the prospect of legal injustice in a particular case. Those sensory antennae may intuit injustices and deficiencies in the law, but they do not ipso facto explain what to do about the deficiency. . . . The discretion of the judge is essentially untrammeled under the Directory Provision.

Palmer, *supra* note 40, at 420.

52. In Livingston's plans, the judge could exercise equity only in individual cases, being denied the possibility of making precedent out of his decision, and being bound to report his decision to the legislature. *See id.* at 402.

53. Têtе, *supra* note 47, at 21.

54. This rule provided that 'prescription runs against all persons unless exception is established by legislation'. As to the application of this maxim and a comparative overview between France and Louisiana, see B. West Janke-F.-X. Licari, *Contra non valentem in France and Louisiana: Revealing the Parenthood, Breaking a Myth*, 71 LA. L. REV. 503 (2011).

doctrine of '*contra non valentem*' to many cases in which prescription did not run.[55]

The *contra non valentem* maxim seems to be a device for enhancing the flexibility of the system, in cases in which a right cannot be claimed for reasons independent of the will of individuals. This case implies a difficult balance between legal certainty—which is best ensured through a strict construction of legal rules—and flexibility, which allows the adaptation of laws to social change and to the surfacing of new social needs.

V. THE VALUE OF LEGAL CERTAINTY AS A WAY TO UNDERSTAND THE CIVILIAN TRADITION FROM INSIDE

From a general viewpoint, it can be said that the trade-off in Louisiana has been pursued through recourse to *jurisprudence constante*,[56] fulfilling at the same time the values of legal certainty and of flexibility, which are usually thought of as clearly distinct, if not opposite. If a

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55. Examples of the operation of the maxim 'contra non valentem agere non currit praescriptio' may be found in *Quierry's Executor v. Faussier's Executors*, when the Louisiana Supreme Court applied that doctrine to the case of courts closed in anticipation of the British invasion in the Battle of New Orleans. By 1856 in the case of *Reynolds v. Batson*, the Louisiana Supreme Court singled out three situations in which the *contra non valentem* maxim applied to prescription: (1) when there is some event which prevents courts from taking cognizance of the plaintiff's action; (2) when some cause occurs which prevents creditor from suing; (3) when the debtor willfully acted to prevent the plaintiff from suing. In 1979, in the case *Corsey v. State* a fourth case was added, that occurring when the cause of action was not known nor reasonably knowable by the plaintiff.

The application of this maxim has not been smooth, for the same Supreme Court in certain cases disavowed it. However, it has kept resurfacing and has never been once and for all overruled. The recourse to this maxim is an unequivocal breach of the legislative will.

56. The notion of *jurisprudence constante* to which Louisiana jurists cling is that given by François Gény. In a passage quoted by Tête, *supra* note 47, at 4 n.13, F. Gény, *Méthode d'interprétation et sources en droit privé positif* (La. State L. Inst. transl., 1963, n.149), observes:

> [P]revious decisions, especially when they form a constant stream of uniform and homogeneous rulings having the same meaning, should have a considerable authority in the mind of the interpreter. . . . [N]ot only . . . they will exercise on him a moral and practical influence which their origin commands, but they will impose on him a moral and practical influence which their origin commands, but they will also impose on him a conviction analogous to the 'force of written reason' known to our old law. . . . [I]n the presence of a rule supported by a firm line of prior decisions, the interpreter can abstain from a new inquiry on the grounds of his faith in the alleged precedents. He has a basis for solving his personal doubts in the sense indicated by the authority, which he should not lay aside except for decisive reasons that swing his conviction in the opposite direction. This certainly does not represent legislative force in the proper sense, such as we attach to written law or custom; for whenever they expressly rule, they cut off any free inquiry. But it nevertheless represents a serious force which can, and to some extent should, control the uncertainty or the caprice of subjective reasoning.

solution supported through jurisprudence constante were found to be unsatisfactory because of changed circumstances, it could be overruled because jurisprudence constante enjoys great authority, yet is not binding.[57]

In a previously referenced article, John Lovett[58] tries to sketch the trajectory followed by the value of legal certainty throughout the nineteenth and twentieth centuries. This does not relate to the invasion of 'civil law fields' by the common law, but rather which version of civil law—because Louisiana has been under both French and Spanish control—has to be seen as controlling the field of private law. It is quite well known that Louisiana civil law prior to codification was initially French and then Spanish. Lovett finds many examples in which the search for 'predictability of legal rules' (rectius: the predictability of their interpretation) justified recourse to legal texts and cases of the 'Spanish' past, as a support for the interpretation of provisions in force, or for a strict interpretation of the law in force.

He remarks that in the first half of the nineteenth century, in cases such as *Cottin v. Cottin* and *Cole's Widow v. His Executors*, the Supreme Court of Louisiana 'resort[ed] to applying pre-codification Spanish law in spite of the existence of the newly drafted Digest and later the civil code of 1825'[59].

Other cases express the same need for legal certainty. In *Marie v. Avart's Heirs*, the validity of a will was at stake, in which the testator—Avart—directed that his executors should buy the slave Marie, the concubine of the *de cuius*, and her daughter, and afterwards emancipate them and leave them some of his property. The will was challenged by the *de cuius*'s heirs who alleged his insanity at the time he made his last will. The counsel for Marie argued in favour of his client on the basis of the Digest, which allegedly forbade introducing evidence of the deceased person's insanity; the counsel for the heirs based their claim on another provision of the Digest, which seemed to pave the way for the opposite conclusion.

Judge Martin looked for the legislature's intent, and he concluded that sanity was 'a sine qua non of this kind of donation, which the donee,

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57. As Tête, *supra* note 47, at 23, points out, '[a] court which has the power to determine that its decisions have generated the elements of custom also has the power to determine that these elements have decayed . . . . [T]he courts could also strike down a custom which they deemed unreasonable or founded in error'. That author seems to acknowledge even the opposite possibility that judges follow a custom *contra legem* where 'reliance on the custom is so strong that it would be unjust not to apply to it in the case before the court'. *Id.* at 23 n.85.

58. Lovett, *supra* note 31.

59. *Id.* at 1413-14.

or the person claiming under him, may be called on to establish', and therefore he found for the heirs. According to him, the only relevant source was the Digest. What actually drove Martin's decision was the social policy underlying the legislative framework, that of protecting the interests of the heirs from the risk of a 'last minute' will which could infringe their rights.

In *Saul v His Creditors* (1828), the legal issue at stake was whether property acquired by a married couple while residing in Louisiana was subject to the community of acquets and gains—and thus to be divided equally upon the dissolution of the marriage—even if they married in another state. The conflict was between the husband's creditors, whose position was of course that the community regime was not applicable, and the children of the marriage who claimed, as heirs of their deceased mother, her half of all property acquired by the couple in Louisiana.

The court acknowledged *ex professo* the importance of legal certainty in cases like this. Even if in some cases the rule had been applied according to which property (acquired from married couples) was governed by the law of the state where the acquisition had occurred, these cases had not been found sufficient by the court to consider this principle as *jurisprudence constante*.

The case came before the court at a time when an important legal change occurred. While the 1808 Digest provided for the community of acquets and gains for every marriage contracted within the territory of Louisiana, not ruling the case of marriage contracted in another state, the 1825 civil code filled this gap, acknowledging the community regime for couples who bought property in Louisiana but married elsewhere, while under the previous code the community regime applied only for properties bought in Louisiana by couples married in Louisiana. The Civil Code of 1825, however, was not deemed to have a retroactive force. Because the wife's death occurred before its enactment, it could not apply to the case in question, which fell instead under the 1808 Digest. The latter was interpreted by the Court in the light of Spanish legal sources—as interpreted by Spanish commentators—which could be applied because they had not been expressly repealed. According to these sources, the controlling law was that of the place where the property had been bought. Thus community of property was found to exist from the time that the parents came to Louisiana, and the children were recognized as privileged creditors in their mother's estate. In this case, legal certainty was pursued and resulted in a finding for the continuity of ancient laws.

In conclusion, the same value—legal certainty—was the underlying rationale of both the above-considered judgments. Yet, within a few years this goal was pursued by the Supreme Court of Louisiana through two different approaches: in one case, grounding the solution on the codal text; in the other, looking backward to sources other than positive law from which to draw the interpretation of this latter.

VI. CONCLUSION

This survey compared two systems—those of Italy and Louisiana, both members of the civil law family—concerning different ways in which courts interpret law and deal with the issue of legal gaps. This writer's opinion is that by comparing the manner in which the law is interpreted, one may have a deeper insight into how the legal systems work and develop.

The first element considered was the way in which the legislatures approached this issue. As to Italy, art. 12 of the *Dispositions on the Law in General* (*Disposizioni sulla legge in generale*) was examined. In particular, attention was focused on analogy as the way by which courts may fill gaps. The history of art. 12 revealed that this provision is the result of a progressive "closing of the door" on judicial discretion, a process which, far from having affected only Italy, spread across continental Europe in the eighteenth century and marked a watershed between the past, in which courts were vested with law-making functions, and modern times, in which courts have been assigned the institutional role of law-appliers. Yet, in spite of this planned restraint on judicial freedom as to the adjudication of cases, the case of moral damage was examined as an example of how courts can get around the strict boundaries drawn by the legislature, erasing de facto a legal provision governing the case, and replacing it with a judge-made rule through recourse to the constitution and the doctrine of direct enforceability of rights provided by this latter.

As to Louisiana, the analysis of art. 4 of the civil code—and of its predecessors—revealed the key role of equity.

Through this complex notion, two main dimensions of the system have been disclosed: one resulting from the coexistence and interaction of common and civil law legal traditions; the other resulting from an unresolved tension between written law in force and past case law, which in some cases was used as a repository for the interpretation of present law. As to the former, equity was understood by some scholars as a device by which courts could ground solutions considered 'fair', drawing them, not necessarily from 'inside' the legal system, but also from

'outside' of it. As to the second, one may note that the dialectic relationship between present and past law implies the presence of an older civilian tradition—composed of Spanish and French pre-codification law—and a more recent one, underlying the civil code.

The actual difference which the survey seems to disclose is that in Louisiana legal change is produced by courts more overtly, this being the result of a higher degree of openness in the system.